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CALIFORNIA REPORTER

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SECOND SERIES

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27 Cal.2d 150

RICHFIELD OIL CORPORATION v. STATE BOARD OF EQUALIZATION.

Sac. 5640.

Supreme Court of California, in Bank.

Nov. 1, 1945.

Rehearing Denied Nov. 29, 1945.

1. Licenses 🔑1, 28

The retail sales tax is not a tax on sale, but is an excise tax for privilege of conducting a retail business measured by the gross receipts from sale, and the tax is a direct obligation of the retailer, and is not imposed on the consumer. St.1941, pp. 532, 536, §§ 6006, 6051, 6052.

2. Commerce 🔑77

Where a general tax is levied on all property alike, goods not intended for export are not immune because they are later exported. U.S.C.A.Const. art. 1, § 9, cl. 5; art. 1, § 10, cl. 2.

3. Commerce 🔑77

Where a general tax is levied on all property alike, goods are not exempt because they are intended for exportation or manufactured under a contract for export. U.S.C.A.Const. art. 1, § 9, cl. 5; art. 1, § 10, cl. 2.

4. Commerce 🔑77

Where corporation contracted with New Zealand government for sale of oil produced in California, and delivery which resulted in passage of title and completion of sale occurred prior to commencement of the exportation, collection of state retail sales tax, which was a uniform, nondiscriminatory excise tax on privilege of doing business in state, was not barred by federal constitutional provisions giving Congress power to regulate commerce with foreign nations, and restricting imposition of "imposts" or "duties" on exports. St. 1941, pp. 532, 536, §§ 6006, 6051, 6052; U.S.C.A.Const. art. 1, § 8, cl. 3; art. 1, § 9, cl. 5; art. 1, § 10, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Duty" and "Impost".

GIBSON, C. J., and EDMONDS, J., dissenting.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Richfield Oil Corporation against the State Board of Equalization to recover retail sales tax paid under protest. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion 155 P.2d 1.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen and John L. Nourse, Deputy Attys. Gen., for appellant.

Robert E. Paradise, Norman S. Sterry, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

CARTER, Justice.

This is an appeal from a judgment for plaintiff in an action to recover retail sales tax paid under protest.

Plaintiff, a corporation, is engaged in producing and selling oil and oil products in California. The New Zealand Government for use by its navy invited offers to sell oil to it for delivery "f.o.b. N.Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff, in the course of its business, submitted an offer with the price quoted f.o.b. ship's rail of buyer's tanker at its storage terminal at Long Beach, California. Pursuant thereto a contract of sale was executed specifying that "(1) Price * * * f.o.b. Los Angeles, payment in London,

* * * (3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, *into N.Z. Naval tank steamer* R.F.A. 'Nucula' *at Los Angeles, California.* * * *

"(7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

"(8). Bills of Lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-in-Charge, Auckland, New Zealand."

Pursuant to the contract plaintiff delivered oil from its storage tanks into the "Nucula" at Long Beach, California. Documents including a bill of lading naming plaintiff as shipper and stating that delivery would be made to the naval officer at Auckland, New Zealand, were delivered to the master of the vessel. Plaintiff also executed a shipper's export declaration, naming it as shipper. The oil reached New Zealand and was paid for in London. It is conceded that title to the oil passed to the buyer when plaintiff delivered it into the tanker at Long Beach, California.

The trial court found the following facts in addition to the foregoing: That oil had never been produced in New Zealand in sufficient quantities for that country's needs, and plaintiff had made other sales of oil to the buyer under similar circumstances; that the parties intended that the oil would be exported to the buyer without interruption.

Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers "for the privilege of selling tangible personal property at retail * * *." Revenue & Taxation Code, §§ 6051, 6052, St.1941, p. 536. The retailers are authorized to collect the tax from the consumers. Revenue & Taxation Code, §§ 6051, 6052. A sale is "any transfer of title or possession, * * * in any manner or by any means whatsoever, of tangible personal property for a consideration, * * *." Revenue & Taxation Code, § 6006, St.1941, p. 532. In the present case the transfer of possession and title took place in California.

[1] In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 164, 78 P.2d 731, 735, 117 A.L.R. 838; see also National Ice, etc., Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, 79 P.2d 380; De Aryan v. Akers, 12 Cal.2d 781, 87 P.2d 695; Standard Oil Co. v. Johnson, 10 Cal.2d 758, 76 P.2d 1184; Roth Drug Inc. v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022.

Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *", (U.S.Const. art. I, § 8, cl. 3). "No Tax or Duty shall be laid on Articles exported from any State." U.S.Const. art. I, § 9, cl. 5. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." U.S.Const. art. I, § 10, cl. 2.

It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution. There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions. The tax falls equally on all transactions without distinction. The tax is not on export business as such nor on the articles in export. Thus, the only theory upon which it may be said that the tax cannot be applied here is, that the property had already been launched upon its export journey when the sale was consummated and the tax attached to the sale, or stated another way, the sale was an inseparable part of the exportation and therefore could not be subject to the tax. But here the delivery of the oil which resulted in the passage of title and the completion of the sale, and the taxable incident, occurred prior to the commencement of the exportation. The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred. If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose sole purpose is to export goods, thus indelibly characterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobile and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered if he gave the retailer an affidavit that he was taking the banjo to Mexico.

[2, 3] When a general tax is levied on all property alike, goods not intended for export are not immune because they are later exported. Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257. Nor are goods exempt from such tax on the ground that they are intended for exportation or manufactured under a contract for export. Turpin v. Burgess, 117 U.S. 504, 6 S.Ct. 835, 29 L.Ed. 988; Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504. It has been said that goods exported to a foreign country do not lose their character as a part of the common mass of property in the state from which exported "until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey." Coe v. Town of Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 478, 29 L.Ed. 715. And also that " 'Whenever a commodity has *begun to move* as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But *this movement does not begin until the articles have been shipped or started for transportation* from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain." (Emphasis added.) Coe v. Errol, supra, 116 U.S. at page 528, 6 S.Ct. at page 479, 29 L.Ed. 715.

The cases of A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865, and Crew-Levick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295, do not compel a different result. In the Spalding case the property had commenced its journey by being committed to a common carrier, an instrumentality whose sole function is transportation in commerce. Hence, when it was delivered to the carrier the process of exportation had begun. In any event both the Spalding case and the Crew-Levick case must be considered as expressing narrow views with reference to the field of state taxation which have been superseded by the recent decisions of the United States Supreme Court. In that connection it should be noted that in the Crew-Levick case, the argument was based upon both the ban against state imposition of imposts on exports and the power over foreign commerce, yet the court treated the case as a proper one for applying the rules applicable to state taxes where interstate commerce is involved. The court stated: "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, * * * is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." Crew-Levick Co. v. Pennsylvania, supra, 245 U.S. at page 295, 38 S.Ct. at page 127, 62 L.Ed. 295. And after discussing authorities dealing with interstate commerce, it is said: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." Crew-Levick Co. v. Pennsylvania, supra, 245 U.S.

at page 296, 38 S.Ct. at page 128, 62 L.Ed. 295; see also Brown v. State of Maryland, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678; but see Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095.

The new approach to the problem of the collision between state taxation and interstate commerce has been developed in many authorities. See Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944; J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429; Gwin, White & Prince Inc. v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229; Department of Treasury v. Wood Preserving Corp., 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188; International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S.Ct. 1019, 1030, 88 L.Ed. 1313; McLeod v. J. E. Dilworth Co., 322 U.S. 327, 349, 64 S.Ct. 1023, 1030, 88 L.Ed. 1304, 1319; General Trading Co. v. Tax Com., 322 U.S. 335, 349, 64 S.Ct. 1028, 1030, 88 L.Ed. 1309, 1319. The essence of these decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce. For illustration in McGoldrick v. Berwind-White Min. Co., supra, a New York City tax upon the sale of goods for consumption was upheld as applied where a Pennsylvania corporation engaged in the production of coal in Pennsylvania delivered it to its customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In Department of Treasury v. Wood Preserving Corporation, 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188, the Indiana Gross Income Tax Act of 1933 was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f.o.b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana.

General Trading Co. v. Tax Com., supra, involved an Iowa use tax. A sale of property was made in Minnesota to Iowa customers, the contract of sale being completed in Minnesota and the goods delivered to a common carrier there for shipment to Iowa.

The case of International Harvester Co. v. Dept of Treasury, supra, concerned an Indiana tax levied on gross receipts from sales, particularly dealing with "(1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where the goods are shipped from out-of-State points to the buyer." 322 U.S. 340, 64 S.Ct. 1019, 88 L.Ed. 1313.

Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states.

Reference is made to Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, where Ohio sought to tax property imported by the taxpayer from the Philippine Islands while it was still in its original package and was held by the importer for manufacture. It was held not taxable but the court was particularly concerned with the original package doctrine and by applying it concluded that the importation had not ended. In the instant case the export had not begun and we have no question of the invocation of that doctrine. Moreover, it is difficult to ascertain the precise holding of that case inasmuch as the opinion written by Mr. Chief Justice Stone, held two things: (1) That the shipment from the Philippine Islands was an import because that territory was not a part of this country and hence the provision against imposts on imports applied, and; (2) That the property was not taxable under that provision. Justices Black, Douglas, Rutledge and Murphy dissented on the second point. Although Mr. Justice Reed apparently joined in the judgment reversing the state court's conclusion of taxability, he dissents on the first issue and his reasoning is of the character generally found in discussions as to the validity of state taxes where interstate commerce is involved.

[4] In the instant case the tax imposed was a uniform nondiscriminatory excise tax on the privilege of doing business in this state. The transaction which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state. The tax imposed was in no sense a tax on exports and became effective before the oil started on its export journey. For these reasons it is clear that the tax was not imposed in violation of any of the provisions of the Constitution of the United States, and is therefore valid.

The judgment is reversed.

SHENK, SCHAUER, and SPENCE, JJ., and PETERS, Justice pro tem., concurred.

GIBSON, Chief Justice (dissenting).

I dissent.

Under the prevailing decisions of the United States Supreme Court the tax imposed in the present case is prohibited by the "import-export" clause of the Constitution of the United States which provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *." Art. I, § 10, cl. 2. Since the question is entirely one of federal law, we are bound by those decisions.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, where a general tax is laid on all property alike, goods not then intended for export are not exempt because they happen to be exported afterwards. Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257. And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. Turpin v. Burgess, 117 U.S. 504, 6 S.Ct. 835, 29 L.Ed. 988; Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504. On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed. A. G. Spaulding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865; see William E. Peck & Co. v. Lowe, 247 U.S. 165, 175, 38 S.Ct. 432, 62 L.Ed. 1049; Turpin v. Burgess, supra, 117 U.S. at page 506, 6 S.Ct. 835, 29 L.Ed. 988; Coe v. Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715. It was said in Coe v. Errol, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped, or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." Cf. Railroad Commission v. Texas & P. Ry. Co., 229 U.S. 336, 33 S.Ct. 837, 57 L.Ed. 1215; Texas & N. O. R. R. Co. v. Sabine Tram. Co., 227 U.S. 111, 33 S.Ct. 229, 57 L.Ed. 442; Southern Pac. Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310.

Applying these general principles or formulas to the facts of the present case, it seems reasonably clear that the sale of the oil, under terms requiring delivery to the ship of a foreign government, at which time title passed, was a step in its exportation. The case of A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865, is particularly pertinent here. In that case a Venezuelan firm requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from plaintiff Spalding, instructing it to deliver the same to a specified exporting carrier in New York addressed to the Venezuelan firm. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to the firm in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, 262 U.S. at page 69, 43 S.Ct. at page 486, 67 L.Ed. 865, in language equally applicable to the case at bar, "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5, of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. Turpin v. Burgess, 117 U.S. 504, 506, 6 S.Ct. 835, 29 L.Ed. 988; Brown v. Maryland, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678. An effort is made to distinguish that case on the ground that the delivery there involved was to a common carrier, while the delivery in the present case was to the purchaser's carrier. This distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. Cf. Turpin v. Burgess, supra, 117 U.S. at page 507, 6 S.Ct. 835, 29 L.Ed. 988; Superior Oil Co. v. Mississippi, 280 U.S. 390, 396, 50 S.Ct. 169, 74 L.Ed. 504; Coe v. Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715. But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of goods and thereby evade the tax. But, as stated in the Spalding case "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account." 262 U.S. at page 70, 43 S.Ct. at page 486, 67 L.Ed. 865. The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in light of all the circumstances, satisfies that inquiry. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. Under the Spalding case, to fix the step at which articles would be exempt from taxation "at any later point would fail to give to exports the liberal protection that hitherto they have received." 262 U.S. at page 70, 43 S.Ct. at page 486, 67 L.Ed. 865.

In some respects it would be more difficult to justify imposition of the tax in the present case than in the Spalding case because here the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, whereas in the Spalding case the sale was to an intermediary and the goods were merely delivered to the carrier.

The contention that the constitutional prohibition against state taxation of exports does not apply to exports originating in taxing states is answered by the decision in Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295, where the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2, was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see Cook v. Pennsylvania, 97 U.S. 566, 574, 24 L.Ed. 1015; Woodruff v. Parham, 8 Wall. 123, 75 U.S. 123, 134, 135, 19 L. Ed. 382, the provision is general in its terms.

The prohibition of the federal Constitution, as interpreted by the United States Supreme Court, is not rendered inapplicable on the theory that the California statute levies the tax, not on the sales, but on the local business activities of the seller, and that, therefore, the tax is not an "impost" or "duty" on exports. Although the formal subject of the tax is the "privilege of selling" Cal.Rev. & Tax. Code, § 6051; see Western Lithograph Co. v. State Bd. of Equalization, 11 Cal.2d 156, 164, 78 P.2d 731, 117 A.L.R. 838, it is clear that the actual taxable event is the sale, or transfer of title or possession, and, in any event, the amount of the tax is expressly measured by gross receipts from sales. (Rev. & Tax. Code, §§ 6006, 6007, 6051.) The United States Supreme Court has stated that in constitutional law cases the formal subject of a tax as declared by a state statute may be disregarded if the tax is in reality on something else, and it has held that taxes purporting to be on local business activities may be unconstitutional if they are in substance on interstate or foreign transactions. See, for example, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 439, 59 S.Ct. 325, 83 L.Ed. 272; Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 294, 38 S.Ct. 126, 62 L.Ed. 295. In the Crew-Levick case the court said, 245 U.S. at page 294, 38 S.Ct. at page 127, 62 L.Ed. 295, that "we * * * are in duty bound to determine the questions raised under the federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." The court held that a Pennsylvania license tax of $3, together with "one-half mill additional on each dollar * * * of business transacted annually," which in effect covered both local and foreign business, was unconstitutional because it "operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions [exporting merchandise]." 245 U.S. at page 297, 38 S.Ct. at page 128, 62 L.Ed. 295. In like manner, the California sales tax, measured by gross receipts from sales, cannot be applied to export sales since it would withhold "a part of every dollar received in such transactions."

In the early case of Brown v. State of Maryland, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678, where the state argued that a license tax on importers did not contravene article I, section 10, clause 2, since it was a tax on the person rather than the article, the Supreme Court said 12 Wheat. at page 444, 25 U.S. at page 444, 6 L.Ed. 678: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And, in the more recent case of Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295, it was expressly held that a state license tax on wholesale vendors of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. Cf. United States v. Hvoslef, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813, Ann.Cas.1916A, 286; Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862. Thus, to the extent that the so-called privilege tax is measured by gross receipts from exports, under the existing decisions of the United States Supreme Court it amounts to a tax on exports and is improper.

It is apparent, however, that a new approach has been taken with respect to the problem of state taxation in the field of interstate commerce, and that there are various local activities by a taxpayer within a state sufficient to support a non-discriminatory tax although the tax may have some incidental effect on interstate commerce. Thus if the present case involved the commerce clause rather than the import-export clause of the federal Constitution, it may be that the tax could properly be imposed, since it falls equally without discrimination, upon all sales in the state, whether the goods are destined for local use or for export. In Department of Treasury v. Wood Preserving Corporation, 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188, for example, an Indiana gross receipts tax was upheld although the goods were sold to an out-of-state buyer and, similar to the situation in the Spalding case, were delivered to a *common carrier* in the taxing state for transportation out of the state. It is somewhat difficult to reconcile these cases upon any other basis than that one concerned foreign commerce and the other interstate commerce.

It does not follow, however, that the views expressed in the Spalding and Crew-Levick cases with respect to imports and exports have been superseded by the interstate commerce decisions. The cases relate to different clauses of the Constitution and involve both different language and different purposes and policies. While a few cases have suggested that the prohibitions of the commerce and import-export clauses of the Constitution are substantially identical insofar as taxation is concerned, Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 295, 38 S.Ct. 126, 62 L.Ed. 295; Brown v. Maryland, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678, other cases have rejected even an analogy between the two. Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095 [refusing to apply original package doctrine to sales of articles transported in interstate commerce]; Woodruff v. Parham, 8 Wall. 123, 75 U.S. 123, 19 L.Ed. 382; cf. Fairbank v. United States, 181 U.S. 283, 306, 21 S.Ct. 648, 45 L.Ed. 862.

The latest decision of the United States Supreme Court involving state taxation of articles in foreign commerce expressly rejects the analogy of the interstate commerce cases. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 877. The state tax there held improper was a general, nondiscriminatory property tax. Although the United States Supreme Court thus had the opportunity to apply the reasoning of the interstate commerce cases, it did not do so, and, further, not even the dissenting opinion discussed the possibility of revising the older cases but instead, relied upon a factual distinction. (See note (1945) 58 Harv.L.Rev. 858-876.) Until such time as that court determines to permit nondiscriminatory state taxation of sales made in foreign commerce, it would seem improper for a state court to give its approval to such a tax.

The judgment, therefore, should be affirmed.

EDMONDS, J., concurred.

Rehearing denied; GIBSON, C. J., and EDMONDS, J., dissenting; TRAYNOR, J., not participating.

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27 Cal.2d 164

PEOPLE v. BENDER.

Crim. No. 4596.

Supreme Court of California, in Bank.

Nov. 1, 1945.

1. Criminal law ⚿784(7)

In a criminal case wherein circumstantial evidence is received, the court should unequivocally declare to jury that to justify conviction facts or circumstances must not only be consistent with theory of guilt, but must be inconsistent with any other rational conclusion.

2. Criminal law ⚿824(1)

Generally, in criminal cases, trial court must give, of its own motion, instructions on general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves, but trial court need not give instructions upon specific points developed through evidence introduced at trial unless such instructions are requested by party desiring them.

3. Criminal law ⚿825(1)

Where trial court fully and fairly charges jury upon law appertaining to the facts, trial court's failure to instruct on any particular matter deemed essential is not error in absence of a request for such instruction.

4. Criminal law ⚿784(1)

In criminal case where circumstantial evidence is substantially relied upon for proof of guilt, instructions on general principles of law pertinent to such cases necessarily include adequate instructions on rules governing application of such evidence.

5. Criminal law ⚿824(1)

The verdict of jury uninstructed as to law relating to facts of case cannot be sustained merely because proper instructions were not requested. Pen.Code, § 1093, subd. 6; § 1127.

6. Criminal law ⚿829(15)

In murder prosecution based on circumstantial evidence, failure to instruct that to justify conviction facts must not only be consistent with theory of guilt, but must be inconsistent with any other rational conclusion did not warrant reversal where jury was told that if evidence was susceptible of two reasonable interpretations one of which pointed to guilt, it was jury's duty to reject such interpretation, and circumstances pointed irresistibly to accused as perpetrator of the homicide. Pen.Code, § 1093, subd. 6; §§ 189, 1127; Const. art. 6, § 4½.

7. Homicide ⚷282

In prosecution for murder by strangulation, evidence did not as matter of law prove torture and hence did not compel inference that killing was murder in first degree, regardless of whether wounds on deceased's head, the immediate cause of death, were result of accused's striking deceased with a blunt instrument. Pen.Code, § 189.

8. Homicide ⚷250

Evidence that deceased was strangled supported finding that accused acted with malice aforethought and hence did not require finding that accused was guilty only of manslaughter. Pen.Code, §§ 187, 188.

9. Homicide ⚷332(2)

Findings that accused who killed his wife acted with malice aforethought and that accused did not act on provocation adequate to reduce the offense to manslaughter, which findings were based on sufficient evidence, were binding on Supreme Court. Pen.Code, §§ 187–189.

10. Homicide ⚷22(2), 23(1)

If jury found that there was no considerable provocation and that accused acted with abandoned and malignant heart, malice would be implied and murder would be in the second degree, and only if jury found that intention unlawfully to take life was a considered intent arrived at or carried out as result of deliberation and premeditation could murder be in the first degree. Pen.Code, § 189.

11. Homicide ⚷308(2)

In murder prosecution, instruction that under certain circumstances killing is murder in second degree "unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing the offense committed would of course be murder of the first degree", was erroneous for use of quoted language, since "specific intent" is not necessarily "willful, deliberate and premeditated" intent which is essential to make homicide murder in first degree. Pen.Code, § 189.

12. Homicide ⚷340(1)

That other and conflicting instructions, some of them correct in themselves, distinguishing murder in first and second degrees were given, did not make any the less prejudicial an instruction predicating conviction of first-degree murder upon a finding of "specific intent" to kill. Pen.Code. § 189.

13. Homicide ⚷146, 152

When killing is proved to have been committed by accused, and nothing further is shown, presumption of law is that it was malicious, and verdict should be murder in second degree. Pen.Code, § 189.

14. Homicide ⚷253(3)

Evidence establishing only that homicide was perpetrated by violent act on spur of the moment during hot anger of a tempestuous quarrel is insufficient to sustain finding that murder was in first degree. Pen.Code, §§ 187–189.

15. Homicide ⚷11

"Malice aforethought" is an essential element of murder whether it be of first degree or second degree. Pen.Code, §§ 187–189.

16. Homicide ⚷13

The words "malice" and "maliciously" within homicide statute do not, at least insofar as implied malice is concerned, require a pre-existing enmity toward victim. Pen.Code, § 7, subd. 4; §§ 187–189, 192.

See Words and Phrases, Permanent Edition, for all other 'definitions of "Malice" and "Maliciously".

17. Homicide ⚷22(1)

"Malice aforethought" is not synonymous with elements of deliberation and premeditation which must accompany a homicide to characterize it as murder in first degree. Pen.Code, §§ 187, 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice Aforethought".

18. Homicide ⚷22(2)

The mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill which must accompany a homicide to characterize it as murder in first degree. Pen.Code, §§ 187–189.

19. Homicide ⇨33

"Voluntary manslaughter" is a willful act characterized by presence of intent to kill engendered by sufficient provocation and absence of premeditation, deliberation, and malice aforethought. Pen.Code, §§ 187–189.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Manslaughter".

20. Homicide ⇨23(1)

"Murder in second degree" is a willful act characterized by presence of malice aforethought and, at least ordinarily, by specific intent to kill, and by absence of premeditation and deliberation. Pen.Code, §§ 187–189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in Second Degree".

21. Homicide ⇨22(1)

"Murder in first degree" is a willful act characterized by presence of malice aforethought and by deliberate and premeditated intent to kill, or by one of the means or by perpetration or intent to perpetrate one of felonies enumerated in statute. Pen.Code, §§ 187–189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in First Degree"

22. Homicide ⇨308(6)

An instruction that to sustain verdict of first-degree murder there need be shown "no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind", without further explanation, was misleading as excluding from required showing any deliberation and premeditation between intent and act of killing, especially where other portions of instruction eliminated any necessity for deliberation or premeditation in forming intent. Pen.Code, § 189.

23. Homicide ⇨22(2)

The words "deliberate" and "premeditated" within first-degree murder statute were intended to have their common dictionary meaning, "deliberate" meaning formed, arrived at, or determined upon as result of careful thought and weighing of considerations, and "premeditate" meaning to think on, and revolve in the mind, beforehand; to contrive and design previously. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate" and "Premeditate".

24. Homicide ⇨282

The length of time a thought must be pondered before it can be said to be deliberated and premeditated so as to constitute a killing murder in first degree is fundamentally a question of fact for jury under proper instructions. Pen.Code, § 189.

25. Homicide ⇨308(6)

Under statute requiring first-degree murder to be "deliberate and premeditated," while it may not be necessary for trial court to instruct jury on significance of quoted words, when court undertakes to define their significance definition should be fair and complete, so that while jury may be told that brain can function rapidly, they must not be misled into thinking that an act can at same time be hasty or impulsive, but extent of reflection if it is to pass the test must reasonably meet the ordinary signification of quoted words. Pen. Code, § 189.

26. Homicide ⇨340(1)

In murder prosecution, error in instruction that deliberation and premeditation as prerequisites to first-degree murder required "no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts in the mind", was harmless where such error affected only degree of the crime, and judgment of first-degree murder was modified by reducing it to murder in second degree, and evidence supported conviction of second-degree murder. Pen.Code, §§ 187–189, 1181.

27. Homicide ⇨282, 332(1)

To extent that character of particular homicide is established by facts in evidence, the jury and Supreme Court on appeal are bound to apply the standards fixed by law. Pen.Code, §§ 187, 189.

28. Criminal law ⇨559

Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute "proof." Code Civ.Proc. § 1960.

See Words and Phrases, Permanent Edition, for all other definitions of "Proof".

29. Homicide ⇨253(3), 347

Evidence in murder prosecution established that the homicide was murder, but did not establish that such murder was deliberate and premeditated, and hence judgment of conviction of first-degree murder would be reduced to impose penalty prescribed for murder in second degree. Pen. Code, §§ 189, 1181.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Stephen Bender was convicted of murder in the first degree, and he appeals.

Judgment modified by reducing it to murder of second degree, and, as modified, affirmed.

Ward Sullivan, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant (known as Richard Bennett) was convicted of the murder of his wife, Rena Bennett. The murder was found to be of the first degree. He appeals from a judgment imposing the death penalty and from an order denying his motion for a new trial. The defendant urges as grounds for reversal the failure of the trial court of its own motion fully to instruct the jury as to the law applicable to circumstantial evidence and the giving of an instruction that, if the specific intent to take life exists at the time of the killing, the offense "would of course be murder of the first degree." He further contends that as a matter of law the evidence at most establishes manslaughter. We have concluded that the evidence is sufficient to establish that the homicide was murder but insufficient to establish that such murder was deliberate and premeditated, and that the only prejudicial errors relate solely to the degree of the crime and do not warrant a reversal if the judgment is reduced to an adjudication of murder of the second degree. Therefore, pursuant to the power vested in us by section 1181 of the Penal Code, the judgment should be reduced to impose the penalty prescribed by law for murder of the second degree and, as so modified, affirmed.

Defendant and Rena intermarried in September, 1943. Thereafter Rena learned from defendant's first wife, June, that defendant and June were not divorced. The married life of defendant and Rena was marked by violent quarrels, reconciliations, and discussions of Rena's intention to have the marriage annulled and the intentions of Rena and defendant to commit suicide. After January, 1944, defendant testified, he and Rena drank from two to four quarts of liquor each day.

The evidence adduced by the People is as follows:

On March 8, 1944, defendant wrote to Rena, "Now I hope you are satisfied. You thought I would not take my own life, but again you are wrong. I promised you * * * to take you with me when I died, but I feel that you made me promise to do so only because you never thought I would. No, Rena dear, I love you too much to hurt you. * * * I could fill numerous pages with criticism and also some of your good qualities, but I know my death due solely to your actions is sufficient. Now you won't have * * * to get an annulment * * * [D]o the same as I am going to do, kill yourself, then you cannot hurt someone else." On March 10, 1944, defendant wrote to the Los Angeles Police Department, "I am taking my own life. * * * My wife is the cause of my suicide." These letters were never sent and defendant did not carry out his stated intention to commit suicide.

About March 29, 1944, defendant was arrested on the complaint of his first wife. The nature of the charge does not appear in the record. Defendant was confined in the Los Angeles County jail. Rena visited him there from time to time. On May 3, 1944, defendant sent Rena an affectionate letter saying that he loved her "beyond description of mere words," asking her to move from the Los Angeles apartment which had been their home because "Too many unpleasant memories are connected in that building to ever give you peace of mind. * * * I never was happy there. * * * If I had 'peace of mind' I never would have said nor done some of the things that occurred in that building. * * * Both you and I are too intelligent to be so small as to let a misunderstanding and a 'jealous' greedy woman—June—come between us. * * * I'll do my part, please do yours by me." On Thursday, May 11, 1944, defendant was released from jail and returned to the apartment (from which Rena had not moved).

Apart from defendant's testimony the only direct evidence of defendant's relations with deceased from May 11 until the night of May 15, when she was killed, is as follows: The manager of the apartment house was in the Bennett apartment and saw Mrs. Bennett on Friday morning, May 12; Mrs. Bennett appeared to be in good spirits. About 1 o'clock Sunday morning, May 14, one Mrs. Bailey, who lived across the hall from the Bennetts, visited them at Mrs. Bennett's "quite emphatic" request. Mrs. Bailey talked with the Bennetts for about an hour. The "conversation wasn't very interesting. I mean I wasn't paying much attention." Mr. and Mr. Bennett did not appear to be quarreling; among other things "they were sort of talking about love or something like that. Well, they didn't seem to agree on it"; defendant said "something to the effect that he loved her, and she laughed and said, 'Isn't that funny?' " They had only one or two drinks during the hour and Mrs. Bailey "wouldn't say she [Rena] was intoxicated."

On Monday morning, May 15, defendant left the apartment to appear in court. While he was away one Prebensen, who had agreed to employ Mrs. Bennett, visited the apartment. He arrived about 9:30 and was there for about ten minutes; she then appeared normal and he did not detect the odor of alcohol on her breath.

At about 5 p.m. on May 15 the maintenance man of the apartment house saw Mrs. Bennett on the street near the house; "she seemed to be cheerful as always." No one except defendant testified to having seen Mrs. Bennett alive thereafter.

The manager of the apartment house was in the Bennett apartment for a few moments each day from May 16 through May 19. On Tuesday, the 16th, she noticed nothing unusual; the apartment was "in perfect order." On Wednesday, the 17th, the maids pulled down the in-a-door bed and found blood stains on the bedding. On the floor in the closet behind the bed was a large bundle on which suitcases and a lamp were piled. The maids did not clean the apartment or change the bed. On Wednesday evening the manager saw a note propped up on a table in the apartment. This note was from defendant to Rena, dated Tuesday, May 16, and reads: "Honey: Cannot wait any longer for you to get home. Have several appointments downtown. * * * Will be back late this afternoon. *Please* wait until I get home. You can understand my feelings after what you told me last evening. I walked practically all night. Got here at 6:00 this morning. Hope you are at Min's [Rena's mother] instead of the hotel with Mike. Why do you do these things?" On Friday afternoon the police were called and found that the bundle in the closet contained Rena's body.

There were two ragged lacerations on the front of her head, abrasion of the right cheek, and bruised areas on the forehead, lower lip, and around the right eye. Finger marks on the neck, the condition of the deep tissues of the neck, and the condition of the lungs, indicated strangulation which contributed to cause death. The immediate cause of death was the head injury. The autopsy surgeon "could not state whether they [the two wounds on the head] were due to something hitting the head or due to the head hitting some object." The brain contained .22 per cent alcohol, which indicates intoxication.

On Tuesday, May 16, defendant, under an assumed name, registered at a Los Angeles hotel. He checked out on May 22. On May 24 the police found him lying in a penthouse storeroom on the roof of the hotel. He "seemed to be in a dazed condition." His clothing and the sheet on which he lay were bloodstained. On each forearm were superficial cuts which "appeared suicidal in type." Strapped to one wrist were letters signed by the defendant. One letter was addressed to the Los Angeles Police Department, dated May 15, and reads in part, "I am taking my own life. * * * My wife admitted to me last evening that she was untrue to me * * * I'm too hurt by her infidelity to write her. * * * I shall die only for her sake. Hope my death will make a better woman of Rena."

June (the first wife) received a letter from defendant dated Tuesday, May 16, which reads in part: "[Y]ou are primarily responsible for my death. As I know Rena would not have done what she did if you had not lied to her. She went completely haywire and I know they will blame me for her death. I came home this morning at 5 a.m. and found her dead. I don't know who killed her, but wish I did before I join her in death. * * * I am going to jump off this roof. * * * I was too panicky to let Rena be as I found her. * * * I had [sic] her in the closet, hoping to gain time to settle all my affairs. * * * Whoever killed her had a good cause, for I know she did me dirt, but now I can only think of her in her goodness."

There is some evidence (not relied on by the People on appeal) which suggests an attempt to show that defendant stole a watch and twenty dollars from deceased. On May 16 defendant pawned Rena's and his watches. He testified that Rena had given him her watch and asked him to pawn it. One Nardoni testified that on Monday morning, May 15 (i.e., definitely before Rena was killed), defendant showed him a man's watch and a woman's watch which resembled the watch of Rena that defendant pawned after she was killed, and told Nardoni that he was going to pawn them "for the purpose of raising some money he owed me." Rena's mother testified that some time before May 7 Rena told her that she had twenty dollars in the sleeve of a certain coat; that after Rena's death she (the witness) examined the coat; on it was a spot which appeared to be blood and there was no money in either sleeve. From defendant's testimony it appears that Rena wore this coat to dinner on the night she was killed. There is, however, no contention that the evidence is sufficient to show that the homicide occurred in the perpetration of robbery.

Defendant's testimony as to the events surrounding the death of Rena is as follows:

After he was released from jail on May 11 and returned to the apartment he and Rena drank a great deal. On May 14 Rena told him that she had, on May 11, filed an action for annulment of their marriage. On Monday, May 15, after he had appeared in court and returned to the apartment at about 10:45 a.m., they drank almost continually, both gin and bourbon. About noon, after they had sexual relations, Rena told defendant that she had received $200 from Prebensen "for which I am supposedly to go to work for him" and that while defendant was in jail she had an affair with Prebensen. (Prebensen testified that he had agreed to employ Mrs. Bennett and had advanced her $200 as her first month's salary and that he had never had sexual intercourse with Mrs. Bennett.) Defendant "became very angry and told her that I felt that any man or woman * * * that would be untrue to one or the other when one or the other was either in a hospital or in jail, where they could not defend themselves, was rather a low type of person. * * * When she was drinking and when you crossed her up, she [would] become very violent; she would fling out her arms or throw things; and at this time," after defendant called her a "common whore," she struck him on the right side of his face (defendant's right eye was blind) "and I must have struck her, because even after that she started crying and I felt sorry and we got up and we had some more to drink." About the middle of the afternoon defendant asked Rena, "Is that the only one that you have been running around with?" He reminded her that they had "promised each other that we would always be honest and truthful with each other." Rena said that, when defendant was in jail, she "had been to some cocktail bar and talked to some people, and then they came back to the apartment late and they had some more drinks at the apartment; and she said she felt very humiliated when she woke up and she found this man there." Defendant and Rena later fell asleep and were awakened by a newsboy at about 5 p.m. (the time when, the maintenance man testified, he saw Mrs. Bennett on the street). Defendant "suggested that we have something to eat, because all that day I did not have a thing to eat and the prior day * * * we didn't have anything to eat." Rena asked defendant to wait until 6 because she expected Mr. Prebensen to return at that time with word from her attorney concerning the annulment. They had more drinks. At about 7 o'clock defendant, at Rena's request went out and purchased brandy. He returned and at about 7:30 they went to a nearby cafe for dinner. During dinner defendant "again mentioned about her infidelity and she remarked about some service man * * * and the eventual thing was that she took him home. * * *" They returned to the apartment and continued drinking. Prior to this day defendant had thought that Rena was unfaithful to him but he had never accused her, and she had never told him, of her infidelity.

Throughout the evening, defendant testified, "we would argue and forgive and then argue, and during the evening two or three times something I would say she would get indignant and fly at me, and on one of those times she was flying at me she slipped on that little hook rug, nothing serious." And on another occasion "I think I pushed her down on the couch." "[T]hat is about all I can recall right at this second, it was just constant wrangling all evening long." Rena appeared to be "a little drunker than usual," "plenty drunk," and defendant "wasn't just to say cold sober, but I wasn't dead drunk, either." At one time during the evening, while Rena was out of the room, defendant wrote the suicide note addressed to the police which was found strapped to his wrist. After further argument Rena "got on her knees," begged forgiveness, and said, "Honey, go on out and take a walk * * * you are an understanding person, that is one thing I love about you. * * * But go take a walk." After her continued insistence defendant went out, walked about for a time, and returned to find the apartment dark and Rena gone. He wrote the note to Rena which the apartment house manager found. He had another drink, went out, walked past the home of Rena's mother and, seeing no lights, walked about for a time and then returned to the apartment. A small light was on and Rena was lying across the bed. He asked, " 'What in hell are you doing on the foot of the bed?' There was no answer, so I * * * put the floor lamp on, and that is the time I discovered the body. * * * I am kind of hazy [as to what I did], I know I was rather shocked. I do remember of running out of the apartment to go to the manager's apartment to call the police * * * I happened to think, well, my God, where have I been, and I came back again to the apartment and * * * this is also hazy, these many things—but I remember putting my ear to her chest and it felt cold and I felt that she * * * was dead. * * * I don't remember now whether these are in order * * * I remember again going out of the apartment again to go over to Betty's [Mrs. Bailey] and call, and then again it came to my mind that I had been in prison [for violation of the Corporate Securities Act] * * * and that I had heard a great many boys in prison discussing alibis and what chance have you got if you are a loser * * * I went through the turmoil that I wanted to die * * * [and considered various methods of suicide and the fact that I owed two or three people money, I thought,] 'It takes time to do these things, and if somebody comes in the apartment they will find her and I won't have time' * * * so I felt that I will just lay her on the floor and close the door so to-morrow morning [Wednesday, when the maids cleaned the apartment] they will find her, and in the meantime I will be able to settle up all of these affairs. * * *" Defendant wrapped the body in a blanket, placed it in the closet, and piled suitcases and a lamp on it. He left the apartment and went from hotel to hotel seeking "a room that was high up" without success. He then pawned his and Rena's watches and paid two bills. He found a hotel room and registered under an assumed name because he "wanted certain time to do certain things * * * I realize it, that it looks bad, but I didn't do it for any specific purpose but that." After he registered at the hotel he drank "constantly." Defendant remembers that he checked out of the hotel on Monday, May 22, and went up to the storeroom on the roof. "The next thing I remember was when I awakened in the Georgia Street Receiving Hospital," where the police took defendant after they found him in the storeroom.

The foregoing account is similar to defendant's statements to the police made at various times after his arrest except that he did not tell them of returning to the apartment on the night of the 15th and finding no one there, but only of returning and finding the body of deceased. He took the officers over the course he followed on his walk. He told them that "the only mistake I made" was to move the body and to fail to notify the police when he found it. Defendant consistently and vigorously denied that he had killed Rena.

About four days after his arrest defendant said to Officer Brennan, "I will bet all the tea in China that you don't convict me of first degree murder." According to defendant he added, "because I didn't do it, and you know * * * I didn't do it." According to Officer Brennan defendant added, "I might * * * make a deal with you and cop out on [plead guilty to]" manslaughter; and later defendant said he was going to "cop out and do six [years and] six [months]," then said, "No, I have changed my mind about that." Defendant denied that he had ever said he would be willing to plead guilty to manslaughter.

Officer Brennan testified that defendant refused to submit to a lie detector test because, defendant said, Dr. DeRivers, police psychiatrist, advised him not to take the test. Defendant testified that he told the officers that he was willing to take the test if his attorney and Dr. DeRivers were present; that Dr. DeRivers had examined defendant and "he told me that he realized my physical and nervous condition; that I should not do anything, or that is what I understood, until I talked to him again"; and the officers refused to give him the lie detector test unless he took it immediately, without the presence of his attorney and Dr. DeRivers.

[1-4] The evidence which tends to show that defendant killed his wife is entirely circumstantial. Defendant contends that, therefore, the trial court of its own motion should have given an instruction embodying the principle (as stated in 8 Cal.Jur. 371, § 405) "that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." It cannot be too strongly emphasized that such quoted statement enunciates a most important rule governing the use of circumstantial evidence. In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received. The general rule relating to the duty of the court in giving instructions in criminal cases is stated in People v. Warren (1940), 16 Cal.2d 103, 116, 117, 104 P.2d 1024, 1031: "'It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction.' 8 Cal.Jur. 309, and cases cited. All of these general principles should be considered in determining whether the trial court has performed its duty in any particular case." To the same effect is People v. Scofield (1928), 203 Cal. 703, 709, 710, 265 P. 914. In a criminal case where circumstantial evidence is substantially relied upon for proof of guilt it is obvious that "instructions on the general principles of law pertinent to such cases" necessarily include adequate instructions on the rules governing the application of such evidence.

In respect to the particular rule now invoked by the defendant the District Court of Appeal in People v. Hatchett (1944), 63 Cal.App.2d 144, 155, 146 P.2d 469, 475, after a review of cases which concern the question, stated that "Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction." In accord is People v. Rayol (1944), 65 Cal.App.2d 462, 464, 150 P.2d 812. However, in view of the constitutional rule (art. VI, § 4½) that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error * * * has resulted in a miscarriage of justice," it does not necessarily follow that the failure to state the principle in substantially the language above quoted will be ground for reversal.

It must be pointed out that defendant requested no instructions. He relies upon the holding of People v. Putnam (1942), 20 Cal.2d 885, 890, 129 P.2d 367, 369, that "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citations.] * * * An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.]" (See People v. Trumbo (1943), 60 Cal.App.2d 681, 688, 141 P.2d 225; People v. Holt (1944), 25 Cal.2d 59, 64, 153 P.2d 21.)

[5] The People, in this connection, call attention to the fact (not mentioned in the last cited opinions) that in 1935 section 1127 of the Penal Code was amended to read, "the court *may* instruct the jury re-

garding the law applicable to the facts of the case" (italics added), whereas before 1935 the section provided that "the court *must* state to them all matters of law necessary for their information" (italics added). From a literal reading of section 1127 and subdivision 6 of section 1093 of the Penal Code ("The judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party") it may appear that the duty of the trial judge to give instructions, in the absence of request therefor, extends only to those instructions which the Penal Code expressly requires. But we cannot believe that, as the People argue, "the legislative intent, by the amendment [of section 1127 in 1935], was to relieve the court from the duty of charging the jury, on the court's own motion, on *all* matters of law necessary for their information. * * *" (Italics added.) The verdict of a jury uninstructed as to the law relating to the facts of a case cannot be sustained merely because proper instructions were not requested.

[6] Here, however, the jury were not altogether uninstructed as to the law necessary to a proper consideration of circumstantial evidence. They were told that "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." This instruction is iminently proper as far as it goes. To it should have been added a direct statement of the precise principle under discussion. But examination of the record discloses that circumstances relied upon by the prosecution and left unexplained, or with an explanation which must have appeared unreasonable to the jury, point irresistibly to defendant as the perpetrator of the homicide and, as hereinafter discussed, indicate that he acted with that "malice aforethought" which constitutes the killing murder. Since the quoted instruction was given, the failure to give the further instruction is not, upon the facts of this record, ground for reversal.

[7] Once the jury had so found, there remained for their determination the more difficult question of the class and degree of the homicide. The evidence does not, as the People contend, compel the inference that the killing was murder of the first degree because perpetrated by means of torture (cf. People v. Murphy (1934), 1 Cal. 2d 37, 41, 32 P.2d 635; People v. Cardoza (1943), 57 Cal.App.2d 489, 498, 134 P.2d 877; People v. Duggan (1943), 61 Cal.App. 2d 379, 380, 143 P.2d 88). Whether or not the two wounds on deceased's head, the immediate cause of her death, were the result of defendant's striking her with a blunt instrument, the evidence, as a matter of law, is insufficient to prove torture. The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer. The following words of Blackstone, written in another connection (killing by stabbing), apply here: "For in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in case of poisoning, it carries with it an internal evidence of cool and deliberate malice." (II Cooley's Blackston, 4th ed., 1360.) Any implication in People v. Duggan, supra, that choking as a matter of law is torture within the meaning of section 189 of the Penal Code must be disapproved.

[8, 9] The evidence does not, as defendant contends, establish at the most that defendant was guilty of manslaughter. It cannot be said of the injuries inflicted here, as was said in People v. Kelley (1929), 208 Cal. 387, 393, 281 P. 609, 611, that "there is nothing in the record from which it may with reason be argued that they were inflicted with that intent or that malice aforethought which is a necessary ingredient of the crime of murder." The evidence that deceased was strangled supports the finding that defendant acted with "malice aforethought"; i. e., "the circumstances attending the killing show an abandoned and malignant heart." (Pen.Code, §§ 187, 188.) That finding, and the further finding that defendant did not act on provocation adequate to reduce the offense to manslaughter, are based on sufficient evidence and, hence, are binding on us.

[10-12] If the jury found that there was no considerable provocation and that

the defendant acted with "an abandoned and malignant heart" the "malice" would be "implied" and the murder would be of the second degree. Only if they found that the "intention unlawfully to take away the life of a fellow creature" was a considered intent arrived at or carried out as the result of deliberation and premeditation, could the murder be of the first degree. (Pen.Code, § 189; People v. Holt (1944), supra, 25 Cal.2d 59, 87, 90, 153 P.2d 21; People v. Thomas (1945), 25 Cal.2d 880, 901, 156 P.2d 7, 17.) But here, as in the Thomas case, *supra*, the jury were instructed that "If the unlawful killing is done without the provocation and sudden passion *which reduces the offense to manslaughter,* or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, * * * or the circumstances of the killing show an abandoned heart, this is murder of the second degree, *unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.*" Other instructions as to the class and degree of the homicide were in material part substantially similar to other instructions likewise given in the Thomas case and quoted at length at pages 892 and 893 of 25 Cal.2d at page 14 of 156 P.2d. "Specific intent" obviously is not necessarily the same as that "willful, deliberate and premeditated" intent which is essential to make the homicide now under consideration murder of the first degree. As hereinafter discussed more fully, a "specific intent" unlawfully to take life (accompanied necessarily in every case by malice aforethought) is normally an element of second-degree murder, and such intent is, of course, present in voluntary manslaughter. That other and conflicting instructions, some of them correct in themselves, distinguishing murder of the first and second degrees were given, does not, under the circumstances shown, make the italicized portions of the above quoted instruction any the less erroneous or prejudicial. (People v. Thomas, supra, pages 901-902 of 25 Cal.2d, 156 P.2d 7.)

[13] If the testimony, letters, and declarations of defendant are disregarded the evidence tends to show only that defendant killed his wife while she was intoxicated; there is then substantially no evidence casting light on either motive for, or intent at the time of, the killing. "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree." (People v. Howard (1930), 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385.)

On the other hand, if the testimony, letters, and declarations of defendant are considered as a whole they show that the marriage of defendant and deceased began inauspiciously when defendant failed to tell deceased that his previous marriage had not been dissolved, and that some eight months later the violent disagreements which characterized the marriage culminated, after several hours of drunken quarreling, in murder. The picture of the events which led up to the murder and the events which followed it is a consistent one, interrupted only by the defendant's denial that he killed his wife. This picture suggests reasons for and the facts of quarreling between decedent and defendant but leaves only to conjecture and surmise the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation. Overwhelmingly opposed to such conjecture or surmise, and consistently evidenced by every circumstance, is the rationale of a tempestuous quarrel, hot anger, and a violent killing.

[14] It is contended, in effect, that the evidence is sufficient to sustain the jury's finding that the murder was of the first degree even though it establishes only that the homicide was perpetrated by a violent act on the spur of the moment during the hot anger of a tempestuous quarrel. This, indeed, is substantially what the court told the jury was the law. (See instructions hereinafter quoted.) But such view of the law invokes a standard which is not warranted by and is inconsistent with our statute.

"Murder," says the Penal Code (§ 187), "is the unlawful killing of a human being, with malice aforethought."

[15] Thus "malice aforethought" is made an essential element of the crime of murder whether it be of the first degree or of the *second* degree. "Such malice may be express or implied. It is express when there is manifested a deliberate in-

tention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen.Code, § 188.)

[16] "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law" (Pen.Code, § 7, subd. 4) but they do not, at least insofar as implied malice is concerned, require a pre-existing hatred or enmity toward the individual injured. "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree." (Pen. Code, § 189.) "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—[not material here]." (Pen.Code, § 192.)

[17, 18] It is implicit in the above-quoted definitions that malice aforethought is, as above mentioned, an essential element of murder of the second as well as of the first degree and that such malice aforethought is not synonymous with the elements of deliberation and premeditation which must accompany a homicide to characterize it as murder of the first degree. Obviously, if malice aforethought necessarily included or presupposed a deliberate and premeditated intent then all murder would be of the first degree because any homicide, to constitute murder at all, must be an unlawful killing with malice aforethought; and the Legislature would be guilty of an utterly meaningless classification of murder into two degrees, with no field in which the second could operate. Likewise it is obvious that the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill. The intent to kill exists in voluntary manslaughter but for such a homicide, where the evidence shows merely the intent to kill (coupled, of course, with actual killing) but does not show premeditation, deliberation, or malice, either express or implied, the Legislature, recognizing the frailty of human nature and the effect of great provocation, has set up a separate class and assessed a lighter penalty than is provided where the other elements exist. (Upon reason it can well be argued that malice—an intent to injure—must exist in voluntary manslaughter, but, as has been pointed out elsewhere (People v. Holt (1944), supra, 25 Cal.2d 59, 85, 153 P.2d 21), malice, by common law tradition, is presumed to be wanting in voluntary manslaughter.)

In its classification of malice the Legislature has further evidenced the intent to distinguish between deliberate acts and hasty or impetuous acts. It declares, as quoted above, that "Such malice [malice aforethought] * * * is express when there is manifested a *deliberate* intention unlawfully to take away the life of a fellow-creature. It is implied, when *no considerable* provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Italics added.) ("Considerable provocation" would reduce the offense to manslaughter.)

It becomes apparent that the Legislature has set up in California three major divisions of unlawful homicides:

[19-21] 1. Manslaughter (voluntary; we are not here concerned with involuntary manslaughter): a willful act ("In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence" (Pen.Code, § 20) characterized by the presence of an intent to kill engendered by sufficient provocation and the absence of premeditation, deliberation, and (by presumption of law) malice aforethought.

2. Murder of the second degree: a willful act characterized by the presence of malice aforethought and, at least ordinarily, by the specific intent to kill, and by the absence of premeditation and deliberation.

3. Murder of the first degree: a willful act characterized by the presence of malice aforethought and by a deliberate and premeditated intent to kill, or by one of the means, or by the perpetration or attempt to perpetrate one of the felonies, enumerated in the statute.

It is patent that the homicide in this case can be murder of the first degree only if it is shown to have been deliberate and premeditated. To appraise the legal sufficiency of the evidence to sustain the verdict it is therefore necessary to know what is meant by the terms "deliberate" and "premeditated."

[22] As hereinbefore suggested the plaintiff contends, in effect, and the trial court so instructed the jury, that to sustain the verdict of first degree murder there need be shown "*no appreciable* space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind"; that "A man may do a thing willfully, deliberately and intentionally from a *moment's* reflection as well as after pondering over the subject for a month or a year"; that "He can premeditate, that is, think before doing the act, *the moment he conceives the purpose,* as well as if the act were the result of long preconcert or preparation." (Italics added.) If this contention be correct—if an act is deliberate and premeditated even though it be executed in the very moment it is conceived, with absolutely "no appreciable" time for consideration—then it is difficult to see wherein there is any field for the classification of second degree murder.

Of course the instruction that there need be "no appreciable space of time between the intention to kill and the act of killing * * *" is abstractly a correct statement of the law. It will be properly understood (at least upon *deliberation*) by those learned in the law as referring only to the interval between the fully formulated intent and its execution, *and as necessarily presupposing that true deliberation and premeditation characterized the process of, and preceded ultimate, formulation of such intent.* (People v. Thomas (1945), supra, 25 Cal.2d 880, 900, 156 P.2d 7.) But holding that such declaration is a correct statement of the abstract principle of law is not a holding that the same declaration made to a jury without explanation is not error. Particularly is it misleading when read in the context in which it was used. It excludes from the required showing any deliberation and premeditation between the intent and the act of killing and since other portions of the instruction eliminate any necessity for deliberation or premeditation in forming the intent, ("He can premeditate * * * the moment he conceives the purpose," etc.) we find that the court has wholly deleted the only difference, in this type of case, between first and second degree murder.

[23] It is asserted that "There is nothing in the sections of the Penal Code which relate to this subject, which indicates that the Legislature meant to assign any particular period to this process of deliberation or premeditation, in order to bring the act within the first degree." This latter assertion is eminently correct. (See People v. Thomas (1945), supra, 25 Cal.2d 880, 900, 156 P.2d 7.) But likewise there is nothing in the sections of the Penal Code which indicates that the Legislature meant to give to the words "deliberate" and "premeditate" any other than their common, well-known dictionary meaning.

The adjective "deliberate" means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; * * * Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; * * * unhurried; * * * Characterized by reflection; dispassionate; not rash." (Webster's New Int. Dict. (2d ed.).) The word is an antonym of "Hasty, impetuous, rash, impulsive." (Id.) It has been judicially declared that "Deliberation means careful consideration and examination of the reasons for and against a choice or measure." People v. Richards (1905), 1 Cal.App. 566, 571, 82 P. 691, 693. The verb "premeditate" means "To think on, and revolve in the mind, beforehand; to contrive and design previously." (Webster's New Int. Dict. (2d ed.).)

The jury was not given any of these quoted definitions of the words "deliberate" or "premeditate." Instead they were told by way of definition and explanation that deliberation and premeditation required "no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind"; that a man "may do a thing * * * deliberately * * * from a moment's reflection as well as after pondering over the subject for a month or year"; that he "can premeditate * * * the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation." Under that instruction, if it be the law, a jury could find a man guilty of first degree murder and we would have to affirm it, if the circumstances showed that two life-long friends, who never before had quarreled, who were hunting companions and lovers of firearms, sat down at a table to clean their weapons, engaged in friendly discussion, suddenly quarreled, and one, who never before had had but kindly thoughts for his friend, precipitately, in the twinkling of an eye, "the moment he conceives the purpose", with "no appreciable space of time between the intention to kill and the act of killing," in the anger of the moment slew his friend. Excluding such great provocation as would reduce the offense to manslaughter those circumstances would show implied malice aforethought and the specific intent to kill; i. e., second-degree murder (punishable by imprisonment in a state prison from five years to life), but we think that such a slaying was never intended by the Legislature to be placed in the same class with murder which is truly cold-blooded (deliberated, and premeditated) or which is committed "in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem," or "by means of poison, or lying in wait, [or] torture." (Pen.Code, § 189.)

[24] We do not undertake to say, as a matter of law, how long a thought must be pondered before it can be said to be deliberated and premeditated. That is fundamentally a question of fact for the jury in each case under proper instructions. But it is our function to require the trial courts and prosecuting officers to abide by the standards ordained by the statute and to that end to examine the instructions given, as to their compliance with the law, and the evidence, for its legal sufficiency to sustain any essential finding.

[25] The words "deliberate" and "premeditate," as above shown, have clearly defined and commonly understood meanings. In view of such commonly understood meanings it might not be necessary, at least in the absence of a request therefor, for the trial court to instruct the jury at all on the significations of those words, but when it does undertake to define or describe their significativeness any definition or description given should be fair and complete. For example, the jury may be told that "Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can open into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed." People v. Thomas (1945), supra, page 900 of 25 Cal.2d, page 18 of 156 P.2d.) But if they are instructed in that vein, which emphasizes the rapidity with which thoughts may follow each other, fairness requires a further instruction placing at least equal emphasis on the true (see definitions above) meaning of the terms. In other words, while the jury may be told that the brain can function rapidly they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied, and premeditated. The extent of the reflection in every case, if it is to pass the test, must fairly and reasonably meet the ordinary and unquestioned significations of the test words.

It is irrefragable that (in cases of the type now before us) the statutes of California purport to authorize putting a person to his death only where his act of killing was truly deliberate and premeditated; i. e., was murder of the first degree. If we were to uphold a finding of first-degree murder, and consequentially imposition of the death penalty, in cases where (as here) the jury have been authorized to believe that neither deliberation nor premeditation, in any commonly understood meaning of those words, need be shown, we should gravely augment the applications of that penalty. Executions in such cases would be by authority of law only because we so held—not because the language of the statute upon any meaning defined either in the statute or in any standard dictionary so provided.* Although, as pointed out in People v. Holt (1944), supra, 25 Cal.2d 59, 84-89, 153 P.2d 21, 34-37, there have been inconsistencies in the interpretations and applications of the statute sufficient to establish precedents for varying views, we deem it preeminently our duty not to seek to extend the statute but rather to understand it and give it effect as written by the Legislature.

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* The ordinary dictionary definitions are given supra, pp. 24, 25. Paragraph 16 of section 7 of the Penal Code declares that "Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and

[26-28] In the light of this discussion the definition and explanation of the words "deliberate" and "premeditate" given by the trial court as above set forth, under the circumstances of this case, must have been misleading to the jury and would require reversal of the judgment except for the fact that such error affects only the degree of the crime, which error, in view of the disposition we make of the case, becomes immaterial.

In considering the sufficiency of the evidence to support the verdict of first degree murder it is proper to observe that, just as the jury rejected defendant's testimony that he was not present when deceased was killed, they could reject any portion of the testimony bearing on the degree of the murder which they found unworthy of credence, and they could draw reasonable inferences from the testimony they did believe, as related to the other evidence. "But as is true as to all factual issues resolved by a jury, the evidence upon which the determination is made is subject to review on the question of its legal sufficiency to support the verdict. To the extent that the character of a particular homicide is established by the facts in evidence the jury is bound, as we are, to apply the standards fixed by law. 'The discretion of jurors in considering the effect of evidence as proof is not absolute. It is their duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion.' [Citation.]" (People v. Holt (1944), supra, 25 Cal.2d 59, 90, 153 P.2d 21, 37.) Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof. An inference must be "warranted by a consideration of the usual propensities or passions of men, [or] the particular propensities or passions of the person whose act is in question * * *." (Code Civ.Proc. § 1960.)

[29] Since there is no substantial evidence from which it reasonably can be inferred that defendant either formed or carried out the intent to kill deliberately, and with premeditation, in the ordinary meaning of those words, the judgment upon the finding of murder of the first degree cannot be sustained. The evidence, however, amply supports the other findings necessarily implied in the verdict of the jury. The error in instructing as to the degree of the homicide does not enter into the finding that defendant is guilty of "the unlawful killing of a human being, with malice aforethought" (Pen.Code, § 187) and there were adequate instructions on the subject of manslaughter.

For the reasons above stated the judgment is modified by reducing it to murder of the second degree and as so modified is affirmed. The cause is remanded to the trial court with directions to pronounce judgment on defendant sentencing him to imprisonment in a state prison for the term prescribed by law for murder of the second degree.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

PEOPLE v. HESLEN.*

Cr. 4619.

Supreme Court of California, in Bank.

Nov. 1, 1945.

Rehearing Granted Nov. 29, 1945.

1. Homicide ⚷22(1)

In murder prosecution wherein there was no element of poison, lying in wait, or perpetration or attempt to perpetrate any of crimes mentioned in statute, in order to sustain conviction of murder in first degree killing must have been willful, deliberate, and premeditated, or by means of torture. Pen.Code, §§ 187, 189.

2. Homicide ⚷22(1)

Under statute providing that killing is murder in first degree if perpetrated by torture, to establish "torture" it is not

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appropriate meaning." Legal usage ordinarily follows the dictionary definitions. See 26 C.J.S., Deliberate, Deliberation, pp. 689–692; 40 C.J.S., Homicide, pp. 886–889, § 33.

* Subsequent opinion 165 P.2d 250.

enough that severe pain may have been inflicted on victim in course of killing, but there must be intent that such pain may be caused and for purpose of punishment, revenge, persuasion, extortion, or the like, which intent may be manifested by nature of the act and circumstances surrounding homicide. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Torture".

3. Homicide 🔑253(4)

Conviction of first-degree murder could not be sustained on ground that it was perpetrated by "torture" where although victim's throat was cut with knife, there was no indication that accused was endeavoring to prolong the agony or inflict pain preliminary to death. Pen.Code, § 189.

4. Homicide 🔑254

Evidence in murder prosecution was sufficient upon which to find malice and hence a case of second-degree murder. Pen. Code, §§ 187, 189.

5. Homicide 🔑253(3)

Malice aforethought and premeditation are not the same, and hence evidence merely showing malice aforethought is insufficient to warrant finding of first-degree murder which is predicated on premeditation. Pen.Code, §§ 187, 189.

6. Homicide 🔑253(3)

That killing took place in a cafe in presence of 25 or 30 people is persuasive evidence of lack of premeditation and deliberation, and hence that killing was not murder in first degree. Pen.Code, §§ 187, 189.

7. Homicide 🔑253(4)

In murder prosecution, evidence that accused cut his wife's throat with a paring knife and continued to cut even after accused had been struck on the head with a stool showed an "abandoned and malignant heart", and hence established implied malice. Pen.Code, §§ 187–189.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned and Malignant Heart".

8. Homicide 🔑308(2)

An instruction predicating murder in first degree if "evidence proves the existence in the mind of the slayer of the preconceived, deliberate, specific intent to take life at the time of the killing. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree", was not erroneous on theory that word "such" referred only to specific intent which is not enough for first-degree murder, since "such" referred to deliberate and preconceived specific intent. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Such".

9. Homicide 🔑23(2)

Provocation insufficient to fully negative or raise a reasonable doubt as to both premeditation and malice, thereby reducing offense to manslaughter, may nevertheless negative or raise a reasonable doubt as to premeditation or deliberation, leaving the homicide as murder in second degree. Pen. Code, §§ 187–189.

10. Homicide 🔑308(6)

An instruction that to constitute murder in first degree intent to kill must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation, was erroneous for implying that the only thing that will erase pre-existing reflection is sudden heat of passion. Pen.Code, §§ 187–189.

11. Homicide 🔑308(2)

Instructions which eliminated possibility of second-degree murder where reason for absence of premeditation would be provocation or passion of less magnitude than that required for manslaughter, and that homicide committed in unreasonable fit of passion is not reduced to manslaughter, were erroneous for laying down a test too strict for negativing premeditation. Pen.Code, §§ 187–189.

12. Homicide 🔑308(2)

In murder prosecution, instructions that there need be "no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind" to warrant conviction of first-degree murder, and that a person may do a thing deliberately and intentionally from "a moment's reflection", were erroneous for failing to apprise jury of full significance of difference between first and second degree murder. Pen.Code, §§ 187–189.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Frank M. Heslen was convicted of murder in the first degree, and he appeals.

Reversed and remanded for new trial.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., John Quincy Brown, Dist. Atty., of Sacramento, and Albert H. Mundt, Chief Deputy Dist. Atty., of Represa, for respondent.

CARTER, Justice.

Defendant appeals from a judgment imposing the death penalty for murder of the first degree and from an order denying his motion for a new trial.

The homicide involved in this action occurred on July 15, 1944, between 4 and 4:30 p. m. in the Blue Ribbon Cafe in Sacramento. The cafe has two entrances, the front being on 12th Street, the rear opening on an alley. Along one side of the cafe runs a bar where beverages are sold and along the other, booths to accommodate customers. The deceased, Violet Heslen, the wife of defendant, was sitting on a stool at the rear end of the bar, having been served a drink. There were 25 or 30 people in the cafe. Jack Fitzgerald, the proprietor of the establishment, was tending bar. A short time after the deceased had arrived at the cafe, defendant entered by the rear door and stood or sat beside and talked with her for a short time. According to the evidence adduced by the prosecution, defendant picked up a knife lying on a sink drain board back of the bar and placed it on the bar under his arm. Its presence was revealed to deceased when defendant shifted his arm in ordering a drink. She grasped the knife and threw it across the room. Defendant ran across the room, retrieved the knife and started toward deceased with it in his right hand. Deceased fled behind the bar entering from the rear, with defendant in pursuit. She passed Fitzgerald about the middle of the bar. The latter in his endeavor to intercept defendant was struck and shoved aside by the defendant. The pursuit continued with deceased ducking under the front end of the bar and proceeding toward the rear on the customers' side of the bar. Deceased was overtaken by defendant when she reached the rear of the bar. There he grasped her around the chin or mouth with his left arm, turned her toward the bar or front of the cafe and cut her throat with the knife. He was struck by persons in the cafe with a stool and a bottle. He went behind the bar, wiped his hands and fled through the back door. After a pursuit he was captured.

The events in the defendant's words occurred as follows: "Well, we (defendant and deceased) talked on there. I don't know what we did talk about. We were talking about * * * one of the main topics was her drinking there, and I told her that I had told Jack not to give her any more whiskey, and then she said something about me sitting down, and I said, 'No, you sit there'; and she insisted that I sit down, which I did, on the stool, and she stood up at the corner of the bar, and I had ordered the drink previous to this from Mrs. Fitzgerald. She ordered a shot, and I ordered a bottle of beer, and we were talking—I don't know just what the conversation was. There was a lot of things that I don't remember in there, because I had been drinking. I knew that. The first thing I knew, I noticed the knife by her arm * * * by her hand and by her arm, like this (indicating), and I pushed my arm over toward this knife to hide it, and I was going to turn around to Fitzgerald and order the drink, and she said * * * First, I said, 'When I get this drink, I am doing to drink it and go back to Oakland to work tonight,' and she said, 'What's your hurry?' And I said, 'I promised the man I would be back,' and she said, 'You have got some bitch over there.' And I said, 'No, I haven't. I don't do anything like that.' I said 'All I do is work, because I have got to send money to my family.' She said, 'Yes, to your family and that bitch back there, too,' * * * meaning my former wife. Then I turned to Jack and was going to ask him about the drink, when I felt a stab in my hand * * * a sting like in my hand. Q. In which hand? A. In my left hand, and, as I did, it kind of brought me to, and I got off of the stool, and in getting off of the stool, I stumbled, and by that time she had thrown this knife, it looked to me like over in the corner, and I went over and I picked the knife up and threw it back on this drain board, back of the bar, and then I turned and picked my glasses up that had dropped out of my pocket * * * not these, * * * they were in a leather case. Not these. I lost them in that scuffle there. I turned and come back up, and I seen the knife again, and I went toward her, because in all her other threats to commit suicide, I knew I could talk to her, and talk her out of it, and then she started to run, and I run after her. I knew she would do something with herself with that knife, because she had made threats before; and at one time she took some sleeping pills and tried to commit suicide. I run around the bar and run under the opening. * * * She run under and I run under behind her, and as I came out of the opening, she was nearly to the end of the bar, and I put my glasses in my back pocket then, and I seen her stoop over or bend over with her hand up to her throat, and I run and grabbed her then and straightened her up, and got my arm through her elbow, like this (illustrating) through her left hand, and was reaching for the knife, trying to get this knife away from her, and then someone struck me over the head with a stool, * * * I guess it was a stool. I knew I was struck with something, and I found out afterwards it was a stool. * * * When I was falling, that is the last I remember until I come to in the station over here in the hospital."

Defendant contends that the evidence fails to show premeditation necessary for murder of the first degree and would sustain no more than manslaughter or second-decree murder. He also complains of instructions given to the jury.

Looking at the background, the circumstances surrounding the homicide, it appears that defendant was fifty years old. He has been a railroad man and since 1913 has been in the employ of various railroads throughout the country, holding such jobs as switchman, brakeman, yardmaster, and yard conductor. At the time of his arrest he was working for the Southern Pacific Company. Many witnesses testified to his good reputation for peace and quiet. He first met the deceased in Detroit, Michigan, in the year 1931. At that time defendant was living with his second wife and four children. Defendant and Violet soon became intimate acquaintances. In 1940 defendant's second wife divorced him and in August, 1943, Violet met the defendant at Spokane, Washington, the residence of defendant's mother and one sister, and they were married. Violet had also been married before, and according to the testimony of defendant, was undivorced from her former husband, which fact he did not know at the time of their marriage. Defendant and Violet had lived together as man and wife prior to their marriage. In the early part of 1943 they lived in a flat over the Blue Ribbon Cafe. While living in that place, they, and particularly Violet, frequented the Blue Ribbon Cafe. There they formed the acquaintanceship of Jack Fitzgerald, the owner of the cafe, and Stella Fitzgerald, his wife. The married life of Violet and defendant was marred by frequent quarrels and separations. The quarrels seemed to be caused chiefly by conduct on the part of Violet consisting of excessive drinking, jealous accusations of misconduct with other women and the fact that defendant sent sums of money to his former wife and his children. While in Spokane the defendant and deceased lived for the first couple of months in the upstairs portion of defendant's sister's home. His sister testified that because of the cursing of Violet, directed at defendant and herself and threats of bodily injury, the latter and her husband requested that she move. Thereafter she and the defendant did move and resided in the Hotel Empire.

Defendant and the deceased left Spokane separately on the 5th and 6th of April, 1944, agreeing to later meet in Sacramento. Defendant hired out to the Southern Pacific Company in Portland, Oregon, and took up residence in Oakland and Roseville, California. His wife came to Sacramento and resided in the home of Mr. and Mrs. Fitzgerald. She obtained work as a bus driver for the United States Signal Depot in Sacramento. Defendant claimed that the Fitzgeralds held an influence over Violet, that they sold her whiskey over his objection and tried to alienate her from him and that they were antagonistic toward him and very friendly with decedent. It appears that when decedent went to Spokane to meet the defendant and get married, she was without her engagement ring, which had been pawned or given as security to the Fitzgeralds. The ring was forwarded when defendant sent money to the Fitzgeralds.

After leaving Spokane, defendant and his wife corresponded amiably, and in June, 1944, she came to the defendant in Roseville. However, about 10 days later, on June 23, 1944, she left and went back to the Fitzgeralds in Sacramento. While they were living apart during this time, defendant made occasional trips, usually of one day duration, to see his wife. While in Sacramento on one of these trips, on June 13, 1944, decedent made a report to the police that defendant was bothering her. Defendant was located on the street and advised to stop bothering his wife. He, at that time, denied that he had been bothering her and at the trial explained that he had just come into town that morning, rode with his wife on the bus driven by her to the Signal depot, and waited outside to see her, but moved on when advised by the Signal depot policeman that he could not ride in on the bus.

The last time defendant saw deceased, prior to July 15, 1944, the date of the homicide, was on June 27, 1944. The two had stayed overnight at the Californian Hotel after defendant came to Sacramento on June 26th. According to the defendant everything was peaceable between them at that time and nothing happened between then and July 15, 1944, to disrupt their friendly relationship. He testified that just a couple of days prior to July 15th, she called him up by telephone and requested that he come to see her. However, the prosecution introduced in evidence a letter, undated, but postmarked July 7, 1944, addressed to deceased from defendant, reading in part as follows:

"Vi, Honey:

"I am so nervous over receiving your nice letter, but will try to write to you. That is good news to have you say that I can have you back again. I have become so desperate lately I don't know what to do. Honest honey, I am right on the verge of doing anything. I made up my mind that I did not want to live any more without you. I couldn't stand it any longer, and I knew that it was the only way out for me. You can never tell me that you have suffered as I have. You know how good I looked three or four months ago and you know how I look now so you must know what I have suffered and there is only one cure for me honey and that is you. I have not been drinking; I swear to this on Jimmy's grave. * * *"

"* * * it is only the pain in my heart and the suffering I have gone through over you. In a way I am glad that this has happened to me as it woke me up and I know now that you will have a new and different man. No batting you around, and nothing I ever did before except to love you. Oh, honey come to me soon please. I need you to talk to me and hear from your own lips that this affair you are in now has been forgotten. You are my only cure and you know it. * * * I wrote you a nasty letter and you will get it after you get this one; it is an answer to your letter of the fifth, Your dear pal letter. I was going to wait till I had your answer to it then I was all done with my life. I was not going to do you any harm but I was just going out the easiest way I knew so that you would know that to the last I kept my promise (I am not so nervous as at first.) See what a nice letter can do for me. * * * I don't see why I didn't do as you said that nite and let you go and send me the letter as you wanted to, but I knew you wanted to go back to him and I just couldn't let you go on the last nite that I ever expected to see you again, I was really desperate then Vi and your talking to me, when you said, 'Please honey' and put your arms up for me then it saved you honey as I know now that something awful could have happened then and I want to thank you Vi dear for saving a damned old fool from doing something desperate. I thought it was so mean of you not to want to be with me on the last nite that you knew I would be there with you and not knowing when I would see you again if ever. I don't want you to get drunk honey when you have your day off. You are so nice and good when you don't drink and remember I can always tell if you have been drinking or not, don't get drunk any more only with me. * * * I sure feel better now that I have a nice letter from you but boy just think how good I will feel when I can come home to you again. These are sure long letters, but I hope you don't mind reading them. You should receive this tomorrow as I am going up town to the post office to mail it or I may go to Oakland Pier and mail it on the train but you will receive it tomorrow the fourteenth. Love and kisses and everything to my baby from your good boy

"Frank."

Defendant explained that he had told deceased he "was going to jump out the window" and that was what he referred to in the letter as "something awful." Further, that she had accused him of not loving her because he was not jealous, and that he wanted her to think he was jealous.

On July 15, 1944, defendant arrived in Sacramento at about 10 a. m. He walked down I Street and met his wife driving the Signal depot bus on her usual route. A soldier was with her. She blew the horn at defendant, stopped the bus and introduced the soldier. At her suggestion they proceeded to the California Hotel bar. Decedent remained at the bar only a short while and then resumed her bus driving. Before she left, defendant informed her that he intended to lie down in the park and get some sleep. While at the bar defendant consumed a double shot of whiskey and another, either single or double shot, and several bottles of beer. His wife and the soldier were in uniform and drank beer. The soldier remained at the bar with defendant when the deceased left. At about 12:30 or 12:45 p. m. defendant went from the bar to the park, lay down and went to sleep. He was awakened some time thereafter by Violet and the two went to the bar in the Californian Hotel. The bartender testified that it was about 3 p. m. when they arrived; that both were obviously intoxicated and for that reason he refused to serve them although Violet asked for a drink. She left after about 10 or 15 minutes and several minutes later defendant left.

Shortly after 4 p. m. Violet entered the Blue Ribbon cafe and sat down upon a stool at the rear end of the bar. She ordered and was served a glass of whiskey. A few minutes later defendant came in a rear entrance and stood beside her. Then according to the witnesses for the prosecution the following events transpired: they proceeded to converse in low tones for a few minutes. The only portion of the conversation overhead by any witness was a statement made by Violet, testified to by Mrs. Fitzgerald, sitting two stools away: "If you had been acting like a gentleman, I wouldn't have left you." Defendant reached over the bar to a sink drainboard and picked up a paring knife belonging to the cafe. He placed this knife on the bar. Mrs. Harden, daughter of Mrs. Fitzgerald, sitting three stools distant, testified that deceased made a grab for the knife as defendant placed it on the bar, saying, "Don't be silly, give me that knife." Then defendant covered it with his left arm. Immediately thereafter in turning to call to the bartender for a drink of beer, defendant moved his arm slightly. Decedent slid her hand under his arm, grabbed the knife and threw it against the cafe wall. Defendant ran after the knife, picked it up and began chasing Violet. The latter, with defendant behind her, ran behind the bar, traversed the entire length thereof, ducked under an opening at the front and proceeded to encircle the bar, running toward the starting point and rear exit. Jack Fitzgerald, tending bar, tried to stop defendant as he came by, but defendant punched him in the eye, slashed at him with the knife, cutting his shirt, and proceeded on. In the encounter with Fitzgerald the latter testified that defendant said: "Get out of my way." "I want that dirty bitch," or "I will catch that dirty bitch." Defendant caught his wife after she had almost encircled the bar, straightened her into an upright position and inflicted the mortal wound. While cutting her throat defendant was hit on the head with a bottle by Fitzgerald who had given chase, also, with a stool by a patron. He swooned and went down but recovered and left, first walking, then running through residential yards, seeking to avoid capture by onlookers and the police who had been summoned. He was captured a short time thereafter, a few blocks from the cafe, and taken to the receiving hospital for treatment. There was evidence that he acted and appeared to be sober when captured, while seeking to avoid capture and upon arrival at the hospital.

According to the testimony of defendant, as heretofore seen, deceased had the knife and he was attempting to prevent her from committing suicide. He claimed to have no recollection of any of the incidents of his flight, or in fact of anything that occurred between the time he was hit on the head and his arrival at the hospital.

It appears that defendant had no weapon upon his person when entering the Blue Ribbon cafe. He explained his entrance through a rear door, which led to an alley, as his usual mode of entering the Blue Ribbon cafe, stating that it was against the rules of the railroad company by which he was employed for an employee to frequent that type of place. This testimony does not appear to have been contradicted.

[1] "Murder is the unlawful killing of a human being, with malice aforethought." Pen.Code, § 187. Murder of the first degree is that perpetrated "by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem * * *." Pen.Code, § 189. In the instant case there is no element of poison, lying

in wait, or the perpetration or attempt to perpetrate any of the crimes mentioned. Hence, in order to sustain the verdict the killing must have been willful, deliberate and premeditated, or by means of torture.

[2] Respondent urges that the killing was committed by means of torture, relying upon evidence that defendant overtook Violet, grasped her around the head, turned her around "sawing" at her throat with the knife, continued to cut and claw at her throat after he had been knocked down with the stool, and cut her windpipe, jugular vein, artery and neck muscles. Torture is the "Act or process of inflicting severe pain, esp. as a punishment, in order to extort confession, or in revenge." Webster's New International Dictionary, 2nd ed. Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. That intent may be manifested by the nature of the acts and circumstances surrounding the homicide. Thus, in People v. Murphy, 1 Cal.2d 37, 32 P.2d 635, 636, torture was found to be present where the defendant administered to the victim, his wife, a severe and unprovoked beating. By use of "a belt, belt buckle, and his fists had bruised and battered his victim's entire body and had broken her jaws. Other treatment of a sordid and shocking nature need not be described." As a result the victim died eleven days later. Similarly in People v. Cardoza, 57 Cal.App.2d 489, 134 P.2d 877, defendant beat the victim on the head and body with an axe handle. He sought no medical aid for her until she became unconscious some time after the beating. The victim died five hours after the beating. On previous occasions defendant had choked and bitten her. The case of People v. Duggan, 61 Cal.App.2d 379, 143 P.2d 88, has been disapproved. People v. Bender, Cal., 163 P.2d 8. It is not enough to establish torture that severe pain may have been inflicted on the victim in the course of the killing. There must be, in addition, an intent that such pain may be caused and further, for the purpose of punishment, revenge, persuasion, extortion, or the like. People v. Bender, supra; Townsend v. People, 107 Colo. 258, 111 P.2d 236. If that were not true practically every murder would be of the first degree inasmuch as in most instances some severe pain would precede the death. We do not believe the Legislature used the word "torture" in such a broad sense. In People v. Holt, 25 Cal.2d 59, 153 P.2d 21, the defendant shot the victim in the abdomen. He did not die until some time later and such a wound would unquestionably cause severe pain. We said at page 84 of 25 Cal.2d, at page 34 of 153 P.2d:

> "Obviously the homicide in this case was not perpetrated by means of poison, or lying in wait, or torture, * * *." (Emphasis added.)

[3] In the instant case, although the method of slaying followed by defendant was gruesome and shocking, the victim must have died a very short time after her throat was cut. There is no indication that defendant was endeavoring to prolong the agony or inflict pain preliminary to death. The whole process of the actual homicide could not have extended over a period of more than a few minutes. According to the prosecution's evidence defendant acted rapidly and determinedly, pursuing to completion his deplorable act even after he was struck on the head, indicating that there was no thought of causing severe pain or torture. There does not appear to have been any purpose of vengeance, punishment, or extortion. Therefore, the conviction of first-degree murder cannot be sustained on the ground that it was perpetrated by means of torture. It must rest on wilfulness, deliberation, and premeditation if it can be sustained at all.

The prosecution especially relies upon the following reasoning to show wilfulness, deliberation and premeditation: That although defendant's evidence shows he was intoxicated, the prosecution's evidence is to the contrary; that there is evidence of previous quarrels between defendant and the victim, and on at least one occasion he slapped her; that they were separated and defendant was trying to get her to return to him but she demurred because of his conduct and treatment of her; that the motive for the homicide was her refusal to return to him as shown by their correspondence from April to July, the time of the slaying, in which it appears that he wanted her to return but she did not wish to unless he changed his conduct; the letter of July 7th heretofore quoted, in which he said that on their meeting a short time before she had been saved from something "awful" when she extended her arms to him; the circumstances surrounding the killing, that is, the pursuit around the bar and the portion of their conversation immediately prior thereto in which she said: "If you had been acting like a gentleman, I wouldn't have left you," followed by her remark after he had obtained the knife from the sink drainboard back of the bar and she saw it under his arm, to the effect: "Don't be silly, give me that"; that these facts show that defendant was desperate over the refusal of his wife to return and formed the design to kill her after he entered the cafe and she still refused to return to him, coupled with his subsequent conduct and remarks to Fitzgerald about wanting "that dirty bitch" when Fitzgerald endeavored to stop defendant's pursuit of his wife; and that the manner of performing the act of slaying, the sawing and cutting even after defendant had been struck with the stool, indicates willful, deliberate premeditation.

[4-6] After a review of the entire record in this case we cannot say as a matter of law that the evidence is insufficient to show a willful, deliberate and premeditated killing. However, the evidence on that issue presents a very close case. From the nature of the homicide act and the circumstances surrounding it there is clearly sufficient upon which to find malice and hence a case of second-degree murder. But malice aforethought and premeditation are not the same. People v. Holt, supra; and People v. Bender, supra. In the instant case not all of the conversation between defendant and his wife prior to his pursuit of her was heard. Only the isolated statements above mentioned were overheard. The prosecution witnesses testified that defendant and his wife were conversing in low tones. The entire action transpired in a few minutes. The remarks of the defendant while pursuing his wife and those in the letter of July 7th, do not necessarily show premeditation. The manner of the homicide shows an abandoned heart—malice but not necessarily premeditation. The statement in the letter does not compel the conclusion that there was a design on defendant's part to kill his wife, and further, even if there had been such a thought at that time it may have been erased when his wife proffered her arms in an embrace. Defendant testified that he meant he would harm himself,—jump out of the window, thus showing the remark was not directed at his wife. When he entered the cafe he had no weapon of any kind. The slaying was accomplished by a knife picked up at the scene of the crime. His comment to Fitzgerald during the heat and excitement accompanying his pursuit of the victim did not necessarily portend a design to kill. Rather it could be viewed in the light of the circumstances as a thoughtless statement made under conditions inducing reckless remarks. The fact that the killing took place in a cafe in the presence of 25 or 30 people is persuasive evidence of a lack of premeditation and deliberation. The case of People v. Holt, supra, is precisely in point. There, the defendant had threatened to shoot the victim's "heart out" two hours prior to the slaying. We said at page 92 of 25 Cal.2d, at uage 39 of 153 P. 2d:

"And we cannot survey all the evidence in this record without the strong conviction that the witness was correct in his appraisal of the threat. It is certain that defendant did not literally carry out any part of his threat. He did not say that he intended to kill Riley. He said that he 'was going to * * * shoot his * * * heart out and wipe it across his mouth.' The very extravagance of that statement makes its value as proof of a deliberately conceived and premeditated intent questionable. The defendant did neither of those things, nor did he make any effort literally to carry out such extravagant statement. It has also been suggested that the statement of the defendant made to the witness Keever a few minutes before the shooting that 'right now I am telling this brakeman off' amounted to a declaration that he was even then in the course of carrying out an intentional homicide. On the contrary, such statement is apparently devoid of any value as proof of a deliberate, fixed design to take life. The expression 'tell off' is a colloquialism meaning 'To reprimand, denounce' (Webster's New International Dictionary, 1943 ed.) and is simply consistent with the defendant's rude and crabbed mood manifested throughout the day."

[7] We have heretofore indicated that the evidence was sufficient, however, to establish express malice and hence more than manslaughter has been established. There is also implied malice. That is present "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Pen.Code, § 188. Here the manner in which the act was committed is sufficient to show an abandoned and malignant heart.

Defendant complains of the following instructions given to the jury (the paragraphs are numbered for later reference):

(1) "All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murders are of the second degree.

(2) "Malice aforethought either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately and without legal cause or excuse.

(3) "It does not imply a pre-existing hatred or enmity toward the individual injured.

(4) "In dividing murder into degrees the legislature intended to assign to the first as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second all other kinds of murder which are murder at common law, and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated:

(5) "Is the killing willful (that is to say, intentional) deliberate and premeditated? If it is, the case falls with(in) sic. the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation; these the legislature has enumerated in the code definition already given you, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes:

(6) "First. Where the killing is perpetrated by means of poison, torture or lying in wait. Here the means used is held to be conclusive evidence of premeditation.

(7) "Second. Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute, here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes the test question: Is the killing willful, deliberate, and premeditated? is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two classes are concerned all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class, the legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations the same test which has been used by itself in determining the degree of the other two classes, to-wit: the deliberate and preconceived intent to kill. It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied *with a deliberate premeditation and clear intent to take life in order to constitute murder of the first degree.* The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.

(8) *"There need be, however, no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.*

(9) "A man may do a thing wilfully, deliberately and intentionally from a *moment's reflection* as well as after pondering over the subject for a month or year. *He can premeditate, that is, think before doing the act, the moment he conceives the purpose as well as if the act were the result of long preconcert or preparation.* There is nothing in the sections of the Penal Code which relate to this subject, which indicate that the Legislature meant to assign any particular period to this process of deliberation or premeditation, in order to bring the act within the first degree.

(10) "If the unlawful killing is done without the provocation and sudden passion which reduces the offense to *man-*

slaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, *unless the evidence proves the existence in the mind of the slayer of the preconceived deliberate specific intent to take life at the time of the killing. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.*

(11) "You are instructed that Section 190 of the Penal Code of the State of California provides that a person guilty of murder in the first degree shall suffer death, or confinement in the State Prison for life, at the discretion of the jury trying the same. Therefore, if you do so find the defendant guilty of murder in the first degree, you have the discretion and duty to determine the nature of his punishment.

(12) "You are instructed that manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

(13) "1. Voluntary—upon a sudden quarrel or heat of passion.

(14) "2. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without the (due) sic. care and circumspection.

(15) "Manslaughter is principally distinguishable from murder in this: that though the act which occasioned the death be unlawful or likely to be attended with bodily mischief, yet the malice, either expressed or implied, which is the essence of murder is presumed to be wanting.

(16) "The heat of passion mentioned in these instructions is the passion sufficient to disturb or obscure reason and render an ordinary man of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.

(17) "In criminal cases, the proof of the moving cause is permissible and oftentimes valuable, but it is never essential. Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory, and that motive may be shown by positive evidence or gleaned from the facts and surroundings of the act; then proof of the motive becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as the jury deems proper.

(18) "Homicide committed in an unreasonable fit of passion is not reduced to manslaughter. In an abstract sense anger is never reasonable, but the law in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person of ordinary self-control."

[8] In regard to the tenth paragraph defendant asserts that it is the same instruction which was denounced as conspicuously bad in People v. Thomas, 25 Cal.2d 880, 156 P.2d 7. See, also, People v. Bender, supra. However, in those cases the words "preconceived deliberate" next preceding and modifying "specific intent" were not present as is true in the instant case. In the Thomas case we determine that the instruction was faulty because it treated a specific intent to kill as being sufficient for first-degree murder, whereas the specific intent must be preconceived in order to have premeditation. People v. Holt, supra; People v. Thomas, supra. In the instant case the instruction required the specific intent to be deliberate and preconceived. Defendant claims however, that the last sentence in the paragraph makes the instruction erroneous because it refers to "*such* specific intent," implying the thought that "such" refers only to a specific intent to take life which is not enough for first-degree murder. Obviously, the word "such" referred to the specific intent as described and modified in the foregoing sentence, that is, a deliberate and preconceived specific intent. "Such" is defined as "of the sort or degree previously indicated or contextually implied." Webster's New International Dictionary, 2d ed. p. 2518.

[9-11] Defendant contends that the instructions gave the jury the impression that the only heat of passion which would negative premeditation is that present in manslaughter. We have recently held that where the "instructions given cover quite

fully the distinction between murder and manslaughter and advise the jury as to the meaning of the term 'provocation' and its materiality in relation to possibly reducing the offense from murder to manslaughter but the instructions are wholly silent in respect to the *materiality of provocation as regards the degree of murder,* if the homicide is found to be murder. *Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of both premeditation and malice* (thereby reducing *the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation,* leaving the homicide as murder of the second degree; i. e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation." People v. Thomas, supra, 25 Cal.2d 903, 156 P.2d 19. (Emphasis added.) In the two sentences before the last in the seventh paragraph of the instructions the jury were correctly advised that the intent to take life must be deliberate and premeditated. However, in the last sentence the implication is that the only thing that will erase preexisting reflection is sudden heat of passion. Provocation, heat of passion, or other circumstances of a character insufficient to reduce the homicide from murder to manslaughter may, nevertheless, negative premeditation. People v. Thomas, supra. The tenth paragraph (heretofore discussed) refers to provocation and sudden passion in referring to manslaughter. That paragraph states that the offense is reduced to manslaughter when the passion or provocation is of that quality. It then proceeds to list the factors that would establish second degree murder, that is, the commission of an unlawful act, of a felony not listed in section 189 of the Penal Code, or the existence of an abandoned heart. Those clauses read together definitely eliminate the possibility of second-degree murder where the reason for the absence of premeditation would be provocation or passion of less magnitude than that required for manslaughter. In the fourteenth paragraph manslaughter is defined and sudden heat and passion are mentioned. Thereafter, it is said (paragraphs 16 and 18):

"The heat of passion mentioned in these instructions is the passion sufficient to disturb or obscure reason and render an ordinary man of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."

"Homicide committed in an unreasonable fit of passion is not reduced to manslaughter. In an abstract sense anger is never reasonable, but the law in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person of ordinary self-control." This test is too strict for negativing premeditation. There may be circumstances of excitement, provocation, passion and the like which the jury might determine refutes any thought of a preconceived plan, but yet would not be sufficient to justify a reduction to manslaughter.

[12] But more important are the eighth and ninth paragraphs of the instructions dealing with the definition and meaning of premeditation which are not distinguishable from those given in People v. Bender, supra. There we discussed the propriety of such instructions in detail and condemned them as failing to apprize the jury of the full significance of the difference between first and second degree murder. See, also, to the same effect People v. Thomas, supra.

In the instant case we have seen that there is grave doubt of the sufficiency of the evidence to establish willful, deliberate premeditation on defendant's part. Although there was evidence to the contrary, there is ample from which the jury could have concluded that defendant was intoxicated. There was evidence that defendant did not have a knife in his hand during the chase. It could have inferred that an altercation occurred between defendant and his wife during their discussion in the cafe over her consumption of whiskey. There are the circumstances of the chase and the excitement accompanying it. The showing of motive is weak. From the whole record we are convinced that the jury were not sufficiently instructed on the requirements necessary to establish first-degree murder and the distinction between it and second degree.

The judgment and order denying defendant's motion for a new trial are reversed and the cause is remanded for a new trial.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

71 Cal.App.2d 526

HOYTT CONST. CO., Inc., v. WHITE et al.

Civ. 14724.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1945.

1. Action ⚷6

In action by vendor to recover possession of and quiet title to realty sold under installment contract on which purchasers allegedly defaulted, trial court properly refused to grant declaratory relief sought by vendor. Code Civ.Proc. § 1061.

2. Quieting title ⚷44(3)
Vendor and purchaser ⚷299(3)

Evidence supported findings in favor of vendor in action to recover possession of and quiet title to realty sold under installment contract on which purchasers allegedly defaulted.

3. Quieting title ⚷39
Set-off and counterclaim ⚷13

In vendor's action to recover possession of and quiet title to realty sold under installment contract on which purchasers allegedly defaulted, purchasers could not interpose counterclaim for damages for alleged breach of restrictions against occupation of tract as originally subdivided by persons other than of the Caucasian race.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Hoytt Construction Company, Inc., against James J. White and others, to recover possession of and quiet title to certain realty and for declaratory relief, wherein defendants filed a counterclaim for damages. From a judgment for plaintiff and an order denying defendants' motion for new trial, defendants appeal.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

Hugh G. Maddox, of Long Beach, for appellants.

Cannon & Callister, of Los Angeles, for respondents.

DORAN, Justice.

Respondent, construction company, sold to appellants two lots in the town of Dominguez under the terms of a sale and purchase agreement providing for a down payment and monthly installment payments pursuant to the terms of a trust deed which the buyer assumed and agreed to pay. Appellants had defaulted; the action herein is to recover possession, quiet title and declaratory relief.

Defendants, appellants here, denied the default, "according to the terms of their contract". The answer set up four separate defenses which, in substance and effect, amounted to a counterclaim for damages. It was alleged in substance that the appellants' two lots were part of a tract which, when originally subdivided, contained certain restrictions against occupation by any person other than one of the white or Caucasian race; that notwithstanding said restrictions, respondent, after having sold the lots to appellants, had sold two lots contiguous to appellants' to persons not of the Caucasian race; that said individuals were permitted to occupy said property by respondent; that said sale and permission constituted a violation of the restrictions by respondent; that the value of appellants' equity was thereby reduced to appellants' damage in the sum specified. The third and fourth separate defenses were abandoned by stipulation and the findings so recite.

[1] The trial court declined to grant relief in connection with plaintiff's application for declaratory relief. The ruling was proper. Section 1061, C.C.P. The action was held to be on the contract in question and the court found against the defendants.

It is contended by appellants that the trial court erred in dismissing the cross complaint, or counterclaim for damages; and erred in certain rulings excluding evidence offered by defendants. With regard to the latter contention, details may be omitted; it is sufficient to note that the rulings were correct.

[2, 3] The evidence supports the findings. Moreover, there is no authority, in the circumstances, for the defenses sought to be interposed by defendants.

There being no error the judgment is affirmed, and the appeal from the order denying a motion for new trial is dismissed.

YORK, P. J., and WHITE, J., concur.

BRYANT v. MARKET ST. RY. CO.

Civ. 12724.

District Court of Appeal, First District, Division 1, California.

Nov. 1, 1945.

Rehearing Denied Dec. 1, 1945.

Hearing Denied Dec. 27, 1945.

1. Appeal and error ⚿989

When a verdict is attacked as being unsupported, power of appellate court begins and ends with a determination as to whether there is any substantial evidence which will support conclusion reached by jury.

2. Appeal and error ⚿996

When two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

3. Street railroads ⚿117(24)

In action for injuries sustained by gripman on westbound cable car when its grip hit cable of defendant's crossing line, which cable was being held by defendant's southbound car after crossing intersection, contributory negligence of plaintiff was for jury, in view of rule of defendant, and custom of gripman on southbound cars, that cable be dropped immediately after crossing intersection involved.

4. Street railroads ⚿114(14)

In action for injuries sustained by gripman on westbound cable car when its grip hit cable of defendant's crossing line, which cable was being held by southbound cars after crossing intersection, evidence authorized inference that plaintiff gripman had knowledge of defendant's rule, and custom of gripman on southbound cars, that cable be dropped immediately after crossing intersection involved and that plaintiff relied thereon and was justified in operating the westbound car over the intersecting tracks.

5. Street railroads ⚿117(5)

In action for injuries sustained by gripman on westbound cable car when its grip hit cable of defendant's crossing line, which cable was being held by defendant's southbound car, after passing the intersection, to permit an automobile to park, under evidence that defendant's rule and custom required gripman on southbound cars to drop cable immediately after crossing intersection, question whether gripman on southbound car was guilty of negligence was for jury.

6. Trial ⚿255(3)

If defendant, after introducing evidence on its own behalf on subject of usage, custom, practice and circumstances and conditions present at time of accident, desired that an appropriate instruction be given, it should have offered one.

7. Trial ⚿43

Evidence of operating rules and customs to be admissible must be material to an issue.

8. Trial ⚿312(1)

Where about an hour after jury retired they requested to be returned to court and a juror requested the rereading of an instruction, the rereading of the instruction was not error.

KNIGHT, J., dissenting.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Personal injury action by Chester Bryant against Market Street Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 158 P.2d 18.

Cyril Appel, Linforth, Cannon & Miller, and Jesse H. Miller, all of San Francisco, for appellant.

Edmund Gerald Brown, Harold C. Brown, and Melvin M. Belli, all of San Francisco (James F. Brennan, of San Francisco, of counsel), for respondent.

WARD, Justice.

[1, 2] A rehearing was granted in this case in order to give further consideration to the contentions of appellant, vigorously urged, that the court had misstated, overstated or understated portions of the evidence. A rereading of the record, in the light of these contentions, has convinced us that the opinion heretofore filed correctly states all of the material facts, and that every fact stated in the opinion is supported by substantial evidence or by reasonable inferences from that evidence. It must be remembered that "when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with

a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184; see also, Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 73 P.2d 217; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Peri v. Los Angeles Junction R., 22 Cal.2d 111, 137 P.2d 441; Laherty v. Connell, 64 Cal.App.2d 355, 148 P.2d 895.

One of the basic questions of fact involved in this appeal is where the southbound Powell street car stopped after crossing O'Farrell Street. We think that the evidence supports the implied finding of the jury that when the Powell Street car stopped it was over the intersection and standing on the down grade. The plaintiff testified that he saw no car in the intersection as he approached. That supports the reasonable inference that no car was there. The gripman of the Powell Street car positively testified he held onto the cable until the back end of his car was even with the south property line of O'Farrell Street. While there are inconsistencies in both witnesses' testimony these inconsistencies were for the jury.

If the car was over the brow of the hill when it stopped then there was no need to keep a loose grip on the cable. To do so obviously created a trap for any car traveling on O'Farrell Street at that intersection. The danger to such cars if the Powell Street car held the cable after passing over the intersection is so obvious that the jury was justified in its implied finding that defendants were negligent and such negligence constituted the proximate cause of the accident.

We are satisfied that the opinion heretofore filed, 158 P.2d 18, correctly disposes of all questions of law and fact presented on this appeal. We therefore adopt that opinion as the opinion of this court. It is as follows:

Defendant appeals from a judgment on a verdict for plaintiff in an action for damages for personal injury. It is urged that there is no evidence of negligence on the part of defendant; that in fact the evidence shows that the accident was caused solely by reason of the negligence of plaintiff. It is also claimed that the trial court erred in denying a motion for nonsuit, a motion for a directed verdict and a motion for a judgment notwithstanding the verdict.

An examination of the evidence indicates that a narration thereof is sufficient to answer the above contentions. Neither the amount of damages awarded, $27,500, nor the testimony in support thereof is attacked. Defendant does suggest, however, that the size of the verdict is referable to the circumstance that it was returned a few days before Christmas, a time when a jury might well feel generous. A point worthy of consideration is the contention that the court erred in giving an instruction on the subject of custom.

The accident occurred in March, 1942, about 8 p. m. at the intersection of O'Farrell and Powell Streets in the city of San Francisco. The physical facts appear as follows: At the intersection of O'Farrell and Powell Streets four cable car tracks intersect. There are four cables, two used by the O'Farrell Street line for propelling its cable cars, operating easterly and westerly, and two by the Powell Street line, operating northerly and southerly. The O'Farrell Street cables were installed at a lower level than those of the Powell Street line. The cables operated in slots, and, when disengaged from the car those of the Powell Street line were normally at a level about three inches below the bottom of the grip of an O'Farrell Street car as it crossed the intersection. The O'Farrell Street car was equipped with a grip which extended into the slot, the grip being used to hold the moving cable, thus transmitting motive power to the car. The grip on the O'Farrell Street car as extended into the slot always remained at the same level, not changing its position in the operation of the car. The bottom of the grip was provided with a mechanical device which held the cable. The device could be released by the gripman at any time he desired, allowing the cable to drop from the grip. By reason of the fact that the Powell Street cable was above the level of the O'Farrell Street cable, it was necessary for the westbound O'Farrell car to drop and let go of its cable before reaching the Powell Street tracks. A bumper was inserted along the O'Farrell Street tracks at a point before the Powell Street tracks were reached so that if the

O'Farrell Street gripman failed to drop his cable the bumper would prevent any damage to the cables operating the Powell Street line. Since the Powell cables were above the O'Farrell Street cables a Powell car could proceed across the intersection without dropping the cable. However, holding the cable would raise it several inches so that if a Powell Street car were within the intersection, or within two or three car-lengths of the property line of O'Farrell Street, the cable would be raised to such a point that the grip of a crossing O'Farrell Street car would strike this cable. Northbound cars on Powell Street are moving upgrade and must therefore hold onto the cable. A signal has been placed at the southeast corner of the intersection to warn O'Farrell Street operators of the presence of northbound Powell Street cars at or near the intersection. The northbound cars at all times have the right of way. There is no signal to warn of the presence of southbound Powell cars.

Plaintiff Bryant was a gripman on the O'Farrell Street car proceeding westerly on the level toward the intersection at Powell Street, which at that particular time was free of either north or south bound cars. The O'Farrell car halted at about the east property line of Powell Street and took on passengers. Plaintiff looked to see whether the signal for northbound cars was clear. He then started up, holding onto the cable to gain momentum, but dropping it at the "let go" mark so as not to be stopped by the protective bumper. Plaintiff testified: "I made the let-go and then I hit something that stopped me suddenly, and that is all I know." Plaintiff's grip hit the Powell cable which at that moment was being held by a southbound Powell car. The Powell car had stopped out of the intersection but near the south curb line of O'Farrell Street in order to avoid striking an automobile.

Plaintiff and defendant differ in their versions of the duties of gripmen when crossing the intersection of Powell and O'Farrell Streets. This variance grows out of instructions given Powell Street gripmen, employees of the defendant system, and certain testimony relative to custom. Student gripmen of defendant were given instructions which included a list of questions and answers. One of the questions was: "Where are the six places to coast?" Coasting means that the grip does not hold the cable. The answer included the blocks on Powell north and south of O'Farrell. Whether such instructions were mandatory or optional was a disputed matter. Defendant officials testified they were optional. Plaintiff contended successfully before the jury that they were mandatory.

The assistant superintendent of the California Street Cable Car Company (the O'Farrell line) was called by plaintiff. The following résumé of his testimony favoring defendant was given on cross-examination: That from his observation when a southbound car on Powell Street stops north of O'Farrell, the gripman on the Powell car holds on to the cable and enters the intersection. When he reaches the O'Farrell tracks he throws the cable out if the track ahead is clear. In case the track ahead is obstructed so that he cannot continue down Powell Street, some gripmen hold the cable and some do not.

The instructor of gripmen on the O'Farrell line testified against the position taken by plaintiff on the trial as follows: "Now, your instructions with reference to—that you gave to Mr. Bryant with reference to the distance that the Powell Street car should be before it was safe to go across—will you tell us what those instructions were in that regard. A. Well, I instructed him to wait until the Powell Street car got three or four car lengths over the crown.

"Q. Three or four car lengths over the crown? A. Three or four car lengths over the crown before he started his car.

"Q. Now, when a car is standing there in that area, that is, a southbound Powell Street car is standing somewhere in the area of that south cross-walk there of O'Farrell Street, have you, as a gripman standing on your platform on the westbound car, a way of determining whether that gripman has dropped the cable? A. If the car isn't crowded you can see when he has thrown the lever over forward and you know that he has dropped the cable out; if the lever is standing straight up, he has got the rope in the cable [grip].

"Q. And can you see that from your position in the car? A. Yes.

"Q. Did you give Mr. Bryant instruction as to how he should act if a car was crowded, and he couldn't see the lever? A. I gave him instructions to ring the gong and get a signal back from the gripman so that he was satisfied it was safe to get across."

Other witnesses for defendant company, including former employees, testified favorably to defendant. Had the jury decided in favor of defendant there would be evidence sufficiently substantial to uphold such verdict. This is equally true of the evidence supporting plaintiff's side of the case, which the jury was entitled to believe. This evidence consists in part of the instruction to Powell Street gripmen to coast on Powell Street between Sutter and Ellis, and plaintiff's statement that he was familiar with the instructions through talking with men on the Market street and O'Farrell Street lines. There was also the testimony of fellow employees that as soon as the back end of the Powell car was clear the O'Farrell car could proceed.

[3, 4] There is a decided conflict in the evidence relative to negligence on the part of plaintiff. The trial court could not say as a matter of law that plaintiff was guilty of contributory negligence. Evidence of custom was introduced by both plaintiff and defendant. Defendant argues that there is no authority for holding a party negligent "by reason of having failed to follow a usual custom to do a thing in a certain specified way or manner" and that the evidence in this case does not "rise to the dignity of establishing any custom or practice to drop the cable under the conditions and circumstances shown to have existed." The latter contention might well be addressed to a jury. In the first consideration there is evidence of the custom of the Powell Street gripman in passing over the O'Farrell Street tracks. In addition, there is the rule referred to by each side during the trial. It may be inferred from the testimony of plaintiff that he had knowledge of defendant's rule and custom and that he relied thereon and was justified in operating the O'Farrell car over the Powell tracks under all the circumstances as they existed at the time of the accident. Ross v. San Francisco Oakland Terminal Railways Co., 47 Cal.App. 753, 91 P. 703; Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376; Delmonte v. Southern Pacific Co., 2 Cal.App. 211, 83 P. 269; Sanchez v. Pacific Auto Stages, 116 Cal.App. 392, 2 P.2d 845.

From all the evidence introduced by plaintiff and defendant, a reasonable inference may be drawn that "coasting" means moving on a car's momentum, without gripping the cable; that a car may coast as well while holding the cable "loosely." This latter method is often used so that the gripman may change quickly from coasting to the use of the cable as a means of propelling the car. Because the Powell cable runs above the O'Farrell cable, a southbound Powell car can coast across the intersection by holding the cable loosely in the grip. It is necessary that the westbound O'Farrell car drop its cable before reaching the Powell tracks.

[5] On this occasion the southbound Powell car was holding the cable, after passing the intersection, to permit an automobile to park. The gripman could have held the car in its position with the use of the brakes. The dangerous condition that would exist if the Powell Street car held onto the cable while within three or four car lengths of O'Farrell Street was so real that a warning light had been erected to warn O'Farrell Street car operators of the approach of northbound Powell Street cars. The fact that no such signal had been erected to warn of the presence of southbound cars may be some indication that the company did not think there was danger from such cars. The only way that there would not be danger from the southbound cars would be if such cars dropped the cable. Here the operator of the Powell car, after crossing the crown of the intersection, and while on the down grade, continued to hold the cable. He should have known that in thus even loosely holding the cable after passing the intersection he was creating a dangerous condition for any O'Farrell Street car. The jury could reasonably infer from the evidence that such conduct violated the rule of the company and the custom of operators. Whether under all of the circumstances it was negligence for the gripman to act as he did was a question for the jury. The motion for nonsuit, the motion for a directed verdict and the motion for judgment notwithstanding the verdict need be given no further consideration.

The court instructed at the request of plaintiff: "If you find from the evidence that it was the duty or it was the custom of the gripman on the southbound Market Street cable cars to hold the cable with the grip while crossing the tracks of the California Street Cable Company at O'Farrell Street and then immediately drop or let loose of said cable and that plaintiff had knowledge of such custom or such duty, and that such custom or duty had been the practice on and prior to the 28th day of March 1942, and you further find that such custom or duty was generally known to and of common knowledge among the gripmen of the California Street Cable Company, and you further find that F. A. Van Beeber, the gripman of the Market Street Railway Company, did not let go of and drop the cable immediately upon crossing or immediately after the rear end of the car he was operating had cleared the southmost rail of the California Street cable car, you may consider these circumstances upon the question of whether defendant, Market Street Railway, was negligent." Defendant urges that the instruction was erroneous and highly prejudicial for the following reasons: "First. It allows the jury to find from the evidence the existence of a duty or custom with reference to holding the cable and dropping the same *without any reference to the particular circumstances and conditions which were present at the time* the Powell Street car was required to stop by reason of the obstruction on its track. Second. It allows the jury to find that a custom existed with reference to holding and dropping the cable when there is no evidence in the record to justify the finding of the existence of any such custom or duty. Third. It allows the jury to find that the plaintiff had knowledge of such custom or such duty when there is no evidence in the record to justify the finding of any such fact. Fourth. It allows the jury to find that such custom or duty had been the practice on and prior to the 28th day of March, 1942, when there is no evidence in the record to justify the finding of any such fact. Fifth. It allows the jury to find on something which was generally known to and common knowledge among the gripmen of the California Street Cable Company, where their knowledge on such a subject would be immaterial to any issue on this case as it is only the knowledge of the plaintiff, and his reliance thereon, which could have caused him to have acted in such manner as to bring about his injury, and there is no evidence in the record that he had any knowledge of any such alleged custom. Sixth. It allows the jury to find that the gripman of the Market Street Railway Company was negligent if he did not let go of the cable and drop the cable upon crossing, or immediately after the rear end of his car had cleared the southmost rail of the California Street cable car tracks when there is no evidence in the record that under the particular conditions and circumstances then existing the gripman was supposed to so act, or that ordinary care required him to so act; on the contrary, the evidence being that whether he held the cable or dropped the same, under the circumstances which then existed, was a matter for his judgment and that holding the cable was good railroading and a safe practice. This instruction is also erroneous in that it violates the well established rule that instructions should not single out, emphasize, and argue to the jury, a portion of the evidence."

[6, 7] The second and sixth grounds refer to the evidence. Defendant claims that there is no evidence of a custom or that gripmen were to act in a designated manner. This point has been heretofore discussed. The third, fourth and fifth points refer to the knowledge of plaintiff of the duty, practice and custom of defendant. These matters likewise have been disposed of previously. With reference to the first point, if defendant, after introducing evidence on its own behalf on the subject of usage, custom, common practice and the circumstances and conditions present at the time of the accident, desired that an appropriate instruction be given, it should have offered one. Our attention has not been called to an instruction proposed by defendant on this subject. Evidence of operating rules and customs to be admissible must be material to an issue in the case. If not material, instructions thereon should not be given. In this case one of the principal issues was the rule and custom of defendant in operating cars and in particular this car at the time of the accident. The court in other instructions specifically referred to negligence, if any, "at the time and place alleged in the complaint" and "in the light of all the surrounding circumstances as shown by the evidence." At the request of defendant the court also fully instructed on contributory negligence.

[8] The objection that the instruction was emphasized by giving it a second time is without merit. About an hour after the jury retired they requested to be returned to court to hear the testimony of one of the witnesses read. After a reading of the testimony one of the jurors requested the rereading of the "instruction regarding Mr. Bryant's prudence in proceeding across the intersection relying on the custom of the Market Street Railway to drop their cable." The instruction was read. It might have been error not to do so. No objection was made before or after the jury was returned to the jury room, and

in the opinion of this court no valid objection could be made.

The judgment is affirmed.

PETERS, P. J., concurs.

KNIGHT, Justice (dissenting).

The statement of the law set forth in the forepart of the above opinion relating to the power of appellate courts in dealing with evidentiary matters is, of course, not questioned; but the law is equally well settled, and has been so for a great many years, that if after examining the record on appeal it is found to be entirely barren of any substantial evidence supporting the verdict, or the verdict is clearly contrary to the uncontradicted facts —in other words, if the record shows that the jury has simply "run away" with the case—it is not only within the power of the appellate court, but it becomes its duty to order a reversal.

Following the granting of the rehearing in the present case, the appeal was reargued on the merits, and additional briefs were filed. The basic ground urged for rehearing was that the decision rendered was founded on an erroneous factual premise. In so contending appellant, on page 2 of its petition for rehearing, states in part: "This court has failed to give consideration to the facts testified to by the witnesses and in place thereof has drawn inferences which have no support in the record. In fact, some of the so-called 'inferences' are drawn in spite of the express testimony of the witnesses to the contrary." Appellant further asserted in substance that in reviewing the case on the merits this court failed to give proper consideration to evidence relating to the particular conditions and circumstances present at the time and place of the happening of the accident. The petition then went on to specify some seven instances wherein it was claimed this court had overlooked or erroneously construed vital portions of the evidence, or had drawn inferences having no evidentiary support.

After having reconsidered the evidence and analyzed the points made by appellant against the soundness of the former opinion, which the majority members of the court have now adopted verbatim (with two pages added at the beginning thereof), it is my firm conviction that the present decision rests on an erroneous conception of the evidence, and that, as appellant contends, the uncontradicted facts of the case show beyond question that plaintiff's injuries resulted solely from his own carelessness in attempting to operate his car across the intersection, under the existing conditions, in clear violation of special instructions theretofore given him by the officials of his own company; furthermore, that as a matter of law the evidence utterly fails to show any negligent act in the operation of the Powell Street car.

As set forth in the main opinion, the accident happened about 8 o'clock at night at the intersection of O'Farrell and Powell Streets where the double tracks of the O'Farrell Street line, running easterly and westerly, cross the double tracks of the Powell Street line at right angles. The O'Farrell Street car was outbound, that is, it was traveling westerly along the northerly track on O'Farrell Street. Two officials of the O'Farrell Street line testified positively, without contradiction, that it was an unwritten rule of that company, and that plaintiff had been specifically instructed, that if a southbound Powell Street car crossed in front of the approaching O'Farrell Street car at that intersection, the O'Farrell Street car should not attempt to cross in back of the Powell Street car unless the latter was at least three car lengths below the southerly crown of the intersection; and that in case the Powell Street car stopped within that distance from the crown of the intersection, the operator of the O'Farrell Street car was to be sure and check that the Powell Street cable was out of the grip before attempting to cross. One of the witnesses so testifying was Jules J. DeMoor, the superintendent of the O'Farrell Street line. The pertinent portions of his testimony were as follows:

"Q. In addition to the written rule which I just read to you, Mr. DeMoor, did you have any other rules of the California Street Railroad [the O'Farrell Street line] with relation to the operation of those O'Farrell Street cars at Powell Street, upon which the employees were advised and instructed? A. Yes, sir, we had the rule that is in the book concerning the northbound car, and we also have—our men are instructed in regard to the southbound

* * *

"Q. Did you have such a rule in addition to the one that I have just read? A. Yes, we have. The men are so instructed —it is not a written rule. The men are instructed by our instructors, that the Powell Street car proceeding south, and our car proceeding west, if a Powell Street car crosses in front of our car at that point, to be sure and not cross in back of that car unless that car is at least three car lengths below the crown, and also in case of a car stopping to be sure and check that the cable is out the grip before crossing. * * *

"Q. Do you give your employees special instructions as to what to do in the event a Powell Street car, southbound, is stopped anywhere near that intersection? * * * A. Yes, sir. All our men are instructed that in cases of a car being stopped, the southbound car being stopped and not being at least three car lengths, or 100 feet below the crown, not to cross in back of that car until they make sure that this man has thrown the cable out. Mr. Miller.

"Q. When you refer to throwing the cable out you mean releasing the cable from the grip and dropping it? A. Dropping it, that's right."

The other witness was Thomas Fitzmaurice, who at the time of the accident and for some seventeen years prior thereto had been in the employ of the O'Farrell Street line, part of which time he acted in the capacity of instructor for gripmen. He testified that in May, 1941, he instructed plaintiff as to the manner in which he should operate his car over the Powell Street intersection. The substance of his testimony was as follows: That he gave plaintiff instructions that when operating west on O'Farrell Street and if a Powell Street car was stopped south of O'Farrell not to cross over back of the Powell Street car unless he made sure that the Powell Street car had dropped the cable out of his grip, because it was considered dangerous; that he told plaintiff that when the cable was in the Powell Street grip it caused the Powell cable to run high enough that he could hit it with his grip in crossing over, and if a Powell Street car was standing there not to cross over until he got a signal from the Powell Street gripman that it was all right to proceed, that he had dropped his cable out. Continuing, his testimony was as follows: "Now, your instructions with reference to—that you gave to Mr. Bryant with reference to the distance that the Powell Street car should be before it was safe to go across—will you tell us what those instructions were in that regard. A. Well, I instructed him to wait until the Powell Street car got three or four car lengths over the crown.

"Q. Three or four car lengths over the crown? A. Three or four car lengths over the crown before he started his car.

"Q. Now, when a car is standing there in that area, that is, a southbound Powell Street car is standing somewhere in the area of that south cross-walk there of O'Farrell Street, have you, as a gripman standing on your platform on the westbound car, a way of determining whether that gripman has dropped the cable? A. If the car isn't crowded you can see when he has thrown the lever over forward and you know that he has dropped the cable out; if the lever is standing straight up, he has got the rope in the cable [grip].

"Q. And can you see that from your position in the car? A. Yes.

"Q. Did you give Mr. Bryant instruction as to how he should act if a car was crowded, and he couldn't see the lever? A. I gave him instructions to ring the gong and get a signal back from the gripman so that he was satisfied it was safe to get across."

The Powell Street car was southbound, but when the rear end of the car reached a point just south of the southerly track of the O'Farrell Street line it was unable to proceed further because there was an automobile on the track which the driver was attempting to park; and when the Powell Street car stopped the gripman thereof did not drop the cable from the grip, but released the grip on the cable so as to allow the cable to run freely through the grip without moving the car. When the track was clear ahead, the gripman tightened the grip on the cable and the car started forward, but it had proceeded no farther than just over the crown of the O'Farrell Street intersection when plaintiff started his car across the intersection, with the result that his grip struck the cross cable of the Powell Street line, snapping the cable in two and throwing the lever of the O'Farrell street car back violently, striking plaintiff in the pit of the stomach and rendering him unconscious. Obviously, in thus attempting to cross the intersection while the Powell Street car was within a few feet of the southerly boundary of the O'Farrell Street intersection plaintiff clearly violated the rule of his own company and the specific instructions theretofore given him as to the manner in which he should operate his car over that particular intersection; and by so doing he became solely responsible for the injuries he received. His only excuse for having proceeded across as he did was that he did not see the Powell Street car; but, according to his own testimony, the reason he did not see it was that in violation of his instructions he did not look for it. In this respect he testified as follows:

"Q. Were you looking in the direction you were traveling, when the thing happened? A. Sure.

"Q. Did you see the Market Street Railway car at all before the accident happened? A. I don't remember about seeing it.

"Q. Do you recall seeing it in the vicinity there, of Powell and O'Farrell Streets? A. No, sir.

"Q. —as you approached that corner? A. No, sir.

"Q. So you cannot tell us anything about that car at all, Mr. Bryant? A. No, nothing at all.

"Q. As to where it was, or when it had crossed your tracks? A. No, nothing at all.

"Q. Or whether it had even crossed your tracks, is that it? A. No.

"Q. Is that your testimony? A. That is right.

"Q. Was there any car there as you proceeded across O'Farrell and Powell? A. There wasn't any car in the crossing; that is all I looked out for.

"Q. That is, there was no car on your car tracks, is that what you mean? A. That is right.

"Q. Your track was clear? A. Yes.

"Q. Whether there was a car just immediately clear of your tracks or not, you don't know? A. There was no car on the tracks, that is all I can say. * * *

"Q. You could proceed out O'Farrell Street without running into any street car? A. That is right.

"Q. That is all you can say as to the position of the Powell Street car at the time this accident happened? A. Yes. * * *

"Q. Did you know when you started to cross that street that if the Powell Street car was holding onto the cable you would run into it? A. Yes, uh-huh. * * *

"Q. Were any lights burning on the Market Street Railway car? A. I don't know.

"Q. Did you pay any attention to the Market Street Railway car at all? A. No."

In the main opinion it is stated: "The Powell car had stopped out of the intersection but near the south curb line of O'Farrell Street * * *." But this is manifestly an erroneous construction of the evidence, for the only testimony on the subject shows to the contrary. It shows that the car stopped on the southerly crown of the intersection with the rear end of the car only a few feet from the south rail of the eastbound O'Farrell Street track. On this point the conductor of the Powell Street car testified as follows:

"Q. And did your car then proceed across O'Farrell Street? A. We did.

"Q. And how far did you proceed? A. Well, we proceeded to where the back end of the cable car would be approximately three or four, maybe five feet, from the eastbound O'Farrell tracks.

"Q. And at the time your car—what did your car do at that time? A. Well, we were forced to stop for an automobile that was endeavoring to park. * * *

"Q. Did you observe whether or not the car was, your car, was over the brow of the hill as it stopped, or where it was? A. Well, I would say that the front of the car might have been a little over the brow, but the trucks proper would be on the flat.

"Q. The trucks proper of the car would be on the flat? A. On the flat, yes, sir. * * * Mr. Miller.

"Q. Mr. McWilliams, would you state again, please, where the rear of your car was with reference to the eastbound O'Farrell Street tracks? A. Approximately three to five feet from them, south of them."

Again in the main opinion, as it is now written, it is stated: "We think that the evidence supports the implied finding of the jury that when the Powell Street car stopped it was over the intersection and standing on the down grade. The plaintiff testified that he saw no car in the intersection as he approached. That supports the reasonable inference that no car was there." In view of the positive testimony given by the plaintiff that he did not pay any attention to the Powell Street car, how can it fairly be said that such testimony reasonably supports the inference that the Powell Street car was not within the intersection?

Finally, on this branch of the case it should be stated that according to plaintiff's own testimony he knew that if a southbound Powell Street car was holding the cable while standing on or near the southerly boundary of the intersection, an O'Farrell Street car would not be able to cross the intersection without striking the Powell Street cable.

It is also my conclusion, as above indicated, that the evidence fails as a matter of law to establish any negligent act in the operation of the Powell Street car. It fails to show that any rule or custom was violated, but on the contrary shows that the gripman of the Powell Street car was following the proper railroad practice in acting as he did under the circumstances. Obviously the car could not proceed beyond the crown at the southerly boundary of the O'Farrell Street intersection because the track was blocked by the automobile, and the testimony shows that it was necessary to hold the cable at the point where it stopped because otherwise it would have been necessary, in order to start the car forward, for the car crew to get out and push it over the crown of the intersection. In this connection, the gripman of the Powell Street car testified that after he brought his car to a standstill he "clanged" the bell for two or three minutes to get the automobile out of the way; that as soon as the track was clear he tightened the grip on the cable to give the car a boost over the crown, and when the rear end of his car passed over the intersection boundary he dropped the cable, and that just as he was about to drop the cable the impact occurred. The only reasonable inference that can be drawn from these uncontradicted facts is that the O'Farrell Street car started to cross the intersection about the time the Powell Street car started to move over the crown. In the main opinion, as now written it is said that "If the car was over the brow of the hill when it stopped then there was no need to keep a loose grip on the cable. To do so obviously created a trap for any car traveling on O'Farrell Street at that intersection." As already shown, however, the uncontradicted evidence proves that the car did not stop "over the brow of the hill." It stopped *on* the brow of the hill and it was necessary to hold the cable loosely at that point so that it could be grasped tightly to start the car. It is perfectly true that an accident would be inevitable if an O'Farrell Street car attempted to cross the Powell Street intersection while a Powell Street car was stopped within a car's length of the southerly boundary of the intersection and was holding the cable loosely. But certainly no such accident would occur if the gripmen of the O'Farrell Street line obeyed the plain instructions given to them by the officials of the O'Farrell Street company not to attempt to cross the intersection while a Powell Street car was within three car lengths of the southerly boundary of the intersection without first ascertaining definitely whether the Powell Street car was holding the cable.

I believe, also, that in the state of the evidence shown by the record herein it was prejudicial error, for the reasons assigned in appellant's briefs, to give the instruction set out in the main opinion in that unqualified form.

The judgment, in my opinion, should be reversed.

Rehearing denied; KNIGHT, J., dissenting.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

71 Cal.App.2d 637

PEOPLE v. BECK.

Cr. 3900.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1945.

Hearing Denied Dec. 6, 1945.

1. Receiving stolen goods ⚷8(3)

Evidence sustained conviction of receiving stolen property.

2. Criminal law ⚷1144(13)

On accused's appeal from a conviction, existence of every fact pointing to guilt of accused which jury could reasonably have inferred from evidence must be assumed.

3. Criminal law ⚷1159(5)

In prosecution for burglary and receiving stolen property, neither fact that jury acquitted accused of burglary nor that his witnesses gave testimony contrary to that which was believed by jury was sufficient to reverse a conviction of receiving stolen property.

4. Receiving stolen goods ⚷8(3)

Where property is found in possession of a party other than its owner under suspicious circumstances, a verdict of guilty of receiving stolen property is justified.

5. Receiving stolen goods ⚿8(3)

Where accused did not have actual possession of trousers of another which were in his constructive possession, in that they were in tent in which he was living at time of his arrest, constructive possession was sufficient to justify implied finding of his having received stolen property.

6. Constitutional law ⚿265

Where, after accused was accused of burglary, an amended information without a court order allowing it was filed accusing accused of burglary and receiving stolen property, and accused without objecting entered his plea of not guilty to each count and requested continuance, accused was not denied due process of law because no order was made allowing the amended information. Pen.Code, § 1008.

7. Criminal law ⚿1144(3)

In absence of positive evidence to contrary, proceedings at time of filing an amended information are presumed regular. Pen.Code, § 1008.

8. Criminal law ⚿1032(4)

Where an amended pleading is filed in open court pursuant to statute by district attorney and accused being present offers no objection, he may not for first time raise point on appeal. Pen.Code, § 1008.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Donald L. Beck was convicted of having received stolen property, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

Seibert L. Sefton, of San Francisco, for appellant.

MOORE, Presiding Justice.

Appellant was accused by the district attorney on two counts of burglary with one prior conviction of a felony. Denial of the prior conviction and a plea of not guilty were entered by Defendant on October 25, 1944. On December 6, 1944, the district attorney filed an amended information accusing the defendant on two counts of burglary and two counts of receiving stolen property. He was thereby also charged with a former conviction with respect to each of the four counts. The minutes of the court for December 6 contain no mention of the court's order allowing the filing of the amended pleading or any objection to the filing thereof. The case had evidently been set for trial on that day for it was then continued to December 18 and the witnesses were instructed to return on that day.

Following the trial the jury returned verdicts of not guilty of the charges of burglary but convicted defendant on both counts of having received stolen property. For count two he was sentenced to the state prison for the term prescribed by law, the sentence to run consecutively with any sentence that he may have to serve for the violation of his parole under a former conviction. For the crime charged in count four he was sentenced to the state prison for the term prescribed by law, the sentence to run concurrently with that pronounced on count two but consecutively with any sentence he may have to serve for violating his parole. From the judgments of conviction and sentence and from the order denying his motion for a new trial defendant appeals.

The facts given in testimony are that defendant was on August 26, 1944, a parolee from the state prison, having been convicted of burglary in 1941. On that date he became a boarder of one Mrs. Besselo on 106th Street in Los Angeles and resided there for one month at the expiration of which he was arrested on the charges of burglary. During the same time one Kenneth Craig, a parolee from the Chino State Prison, visited appellant about twice a week, appellant being steadily employed with a local steel company. On September 13 and 19 respectively the homes of Mrs. Dinino and Mrs. Rhodes in the vicinity of appellant's abode were burglarized. From the first two pairs of trousers, a wrist watch and a compact were taken and from the latter numerous items of Mr. Rhodes including a gold knife and chain were stolen. Most of the articles taken from the two homes were recovered from pawnshops where they had been pledged by a girl friend of Craig. On September 26 when appellant was arrested he was wearing the wrist watch and in his pocket he carried the gold knife and chain. The knife had been altered in that a "gadget" containing some alphabetical letters had been removed.

On being placed in jail at Compton he told the arresting officer that the wrist watch, knife and chain were his. Three days later officer Phelps of the Los Angeles police department in company with Mrs. Besselo searched the tent which appellant had occupied on her premises and found in the upper drawer of the dresser the compact of Mrs. Dinino and the two pairs of trousers hanging on the crossbar of the tent. In the pocket of one pair of trousers was a flashlight, never before seen by Mrs. Dinino, covered with adhesive tape so as to emit only a very dim light. Appellant told officer Phelps that he had given a draft card and other papers to his friend Craig to be used for the purpose of his identification. While appellant awaited trial during October he occupied the same cell block with one Waite, whom he told that he and Craig had accomplished burglaries and that some clothing was taken; that Craig was a soldier absent without leave, needed some civilian clothes and had asked appellant to assist him to get them; that Craig had taken all of the stolen goods and that appellant got none. However, he told Waite that a pair of trousers was left with appellant. He said that he had a wrist watch which he did not think anybody would identify and that he got it from one of the burglaries.

[1-5] The foregoing facts were given in testimony and having been believed by the jury are sufficient to sustain the conviction of receiving stolen property. People v. Latham, 43 Cal.App.2d 35, 38, 110 P.2d 101. We are required to assume the existence of every fact pointing to the guilt of the accused which the jury could reasonably have inferred from the evidence. People v. Hennessey, 201 Cal. 568, 258 P. 49. Neither the fact that the jury acquitted appellant of the crimes of burglary nor the fact that he and his witnesses gave testimony contrary to that which was believed by the jury is sufficient to prevail against the verdict. He denied participation in the burglaries and the jury accepted his testimony as proof of that denial, but his possession of the stolen property under suspicious circumstances warranted his conviction of those crimes. He knew that Craig was a former convict, in impecunious circumstances and out of employment; observed that the merchandise brought into his tent by Craig was second-hand and detected that the initials of the former owner had been removed from the stolen knife. These facts were sufficient readily to bring to the knowledge of a person of ordinary intelligence that the property had been stolen or to arouse a suspicion that its presence was due to a criminal agency. Where property is found in the possession of a party other than its owner under suspicious circumstances a verdict of guilty of receiving stolen property is thereby justified. People v. Jolley, 35 Cal.App.2d 159, 162, 94 P.2d 1011; People v. Bausell, 18 Cal.App.2d 15, 17, 62 P.2d 774. While appellant did not have actual possession of the trousers they were in his constructive possession in that they were in his living quarters at the time of his arrest. Such possession is sufficient to justify the implied finding of his having received stolen property. People v. Fitzpatrick, 80 Cal. 538, 541, 22 P. 215.

[6] Appellant argues at length that he was denied due process of law because no order was made by the court allowing the amended information to be filed. But he made no objection to the filing of the amended pleading. Instead he entered his plea of not guilty to each count. If he did not object he must have consented to the amendment. That he did so is indicated by his request for a continuance which was granted for 12 days.

[7, 8] Moreover, it is presumed in the absence of positive evidence to the contrary that the proceedings at the time of filing the amended information were regular and proper. People v. Perrin, 67 Cal.App. 612, 616, 227 P. 924; People v. Gonzales, 88 Cal.App. 245, 247, 262 P. 1115. Where an amended pleading is filed in open court pursuant to section 1008 Penal Code by the district attorney and the accused being present offers no objection thereto, he may not for the first time raise the point on appeal. People v. Payton, 36 Cal.App.2d 41, 96 P.2d 991.

The judgment and the order denying a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

71 Cal.App.2d 667

LINKE v. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS et al.

Civ. 12974.

District Court of Appeal, First District, Division 2, California.

Nov. 14, 1945.

Rehearing Denied Dec. 14, 1945.

Hearing Denied Jan. 10, 1946.

1. Religious societies ⟹7

A religious organization such as Church of Jesus Christ of Latter Day Saints is purely voluntary and one joining it submits himself to the disciplinary power of the body and his rights as a member are governed by the constitution and by-laws thereof and courts will not interfere unless the church authorities have proceeded contrary to the rules of the association in subjecting him to disciplinary penalties.

2. Religious societies ⟹7

A member's complaint for relief from disciplinary action by authorities of a church of which he is a member must plead facts showing a departure from rules of the organization and for failure to do so a complaint which merely sought settlement of controversy between such member and church officials respecting internal affairs and practices of the church and disclosing member's desire that court declare that his religious views are sound and that court should restore him to membership was properly dismissed.

◆

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Action by Walter Linke against Church of Jesus Christ of Latter Day Saints and another wherein plaintiff complained that he was "disfellowshipped" because of his refusal to admit that his advocacy of certain religious doctrines were contrary to the accepted views of the church. From a judgment of dismissal on ground that no cause of action was pleaded, plaintiff appeals.

Affirmed.

Walter Linke, in pro. per.

No counsel appearing for respondent.

NOURSE, Presiding Justice.

The plaintiff sued the defendant church and its president, but it is not possible to state the nature of his purported cause of action. At the trial in the superior court the defendants failed to appear and the cause was dismissed upon the ground that no cause of action was pleaded.

From the papers on file it appears that plaintiff complains of some act, either overt or hidden, it does not appear, by which he was "disfellowshipped" because he refused to admit that his advocacy of certain religious doctrines were contrary to the accepted views of the church. His brief on appeal does not specify any particular error in the order of dismissal, and cites no authority other than Winston Churchill and a former senator from the State of Utah.

From the paper designated a complaint it appears that appellant advocated religious views contrary to those maintained by leaders of the church particularly in relation to the rights of women members. He states that those in control have shown discrimination in favor of the male members and against women in the practice of the church relating to marriage. He also criticized the views expressed by one of the elders that Eve was the beginning of all evil and caused the fall of mankind, whereas Adam was a hero. For these, and similar disagreements with the church authorities, he was directed to sit in the Sunday School class conducted for women, but was not permitted to address the class or express his own views as to the tenets of the church.

This treatment on the part of the church officials he states was "libelous" and "slanderous", but he does not state that he suffered any damage. To the contrary, he states that he has become the agent of a huge percentage of the congregation, and particularly the women members, in the expression of their views on the subject of equal rights and privileges.

From all that can be gleaned from the paper on file (which is not a complaint, and is not verified) it appears that the plaintiff seeks the relief of this court in a settlement of a controversy between him and the church officials touching the internal affairs and practices of the church and that he desires the court to declare that his religious views are sound and that we should restore him to all the privileges of membership. He does not state that he has been suspended or expelled from membership because of his views, but he implies that he has suffered some disciplinary penalties because of his disagreements with the church authorities.

[1, 2] It is unfortunate for him, if he believes that he has suffered some civil wrong, that he did not procure legal advice so that his cause of action, if he has any, could be presented in a proper manner. A religious organization of this character is purely voluntary and one who joins the society "submits himself to the disciplinary power of the body." 22 Cal.Jur. p. 783. His rights as a member are governed by the constitution and by-laws which he has chosen as his guide and precept, hence, the courts will not interfere unless it appears that the church authorities have proceeded contrary to the rules of the association. 4 Am.Jur. p. 472; Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 136, 111 P.2d 948. But a complaint for relief from such disciplinary action must plead the facts showing a departure from the rules of the organization. Here the appellant has failed to plead any triable cause of action, and hence the proceeding was properly dismissed.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

71 Cal.App.2d 486

LOS ANGELES CITY HIGH SCHOOL DIST. v. STATE BOARD OF EQUALIZATION.

LOS ANGELES CITY SCHOOL DIST. v. SAME.

Civ. 7169, 7170.

District Court of Appeal, Third District, California.

Oct. 31, 1945.

1. Licenses ⊂⇒15(1)

Where school districts during three-year period sold to consumers buildings and improvements theretofore acquired for school sites, and miscellaneous equipment no longer needed for school purposes, and sales had taken place in ten of the 12 quarterly periods on average of two to three sales for each quarter, districts were "persons" and sales were "business" and an "activity for gain, benefit, or advantage" within Retail Sales Tax Act, and hence districts were liable for tax on such sales. Gen.Laws 1937, Act 8493, §§ 2(a, d, e), 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Activity for Gain, Benefit or Advantage", "Business" and "Person".

2. Licenses ⊂⇒15(1)

The term "business" within Retail Sales Tax Act is not used in a commercial sense but must be interpreted in light of statutory definition of the term. Gen.Laws 1937, Act 8493, § 2(d).

3. Courts ⊂⇒97(6)

The interpretation of a state statute is for state courts.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Actions by the Los Angeles City High School District and by the Los Angeles City School District against the State Board of Equalization of the State of California to recover the amount of taxes paid under protest by virtue of assessments made by the board under the Retail Sales Tax Act. From judgments for defendant, plaintiffs appeal.

Affirmed.

J. H. O'Connor, Co. Counsel, and Wm. E. Lamoreaux, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Daniel N. Stevens and John L. Nourse, Deputy Attys. Gen., for respondent.

PEEK, Justice.

These are consolidated appeals from judgments in favor of respondent State Board of Equalization in actions brought by appellant school districts to recover the amount of taxes paid under protest by virtue of assessments made by said board under the California Retail Sales Tax Act. Stats.1933, p. 2599, Deering's Gen.Laws, Act 8493.

A summary of the stipulated facts upon which the cause was submitted shows that the transactions in each case covered a period of three years from April 1, 1939, to March 31, 1942, and consisted of sales of tangible personal property, to-wit, buildings and improvements on real property theretofore acquired by the said districts for school sites, and certain other miscellaneous equipment no longer needed for school purposes. In the case of the high school district, the gross receipts from all the sales amounted to $36,332.83, of which the sum of $15,462.50 represented the sales to consumers which were made the basis of the tax. In the case of the school district, the gross receipts from all sales amounted to $30,818.55, of which the sum of $10,970.40 represented the sales to consumers which were made the basis of the tax. In each case the sales had taken place in ten of the twelve quarterly periods on an average of two to three sales for each quarter.

The trial court concluded that the taxes had been properly assessed against appellants under the authority of said Retail Sales Tax Act, and judgments were accordingly entered for the respondent board.

Upon these appeals it is the contention of appellants that a school district, in making the kind of sales herein involved, is not a retailer nor is it engaged in the business of making sales at retail; that the sales in question were casual and incidental transactions and therefore were without the operation of the taxing statute.

Respondent, on the other hand, contends that where a school district sells tangible personal property to consumers regularly and continuously over a period of several years, such sales come directly within the applicable provisions of said act as construed by the most recent judicial decisions.

The general authority for the levying of the tax in question is found in section 3 of the act, now section 6051, Revenue and Taxation Code, St.1941, p. 536, which during the period in question provided as follows: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State * * *."

The effect of such section is to apply a stated percentage tax upon the gross receipts of a retailer from sales of tangible personal property.

Section 2(e) of said act, now section 6015, of the Revenue and Taxation Code, defines "retailer" to include "Every person engaged in the business of making sales at retail or in the business of making retail sales at auction of tangible personal property owned by such person or others * * *", while "person" is defined in section 2(a), now section 6005, of the Revenue and Taxation Code, to include "this State, any county, city and county, municipality, district or other political subdivision thereof * * *"; and lastly, "business" is defined in section 2(d), now section 6013, Revenue and Taxation Code, as any "activity * * * with the object of gain, benefit or advantage, either direct or indirect."

[1, 2] From the quoted sections it would appear that the appellant districts, which admittedly are political subdivisions of this state, are "persons" as that term is used in the act; that the sales of the property were "business" and an "activity" for "gain, benefit, or advantage, either direct or indirect" as those terms likewise are used in the act, and that the term "business" is not used in the commercial sense attributed to it by appellants but must be interpreted in the light of the statutory definition set forth in the act.

We therefore are of the opinion that the position of respondent must be sustained, and that the rules announced and applied by the Supreme Court in the cases of Bigsby v. Johnson, 16 Cal.2d 860, 118 P.2d 289; Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425; and Northwestern Pacific Railroad Co. v. State Board of Equalization, 21 Cal.2d 524, 133 P.2d 400, are decisive of the issues herein presented for determination.

In Bigsby v. Johnson, 18 Cal.2d 860, 118 P.2d 289, it was held that a printer selling printing at retail, who in the course of his business had made a single sale to a consumer of certain used printing equipment, was taxable therefor under the Retail Sales Tax Act, and that he could claim no exemption by reason of the fact that the sale was casual or incidental and not of a kind ordinarily made by him.

In the case of Union League Club v. Johnson, the court held that, in furnishing food and beverages to members, a bona fide non-profit social club is engaged in business as a retailer and makes sales at retail, and that it is not necessary that such sales be made for profit to bring them within the purview of the act, it being sufficient that they are made with the object of gain, benefit, or advantage.

In Northwestern Pac. R. Co. v. State Board of Equalization, the corporation held a permit from the board to sell certain articles of personal property through its "Stores Department". In addition to the sales made by that department the corporation sold certain surplus and retired rolling stock and equipment. The court held that the fact that the latter sales were incidental to its main business of transportation and not a part of the sales ordinarily made by its "Stores Department" was immaterial and was insufficient to take such sales out of the operation of the statute; and if the number of such sales was considerable, and the gross receipts therefrom substantial, they could not be regarded as casual or isolated transactions exempt from the imposition of a tax.

Appellants recognize the force of these decisions, but insist that they are inapplicable to a school district whose activities are essentially noncommercial and which could not validly be authorized to conduct a business in the sense in which the taxing statute must be deemed to have defined that term (citing City of Los Angeles v. Lewis, 175 Cal. 777, 167 P. 390; Marin Municipal Water Dist. v. Chenu, 188 Cal. 734, 207 P. 251. The point which is made is that such a district cannot embark on or engage in a private enterprise for profit.

The Retail Sales Tax Act neither expressly nor by implication purports to confine its operation to private business. As noted in section 2(a) public corporations and political subdivisions of the State specifically have been made subject to the act, with the apparent intention of making the public business of such bodies subject to the provisions thereof.

Nor do the cases so cited by appellants in this connection lead to a contrary conclusion. In Marin Municipal Water Dist. v. Chenu, supra, 188 Cal. 734, 207 P. 251, the licensing requirements of the Motor Vehicle Act were held to be inapplicable to public corporations and in particular to vehicles used by a municipal water district for the business of the district—which within the provisions of that statute the court interpreted as meaning private business. But that act did not, as does the Retail Sales Tax Act, expressly include such public persons within its terms; nor did that statute, as does the Tax Act, define the word "business" in a manner that can leave no doubt as to its meaning. Union League Club v. Johnson, supra, 18 Cal.2d 275, 115 P.2d 425.

In the case of City of Los Angeles v. Lewis, supra, 175 Cal. 777, 167 P. 390, the statute under attack authorized a county, without limitation, to manufacture and sell cement to any and every purchaser within or without the county in any quantity desired and without regard to the needs of the local inhabitants or to any other public object. While the court held the enactment invalid, it specifically recognized the existence of a general rule which permits a public corporation or entity to sell its surplus property for the purpose of subserving the interests of its inhabitants (citing Dillon on Municipal Corporations, 5th Ed., § 1300; Clark v. City of Los Angeles, 160 Cal. 30, 116 P. 722; City of South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490).

In otherwise attempting to distinguish the Bigsby, Union League Club and Northwestern Pacific Railroad cases, appellants strongly rely on a decision of the Federal Court for the Ninth Circuit, viz., State Board of Equalization v. Boteler, 9 Cir., 131 F.2d 386, 388. There it was held that where a trustee in bankruptcy, in liquidating the business of a wholesale and retail bakery, sells the entire equipment, furniture and fixtures belonging to the bankrupt, such sales are not taxable under the provisions of the California Retail Sales Tax Act, or under 28 U.S.C.A. § 124a, which makes such a trustee, when conducting a business, liable for state taxes, and held the rule expressed in the Bigsby v. Johnson case to be inapplicable.

Without expressing an opinion as to the soundness of the conclusion reached by the court in that case, we agree that the situation presented therein differed materially from the situation which existed in the Bigsby v. Johnson case just as it differs from the one which confronts us in the case at bar. In the federal case the sale was not made in the course of conducting a business but in the process of putting an end to a business. It must be conceded that such is not the situation in the present case.

[3] We are likewise in accord with the view expressed by respondent that the interpretation of a state statute is for the state courts. See City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 171–173, 62 S.Ct. 986, 86 L.Ed. 1355; Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496, 499, 500, 61 S.Ct. 643, 85 L.Ed. 971. However, since the Circuit Court of Appeals has neither criticized adversely nor disregarded

the Bigsby case, and since the decision does not attempt to formulate any general rule of construction, we see no need for resorting to that principle in holding the Boteler decision inapplicable to the case at bar.

The other federal cases cited by appellants in support of their contention that casual transactions incidental to general activities do not constitute doing business, viz., Porter v. Comm. of Internal Revenue, 9 Cir., 130 F.2d 276, and Fidelity Bankers Trust Co. v. Helvering, 72 App.D.C. 1, 113 F.2d 14, are likewise without application to the case at bar. These are cases in which the taxpayer was held to be engaged in a business enterprise within the meaning of the applicable provisions of the Internal Revenue Code. Santee Club v. White, 1 Cir., 87 F.2d 5, also cited by appellants, involved a single isolated sale where the test of taxability turned on the question whether the sale was made for profit. As has been seen under the express ruling of our Supreme Court in the Union League case, profit is not a determinative factor under the California Retail Sales Tax Act. In Dane v. Brown, 1 Cir., 70 F.2d 164, 165, it was held that a single isolated act did not constitute the practice of architecture in violation of the licensing law. The court observed generally that such expressions as "practicing architecture", "engaging in the practice of law", "engaging in business", and similar terms, "contemplate a course of business * * * and not single isolated acts arising from unusual circumstances." In the present case, however, we can have no such question, for, as we have said, casual sales are not exempted from the act. But in any event whether the sales involved in the case at bar were made in the course of business or as single isolated acts arising from unusual circumstances appears to find a definite answer in the following language from the opinion in the Northwestern Pacific Railroad case, supra, heretofore referred to several times:

"But, even if we were to assume that plaintiff, as urged by it, is engaged in two separate kinds of business, viz., retail sales business and transportation business and that the transfers or sales of rolling stock here involved were connected with or related to the latter business and were entirely foreign to its retail business for which it is licensed, it would avail plaintiff nothing. The number, scope and character of the transfers of rolling stock would still serve to bring them within the purview of the taxing act. Even if we were to treat the transfers of the thirteen coaches, made from time to time in 1935, to the Southern Pacific Company as one transaction, the transfer of the three coaches to the same company in 1936 as one transaction, the transfer of the truck-trailer to Pacific Motor Trucking Company in 1937 as one transaction, and the transfer of twenty flat cars to California Barrel Company and the transfer of a locomotive to Hammond-Little River Lumber Company as two transactions, these transfers represent five sales at a total price approximating $100,000.

"Such transfers, and others of a similar nature to follow, may not be regarded as casual or isolated sales." 21 Cal.2d 524, 529, 133 P.2d 400, 403.

For the foregoing reasons the judgments are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

71 Cal.App.2d 492

DRULLINGER v. ERSKINE et ux.

Civ. 7180; Sac. 5726.

District Court of Appeal, Third District, California.

Oct. 31, 1945.

Hearing Denied Dec. 27, 1945.

1. Specific performance 🔑49(2)

In action for specific performance of option to purchase provision in a lease, where reasonable value of premises in 1941 when lease was executed was $7,000, a finding that agreed purchase price of $8,500 was adequate consideration in 1944 when option was exercised was justified, regardless of finding fixing value at time option was exercised at $12,000. Civ.Code, § 3391.

2. Specific performance 🔑49(2)

Although specific performance may not be enforced unless it appears that the seller receives adequate consideration for the contract, the adequacy of consideration must be determined as of the date of the agreement and not at the time of performance. Civ.Code, § 3391.

3. Specific performance ⊂⇒**49(2)**

To be entitled to specific performance of contract to sell land, the agreed price is not required to be absolutely the full value thereof, but it is sufficient if it is the approximate value, so as to preclude the necessary inference of fraud or undue advantage. Civ.Code, § 3391.

4. Landlord and tenant ⊂⇒**92(1)**

If option to purchase land is exercised, vendor may not complain of his loss of increased value of land due to lessee's addition of valuable improvements or to his efficiency method of farming, since adequacy of consideration is founded on value at time of contract. Civ.Code, § 3391.

5. Judgment ⊂⇒**251(1)**

A judgment decreeing specific performance of an option to purchase contained in a lease was not void merely because complaint failed specifically to allege that option specified adequate consideration therefor, or that the contract was fair, where issue of adequacy was conceded by the conduct of defendants at the trial and findings of adequacy and fairness were supported by evidence.

6. Appeal and error ⊂⇒**1039(2)**
Specific performance ⊂⇒**114(2)**

Ordinarily a complaint for specific performance of a contract to purchase realty should allege facts showing adequacy of consideration and fairness of the transaction, but when those issues are tendered at the trial by consent and the court adopts findings thereon which are reasonably supported by the evidence, defendant is not prejudiced by the omission to so specifically allege and the judgment may not be reversed on account of the mere defect of the pleading. Civ.Code, § 3391, Const. art. 6, § 4½.

7. Judgment ⊂⇒**251(1)**

In action for specific performance of an option to purchase realty, where defendant did not object to evidence on ground that complaint failed to state a cause of action, nor call court's attention to failure of complaint to specifically allege facts showing adequacy of consideration and fairness of the transaction, and there was no demurrer to complaint as filed, failure of complaint to contain such allegations did not void the judgment. Civ.Code, § 3391; Const. art. 6, § 4½.

8. Appeal and error ⊂⇒**232(1)**

Where only objection to evidence of plaintiff was on ground that it was immaterial, or not within the issues, defendant could not validly claim for the first time on appeal that the pleadings failed to specifically allege that consideration was adequate or that the transaction was fair. Civ.Code, § 3391; Const. art. 6, § 4½.

9. Appeal and error ⊂⇒**1170(3)**

A technical defect of a complaint which could be easily cured by a mere interlineation or addition to the pleading should not result in the reversal of a just judgment when the appellant deliberately concealed the real defect by a general objection to evidence, without calling attention to the point upon which he relies. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Dale Drullinger against Charles Erskine and Alma Erskine, husband and wife, for specific performance of an option to purchase realty. Judgment for plaintiff, and defendants appeal. Affirmed.

Jack J. Miller, of Stockton, for appellants.

Maxwell M. Willens and Forrest E. Macomber, both of Stockton, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment for specific performance of an option to purchase real property for an agreed price of $8,500.

The appellants contend that the complaint fails to state a cause of action for the reason that there is an absence of allegations that the consideration is adequate, or that the transaction is fair and just as to the defendants. It is also asserted the option contained in plaintiff's lease was superseded by a later valid agreement to sell the land for the same price to the United States Department of Agriculture, which took the second option as security for the loan to plaintiff of $8,500 with which he was to exercise his option to purchase the land. For those reasons it is claimed the findings and judgment are not supported by the evidence.

The complaint alleges that the defendants own sixty acres of farming land in San Joaquin County, subject to a trust deed held by the Federal Farm Mortgage Corporation to secure a previous loan of $4,500 procured by them; that on June 1, 1941, the defendants executed a written lease of the land to the plaintiff for the term of five years, at $816 rental per year for the first three years, payable in installments of $68 per month, and for $1,000 per year for the balance of the term, payable at the rate of $83.33 per month, subject to the performance of specified covenants on the part of the lessee. The lease contained an option for plaintiff to purchase the ranch for $8,500 at any time "prior to the expiration of this lease" upon written notice and upon fulfillment of the covenants of the lease. The complaint alleges the complete fulfillment of all covenants of the lease and an exercise of the option to purchase the land by written notice thereof on May 4, 1944, and a tender of the sum of $8,500 to the defendants, which was refused.

No demurrer to the complaint was filed. The defendants answered denying the material allegations of the complaint, except that the execution of the lease, which was attached to the complaint as Exhibit "A" thereof, was admitted. As a separate defense the answer alleged the subsequent execution of an agreement between the parties, pursuant to which defendants executed a second option to sell the land to the United States Department of Agriculture, for said sum of $8,500, and that said second option superseded and rendered void the option to plaintiff contained in the lease. The second option was merely incidental to the negotiation of an $8,500 loan on the land by plaintiff with which to exercise his option contained in the lease. The second option contained this provision: "This option is given to enable the Buyer [plaintiff] to obtain a loan from the United States acting by and through the Secretary of Agriculture * * * for the purchase of said lands," for the sum of $8,500.

The court adopted findings favorable to the plaintiff in every essential respect. It was determined that the lease, containing an option for plaintiff to purchase the land during its term for $8,500, was executed; that said purchase price was an adequate consideration; that all of the conditions of the lease were fully performed by plaintiff; that he secured a loan of $8,500 from the United States Farm Securities Administration with which to purchase the land; that he duly exercised his option and tendered said agreed purchase price within the term of said lease, and that the second option was merely incidental to the procuring of said loan with which to purchase the land, and that it did not supersede or annul the option contained in the lease. Judgment for specific performance was thereupon rendered against the defendants, requiring them to execute and deliver their deed of conveyance to the land upon receipt of said sum of $8,500. From that judgment this appeal was perfected.

[1, 2] The court adopted a finding to the effect that the agreed purchase price of $8,500 was an adequate consideration for the land. That finding is supported by the evidence. The court further found that the reasonable value of the land on June 1, 1941, when the lease was executed, was the sum of $7,000, but that owing to plaintiff's efficient farming and improvements supplied, the value of the land was increased to the approximate sum of $12,000 on May 4, 1944, when the option was exercised. But the latter finding is immaterial. Specific performance may not be enforced unless it appears that the seller receives "adequate consideration for the contract." Civil Code, § 3391. But the adequacy of consideration must be determined as of the date of the agreement, and not at the time of performance. O'Connell v. Lampe, 206 Cal. 282, 285, 274 P. 336, 337; 23 Cal.Jur. 442, § 17. Mr. Moorehead, secretary-treasurer of the Stockton branch of the Federal Land Bank, testified that the property was worth "about $7,000" on June 1, 1941, when the lease was executed. In the O'Connell case, supra, a judgment refusing to direct specific performance of an option to purchase real property, which, like this case, was included in a lease, was reversed because the court erroneously based its findings of inadequacy of consideration at the date of the exercising of the option, instead of at the time of the making of the contract. The court said in that regard: "The accepted rule in this state is that the question of the inadequacy of the consideration relates to the time of the formation of the contract—that is, the time the contract was made. Morrill v. Everson, supra [77 Cal. 114], at page 116 [19 P. 190]; Andersen v. Charles, 52 Cal.App. 290, 293, 198 P. 641;

Keim v. Lindley, N.J.Ch., 30 A. 1063, 1086; 25 R.C.L. 210, par. 10. The trial court in this case departed from the rule and found an inadequacy of price, not at the time the lease was entered into and the option granted, but at the date on which the option to purchase was exercised. There is no finding of any unfairness or undue delay on the part of the lessee."

[3,4] The appellants in this case, according to Mr. Moorehead, would receive $1,500 more for their land than it was worth at the time of the execution of the lease. That furnishes evidence in support of the finding that the price was not inadequate. It is not necessary that the agreed price of land shall be absolutely the full value thereof. It is sufficient if it is of the approximate value, so as to preclude the necessary inference of fraud or undue advantage. A vendor may not complain of slight or inconsequential loss of value, in the absence of fraud in procuring the contract. Schader v. White, 173 Cal. 441, 160 P. 557. The increase or diminution of the value of land at the time of the exercise of an option to purchase it does not alter the binding effect of a valid option to sell the land for a specified price. If the option is exercised the vendor may not complain of his loss of increased value of the land due to the lessee's addition of valuable improvements or to his efficient method of farming. The adequacy of consideration is founded on the value of the land at the time of the contract to sell it.

[5] The judgment in this case is not void merely because the complaint failed to specifically allege that the option to purchase the land specified an adequate consideration therefor, or that the contract was just and reasonable as to the vendor. The court had jurisdiction of the parties and of the subject matter. The defendants failed to demur to the complaint. The issue of adequacy of consideration was conceded by the conduct of the defendants at the trial. The court adopted findings to the effect that the agreed purchase price was adequate. The judgment was rendered accordingly. There was no miscarriage of justice.

[6] It is ordinarily true that a complaint for specific performance of a contract to purchase real property should allege facts showing adequacy of consideration and fairness of the transaction. 23 Cal.Jur. 493, § 52. But, when those issues are tendered at the trial by consent of the parties and the court adopts findings thereon which are reasonably supported by the evidence, the defendant is not prejudiced by the omission to specifically allege such facts, and the judgment may not be reversed on account of the mere defect of the pleading. Bonney v. Petty, 125 Cal.App. 527, 13 P.2d 969; Ades v. Brush, 66 Cal.App.2d 436, 444, 152 P.2d 519, 523; 23 Cal.Jur. 498, § 53; 58 C.J. 1159, § 480. In 23 Cal.Jur. at page 498 it is said in that regard: "A failure to allege the value may be cured by findings and judgment for the plaintiff, where it is clear that both parties understood the fairness of the contract to be an issue."

In the Ades case, supra, although it was not a suit for specific performance, the judgment for plaintiff was affirmed in spite of the fact that a demurrer to the complaint was erroneously overruled. The court declared the general rule with respect to a complaint which defectively alleges a cause of action, as follows: "It is also well settled that the failure of a complaint to state a cause of action is not fatal to a judgment for the plaintiff unless the appellant can show that the error has resulted in a miscarriage of justice. Where the parties at the trial treat a certain issue as being involved, and the judgment is based on that issue, it is not a prejudicial error that the complaint defectively alleges, or fails to allege at all, that issue."

In the Bonney case, supra, which was a suit for specific performance to compel the owner to convey land pursuant to a written contract for a specified purchase price, the court said, 125 Cal.App. at page 530, 13 P.2d at page 970: "Although in the case at bar, * * * the amended complaint is defective, the evidence hereinafter set forth shows that the contract is, as to the defendant, just and reasonable and sustained by an adequate consideration, and the court has so found. After judgment, the amended complaint is sufficient to sustain the action."

In the present case the complaint alleges the execution of the lease, a copy of which is attached to the pleading and marked Exhibit "A", containing the option to purchase the land for the specified sum of $8,500, as the value of the land; that the plaintiff fulfilled all the terms and conditions of the lease, and gave notice in writing on a specified date of his exercise of the option and which tender was refused by the defendants "due solely and exclusively to bad faith upon the part of defendants."

[7] It is true that defendants' attorney repeatedly objected to testimony on the general grounds that it was "incompetent, irrelevant and immaterial", and that it was "not within the scope of the issues raised by the complaint." But not once did he object to evidence on the ground that the complaint failed to state a cause of action. Nor did he ever call the court's attention to the failure of the complaint to specifically allege that the agreement to purchase the property for $8,500 was an adequate consideration, or that the transaction was fair and equitable as to the defendants. The numerous objections of the defendants were directed to plaintiff's effort to prove that the Federal Loan Corporation, which held a trust deed from defendants to secure a previous loan of $4,500, had given defendants notice of foreclosure; that plaintiff had made certain improvements enhancing the value of the ranch, or that plaintiff's notice of exercising his option was made after his fulfillment of all the covenants of the lease. The court suggested with relation to plaintiff's offer to prove that his improvements and manner of farming the land had increased the value from $7,000 at the time of the execution of the lease to $12,000, that plaintiff had a right to prove anything to show "that the transaction was fair." The defendants' attorney failed to call the court's attention to any such alleged defect in the complaint. In fact, the silence of the defendants' attorney on that issue at that time may reasonably be construed as giving assent that such evidence of the fairness and reasonableness of the transaction and the value of the land were proper issues. In response to plaintiff's offer to prove by Mr. Moorehead, the manager of the Federal Loan Corporation, that plaintiff's farming and improvements had increased the value of the ranch to $12,000, this colloquy occurred:

"The Court: Well, of course if you have a valid option and you have exercised the option, most of these other things are irrelevant.

"Mr. Miller: That's right.

"The Court: However, you may show * * * that the transaction was fair.

"Mr. Williams: Fair and equitable.

"The Court: Fair and equitable."

No objection was then, or at any other time, made by the defendants to testimony sought to be elicited for that purpose. But when Mr. Moorehead was asked, "Q. What was the condition of the [defendants'] loan at that time?," he replied, "In serious default." The witness was then asked: "What had your company done with reference to the loan?" To that question Mr. Miller did object on the ground that the evidence of notice from the Federal Loan Company to foreclose defendants' trust deed for default in payments was "incompetent, irrelevant and immaterial." He added the inquiry, "What difference does it make as to what his company did?"

Such colloquies fail to even suggest that defendants relied upon a failure of the complaint to allege that the transaction was fair and equitable, or that the consideration was adequate. In fact we think the record, fairly construed, amounts to a concession that those were proper issues to be determined. That is particularly true in the absence of a demurrer to the complaint. It is apparent that if the defendants had suggested those defects of pleading, in the course of the trial, the plaintiff, upon application therefor, would have been granted leave to amend the complaint. Article VI, Section 4½, of the Constitution, provides that: "No judgment shall be set aside, * * * in any case, on the ground * * * of the improper admission or rejection of evidence, or for any error as to any matter of pleading, * * * unless * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Certainly the failure to specifically allege in the complaint that the contract price of the land fixed by the defendants was adequate, or that the transaction was just and fair as to them, could not possibly prejudice the defendants, or result in a miscarriage of justice. We are satisfied there was not a miscarriage of justice in this case. The complaint alleged that the sole and only reason why the defendants refused to carry out their agreement to sell the land was founded on their "bad faith." It seems quite evident that the defendants refused to fulfill their agreement to sell the land because the value had increased from their fixed selling price of $8,500, at the time of the execution of the lease, to $12,000, at the time the option was exercised. That does not furnish equitable ground for repudiating the contract.

[8] The defendants' objections to certain questions propounded, on the general grounds that the evidence was "incompetent, irrelevant and immaterial", or that it was "not within the scope of the issues raised by the complaint," were unavailing on appeal from an adverse judgment to now contend, for the first time, that the pleading failed to specifically allege that the consideration was adequate, or that the transaction was fair and just as to the defendants. Howland v. Oakland Consolidated St. Ry. Co., 110 Cal. 513, 519, 42 P. 983; Baker v. Miller, 190 Cal. 263, 266, 212 P. 11; Poledori v. Newman, 116 Cal. 375, 48 P. 325; Boro v. Ruzich, 58 Cal.App.2d 535, 539, 137 P.2d 51; 2 Cal.Jur. 241, §§ 70-75; 4 C.J.S., Appeal and Error, §§ 247, 248, p. 499. In the text last cited it is said: "* * * An objection made in the trial court will not be treated in the appellate court as raising any question for review which is not within the scope of the objection as made, both as to the matter objected to and as to the grounds of the objection, *so that the question may be fairly held to have been brought to the attention of the trial court.*" (Italics added.)

In 2 California Jurisprudence, p. 245, quoting with approval from the case of Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 P. 195, 196, in which it was claimed on appeal that the answer failed to state facts sufficient to raise a particular issue, the text reads: "It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient, in order that he may have a fatal objection. Such course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated."

[9] In the Howland case, supra [110 Cal. 513, 42 P. 984], the Supreme Court held that an objection to evidence on the ground that it was "irrelevant, immaterial, and incompetent, and not a proper hypothetical question," was unavailing on appeal, because the "appellant should have pointed out the particular defect" relied upon to exclude the evidence. The court said the specific defect should have been pointed out to the court and adverse counsel so as to permit the correction of that defect, if possible, and thus prevent an unfair trial or a miscarriage of justice. Clearly that principle is applicable to the present case where the appellant relies on defective allegations of the complaint which might have been easily cured by an amendment of the pleading. It is apparent that a technical defect of a complaint which could be easily cured by a mere interlineation or addition to the pleading should not result in the reversal of a just judgment when the appellant deliberately conceals the real defect by a general objection to evidence, without calling attention to the point upon which he relies. Such procedure would tend to convert a trial into a contest of trickery and stratagem. In the Poledori case, supra [116 Cal. 375, 48 P. 326], it is said in that regard: "If objection to the introduction of any evidence had been made upon the ground that the defect to which it related *was not alleged in the complaint,* the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings."

The foregoing quotation was approved and relied upon as a correct statement of principle in the Boro case, supra.

In the Baker case, supra, a judgment in favor of the plaintiff for specific performance was affirmed on appeal. The complaint failed to state that the contract sought to be enforced with relation to real property was based on an adequate consideration or that the transaction was just and reasonable as to the defendant. A demurrer to the complaint was overruled. The court said [190 Cal. 263, 212 P. 15]:

"Aside from the statement of the value of the estate, there is not here any attempt to state facts at all—nothing more than the general language of the statute, *which amounts to a mere conclusion of law without facts to support it.* [Citing authorities.] * * * We are not inclined, however, to reverse the judgment for that reason. Whether the defendant called the attention of the court below to the infirmity of plaintiff's complaint, or only demurred as a matter of form, does not appear. * * *

"The judgment is affirmed."

The judgment in this case appears to be just and equitable. The findings and judgment are adequately supported by the evidence. The defect in the complaint was waived by the conduct of the defendants at the trial.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

BALDWIN v. BALDWIN.*

Civ. 14877, 14895.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1945.

Hearing Granted Dec. 27, 1945.

1. Divorce 🔑327

Evidence supported finding that husband had in good faith established his domicile in Nevada at time of his divorce by Nevada court, so that Nevada decree was final and entitled to full faith and credit.

2. Divorce 🔑327

The question of whether a former resident of California established a legal domicile in good faith in another state prior to his obtaining a divorce decree there was one of fact, and a finding that party had established a domicile in another state based upon substantial evidence would not be disturbed on appeal.

3. Divorce 🔑329

A suspicion of fraud in prosecution of a divorce action by a former resident of California in a foreign jurisdiction will not avail to defeat foreign decree or California court's finding as to validity of foreign decree.

4. Judgment 🔑470

A decree of a court of competent jurisdiction regular on its face is presumptively valid.

5. Divorce 🔑329

Although foreign divorce decree is subject to attack on ground of fraud, fraud is not to be presumed but must be proved affirmatively.

6. Divorce 🔑329

Where Nevada divorce decree obtained by husband showed regularity, decree could be collaterally impeached only by positive evidence of fraud in proving jurisdictional facts.

7. Divorce 🔑326

The question as to where fault lies has no relevancy to exercise of state power to dissolve marital status.

8. Divorce 🔑326

The power of a state court to dissolve marital status is not dependent on whether plaintiff is able to establish such facts as will entitle him to a decree.

9. Divorce 🔑326

Every United States citizen has right to establish his domicile in any state of the Union and when he has once satisfied court that he has honestly done so he is entitled to have his marital rights adjudicated there according to law of forum. U.S.C.A.Const. Amend. 14, § 1.

10. Judgment 🔑822(1)

A judgment of a state court should have same credit, validity and effect in every other court in United States, which it had in state where it was pronounced, and whatever pleas would be good to a suit thereon in such case, and no others, could be pleaded in any other court in the United States. U.S.C.A.Const. art. 4, § 1.

11. Divorce 🔑327

Where Nevada court had jurisdiction to enter final judgment on merits in divorce action by husband who had formerly been resident of California by reason of husband establishing a bona fide residence in Nevada, Nevada decree was entitled to full faith and credit in California and constituted a bar to hearing on merits in divorce action subsequently instituted by wife in California, notwithstanding that matrimonial domicile had never been in Nevada and that wife was not present at trial in Nevada. U.S.C.A.Const. Amend. 14, § 1.

12. Divorce 🔑182

An order requiring husband to pay expenses of wife's appeal in divorce action is dependent as much upon wife's necessity as upon husband's ability. Civ. Code, § 137.

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* Subsequent opinion 170 P.2d 670.

13. Divorce ⚷182

An order requiring husband to pay expenses of wife's appeal in divorce action was illegal, where it did not appear that requested allowance was necessary to enable wife to prosecute her appeal.

14. Divorce ⚷221

Before order on behalf of wife for suit money may be made under statute, in addition to proving her necessitous circumstances wife must also show that defendant is her husband and that action to be prosecuted is for a divorce or separate maintenance. Civ.Code, § 137.

15. Divorce ⚷182

Before making order requiring defendant in divorce action to pay expenses of plaintiff's appeal out of his separate estate court must first determine from entire evidence that plaintiff is the wife of defendant. Civ.Code, § 137.

16. Divorce ⚷228
Husband and wife ⚷295

The application for suit money or for other aid desired by wife in action for divorce or separate maintenance is a proceeding for separate judgment, which, when granted, has nothing to do with final judgment. Civ.Code, § 137.

17. Divorce ⚷182

An order requiring defendant to pay expenses of plaintiff's appeal in divorce action was illegal, where judgment from which appeal had been taken recited that marital status of parties had been terminated by a prior Nevada decree. Civ. Code, § 137.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis and Stanley Mosk, Judges.

Action for divorce by Rowena Schneider Baldwin against Baldwin M. Baldwin. From an adverse judgment, the plaintiff appeals, and from an order requiring defendant to pay plaintiff expenses for prosecuting her appeal, the defendant appeals.

Judgment affirmed, and order reversed with instructions.

Jerry Giesler, Meyer M. Willner, Joseph Scott, and J. Howard Ziemann, all of Los Angeles, for appellant.

Meserve, Mumper & Hughes, Roy L. Herndon, Frank P. Doherty, and William R. Gallagher, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The court below denied plaintiff's prayer for a divorce after sustaining defendant's plea in bar that the marriage of the parties had been dissolved by a valid decree of the District Court of Washoe County, Nevada, on December 16, 1939. After filing notice of appeal appellant initiated a proceeding to procure an order requiring defendant to pay her expenses for prosecuting her appeal including fees for the appellate service of her attorneys and the costs of printing their briefs. Judge Mosk made the order which she requested and from this defendant also appeals. Both appeals were consolidated for decision.

We are now to determine (1) whether the evidence justified the finding that defendant had in good faith established his domicile in Nevada at the date of the decree entered in the Washoe District Court; (2) whether that decree was final and entitled to full faith and credit or was open to collateral attack; (3) whether plaintiff was entitled to suit money for her appeal in spite of the judgment that the parties had been divorced in December, 1939.

The parties were intermarried October 27, 1937, in Arizona and separated January 24, 1939, at Los Angeles where they had maintained their home. There was no issue of the alliance but plaintiff had been twice divorced and had three children of the prior marriages. They were supported by their respective fathers.

Defendant Established a Domicile in Nevada

In support of his allegation that he had in good faith established a domicile in Nevada in 1939 defendant testified that some months prior to July 1, 1939, he decided to change his place of permanent residence to Nevada and made a number of visits to that state in search of properties for himself and for his mother; that about the last-mentioned date he departed with all of his belongings from Los Angeles for Reno where he established his residence in a prominent hotel; that thereafter he successively occupied apartments at two different well-known addresses in that city; that he voted at Reno in the national election of 1940, having registered as an elector of Nevada; that he paid all federal income taxes accruing after his arrival to the Collector of Internal Revenue at Reno and personal property taxes levied by the authorities of Washoe County; that in all his returns for national income taxes he gave his living quarters in Reno as his place of residence. Immediately upon arrival in Nevada and in the subsequent years he registered his automobile with the motor vehicle department of that state, always giving his local address as the place of his residence. Also he opened, and has continuously maintained, a commercial account with a local bank and has there at all times kept a safety deposit box. In registering under the National Selective Training and Service Act of 1940, 50 U.S.C.A.Appendix, § 301 et seq., in good faith he gave his post office box at Reno as his address. He testified that he had continuously resided in Reno except at the times of three temporary absences and on each of those departures he intended to return to that city as the place of his permanent abode and that upon the return of peace he will resume life there.

When he applied for a license to be married in Manasas, Virginia, March 5, 1940, he entered upon his application his Reno residence as his address. Thereafter he lived with that wife and her three children in Reno until her death in December 1940. When he procured a license to wed his present wife at Chicago, May 12, 1941, he again gave his address as Reno, Nevada, and there subsequently with her maintained a home at a popular hotel.

In support of defendant's testimony nine other witnesses residing in Reno were called. Ernest Bingham testified that he and defendant occupied the same apartment for about nine months after September 1, 1939. During the fall of 1939 he accompanied defendant to inspect several properties and introduced Mr. Baldwin to tenants, owners and experts in land values with whom he consulted. They visited a property adapted to the use of a health resort and checked as to its value and the cost of suitable improvements. During the same time he actively participated in local politics. Henry Bennett advised defendant with reference to properties on numerous occasions in the autumn of 1939 and until he entered the army. Raymond Knisley accompanied defendant on several trips to Nevada in the spring of 1939 in search of properties for defendant's mother and for themselves. The other witnesses gave proof of his continuous residence in Reno and of his civic activities there subsequent to his arrival.

The Evidence is Sufficient

[1-6] Such evidence abundantly supports the finding that defendant had in good faith established his domicile in Nevada at the time of his divorce by the court at Reno. The question of whether a former resident of California established a legal domicile in good faith in another state prior to his obtaining a decree of divorce there is one of fact. A finding that a party had established a domicile in another state based upon substantial evidence will not be disturbed on appeal. Calhoun v. Calhoun, 70 Cal.App.2d 233, 160 P.2d 923; Windsor v. Windsor, 42 Cal.App.2d 464, 109 P.2d 363. Nor will a suspicion of fraud in the prosecution of a divorce action by such party in the foreign jurisdiction avail to defeat the foreign decree or the California court's finding as to its validity. Plante v. Plante, 54 Cal.App.2d 318, 128 P.2d 787; Galloway v. Galloway, 116 Cal.App. 478, 2 P.2d 842. Moreover, a decree of a court of competent jurisdiction regular on its face is presumptively valid. Plante v. Plante, supra; Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273. While it is subject to attack on the ground of fraud, yet fraud is not to be presumed but must be proved affirmatively. Galloway v. Galloway, supra, 116 Cal.App. page 480, 2 P.2d 842. Inasmuch as the recitals in the Nevada decree of defendant's divorce betray regularity it could have been impeached only by positive evidence of fraud in proving jurisdictional facts.

[7-9] Appellant earnestly contends that inasmuch as her innocence of blame and respondent's culpability for their domestic infelicities were established in the court below she was therefore entitled to a decree on the merits because California was the "matrimonial domicile" and she

was not present at the trial in Nevada. Citing Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321. Not only did she neglect to cite Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, but she ignored the doctrine that "the question as to where the fault lies has no relevancy to the existence of the state power in such circumstances." The power of a state court to dissolve the marital status is not dependent on whether the plaintiff is able to establish such facts as will entitle him to a decree. Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273; Atherton v. Atherton, 181 U.S. 155, 21 S.Ct. 544, 45 L.Ed. 794; Thompson v. Thompson, 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347. Every citizen of the United States has the right to establish his domicile in any state of the Union (U. S. Constitution, Amendment XIV, Sec. 1) and when he has once satisfied the court that he has honestly done so he is entitled to have his marital rights adjudicated there according to the law of the forum. Such state may not deny him "the equal protection of the laws."

[10] Appellant argues (1) that it was not the court's intention in Williams v. North Carolina "to oust the rightful jurisdiction and sovereignty of a state over the marital status of its domiciled residents" and (2) that it did not intend "to sanction or make it proper for a wrongdoing spouse to flaunt and defeat the sovereign jurisdiction of a state over the marital status by fleeing to a state of easier divorce and there, through the use of fraudulent testimony, dissolve the status in which the state from which he fled has so vital an interest and over which it rightfully exercises so jealous an authority." These are eloquent phrases but they are not consonant with the declaration of the court that the Williams case must be treated "precisely the same" as if Williams had long ago acquired a permanent abode in Nevada. 317 U.S. 287, 63 S.Ct. 210, 87 L.Ed. 282, 143 A.L.R. 1273. Nor is the language of appellant consistent with that used by Chief Justice Marshall, to wit: "* * * the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Hampton v. McConnell, 3 Wheat. 234, 235, 4 L.Ed. 378.

The Nevada Decree is Entitled to Full Faith and Credit

[11] The state of such new domicile is all powerful to dissolve a marriage irrespective of the state in which it was contracted (Williams v. North Carolina, supra), and the judgment entered, right or wrong, is "a conclusive adjudication of everything except the jurisdictional facts upon which it is founded * * *." Id., 325 U.S. 226, 65 S.Ct. 1092, 1096, 157 A.L.R. 1366. It follows that since the Nevada court had jurisdiction to enter a final judgment on the merits, even though it effectively changed the marital status of defendant, such judgment is entitled to full faith and credit in California. U. S. Constitution, Article IV, section 1. Therefore it constituted a bar to a judgment on the merits by the court below. In truth, appellant's argument ignores the very purpose of the full faith and credit clause which was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by judicial proceedings of the others, and to make them integral parts of a single nation. * * *" [317 U.S. 287, 63 S.Ct. 211].

The significance of the cited case of Williams v. North Carolina is clarified by the later fortunes of that litigation. Subsequent to the reversal of the North Carolina conviction of Mr. Williams and Mrs. Hendrix (317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273) the prosecution proceeded upon the theory that the Nevada court which had granted both of them divorces from their former spouses had not obtained jurisdiction for the purpose of divorce because their residence in the latter state was not a bona fide domicile but a temporary sojourn to satisfy the statutory residential requirement. Upon that issue the jury decided in accordance with the state's contention. A legal conviction of the couple resulted from a finding of the fact that by reason of their fraud the Nevada Court did not have jurisdiction of the parties at the time of granting their divorces. 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. —, 157 A.L.R. 1366. Likewise, it may be assumed that if Mrs. Baldwin had successfully proved that defendant had not established a domicile prior to the decree of December 16, 1939, the court below would have adjudicated the merits of her complaint.

Plaintiff Barred From Proving the Merits of Her Case

The foregoing disposes of appellant's third point that it was error for the court to reject proof designed to establish that respondent was the wrongdoer. Such evidence would have been addressed to the merits of the controversy and that had already been adjudicated by the Nevada court which had acquired jurisdiction by virtue of defendant's established domicile. The Delanoy case is no longer authority, having grown into disuse as the result of the first Williams decision, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273. The judgment can only be affirmed.

The Order for Suit Money is Illegal

[12-15] Two and a half months after entry of judgment and one month after filing her notice of appeal plaintiff caused to be issued an order to show cause why defendant should not be required to pay the expenses of her appeal out of his separate estate, it having been already conceded that there was no community property. For two reasons such order should not have been made: (1) Having shown that she was the recipient of $900 monthly in addition to the support money for her children and that she possessed over $2,000 at the time of demanding such order, the requested allowance was not necessary to enable her to prosecute the appeal. The purpose of section 137, Civil Code, is to enable the wife properly to present her cause. Mudd v. Mudd, 98 Cal. 320, 322, 33 P. 114. An order requiring such payment is dependent as much upon the wife's necessity as upon her husband's ability. 27 C.J.S., Divorce, § 222, p. 924. (2) The very judgment from which the appeal had been taken decided that the defendant was not plaintiff's husband after December 16, 1939. That adjudication was in turn predicated upon the finding that the parties had been divorced by valid decree on December 16, 1939. Before an order on behalf of the wife for suit money may be made under section 137, in addition to proving her necessitous circumstances she must also show that the defendant is her husband and that the action to be prosecuted is for a divorce or separate maintenance. Carbone v. Superior Court, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St.Rep. 82. Before making such order the court must first determine from the entire evidence that plaintiff is the wife of defendant. Hite v. Hite, supra. To allow her suit money for the purpose of enabling her to prove that she is respondent's wife is "a glaring absurdity." Hite v. Hite, supra, 124 Cal. at page 394, 57 P. at page 230, 45 L.R.A. 793, 71 Am.St.Rep. 82, Chief Justice Beatty's concurrence. If in the first action of spouses for divorce the court must ascertain that the woman is the wife of the man before ordering the payment of suit money to her, surely such order will not be made where it has already been adjudged by a competent court that he is not her husband.

[16, 17] To overcome the disadvantage of the foregoing principles plaintiff contends that the marital status referred to in section 137, Civil Code, refers to the time of the filing of the complaint. Such construction is neither compatible with a reasonable interpretation of the statute nor with the decisions of our courts. The application for suit money or for other aid desired by the wife "is a proceeding for separate judgment, which, when granted, has nothing to do with the final judgment in the case." Baker v. Baker, 136 Cal. 302, 304, 68 P. 971, 972. The decree denying plaintiff relief and holding that defendant had been divorced from plaintiff December 16, 1939, had been entered August 4, 1944. She initiated the proceeding on October 16, 1944, for an order requiring defendant to pay her suit money and costs on appeal. At the hearing she was met not only by the Nevada decree which was presumptively valid but by the judgment here on appeal declaring that such decree had effectively dissolved the marriage of the parties. Upon such undisputed documentary evidence, which in itself spelled finality, the court had no discretion to make an award of money to be paid by defendant and should have denied the application.

The Bancroft case (Bancroft v. Bancroft, 9 Cal.App.2d 464, 50 P.2d 465) relied upon by plaintiff is of no value here. The testimony of that husband given to prove that there had been no marriage was insufficient to overcome the wife's proof that there had been a marriage. Consequently the court there had no alternative but to make the award.

It is ordered that the judgment appealed from in case 14877 be and it is hereby affirmed.

It is ordered that the order appealed from in case numbered 14895 requiring defendant to pay plaintiff and her attorneys the moneys therein specified be and the same is hereby reversed with instructions to enter a dismissal of the proceeding.

McCOMB, J., and FOX, J. pro tempore, concur.

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71 Cal.App.2d 646

PEOPLE v. WADE et al.

Cr. 1911.

District Court of Appeal, Third District, California.

Nov. 13, 1945.

Rehearing Denied Nov. 26, 1945.

1. Criminal law 🔑1159(1)

It must appear clearly and beyond reasonable doubt that on no hypothesis whatever is there sufficient, substantial evidence to support conclusion reached in court below before appellate court may reverse conviction for insufficiency of evidence.

2. Criminal law 🔑1159(1)

That circumstances might also reasonably be reconciled with innocence of defendant or that evidence is susceptible of two reasonable inferences, one looking to guilt of defendant and other to his innocence, is not sufficient to justify appellate court in reversing conviction for insufficiency of evidence.

3. Criminal law 🔑1159(1)

Unless there is presented a reasonable basis for declaration that evidence is insufficient as matter of law to meet applicable standard, affirmance of conviction must follow, and such rule is controlling where commission of offense charged is conceded and it is left to be determined only who was perpetrator of the crime.

4. Robbery 🔑24(1)

Evidence was sufficient to sustain conviction for robbery in first degree.

5. Robbery 🔑15

Where two or more people associate themselves together for purpose of robbery, thereby becoming principals, and when in furtherance of such plan and to consummate the crime one is armed with a dangerous weapon, all are equally guilty and all should be punished as principals. Pen.Code, §§ 31, 971.

6. Robbery 🔑24(2)

In prosecution for first-degree robbery, evidence justified jury in concluding that defendant entered store with same intent to steal as that which actuated his codefendant, who carried weapon, when he entered the establishment. Pen.Code, §§ 31, 971.

7. Robbery 🔑24(2)

The intent of one charged with first-degree robbery is a question of fact which may be proved like any other fact by acts, conduct, and circumstances connected with the offense.

8. Robbery 🔑24(2)

In robbery prosecution, evidence justified jury's conclusion that defendant associated himself with codefendant in common design to rob proprietor of store at point of a gun, which design was carried out according to plan, and that defendant therefore intended the ordinary consequences of his acts. Pen.Code, § 20.

9. Criminal law 🔑20

The intent referred to in statute providing that in every crime there must exist a union or joint operation of act and intent or criminal negligence is merely an intention to do the unlawful act. Pen.Code, § 20.

10. Criminal law 🔑24

If one does an unlawful act voluntarily and willfully, he is presumed to have intended what he did as well as all natural, probable, and usual consequences of his act.

11. Criminal law 🔑422(9), 528, 781(1)

The extrajudicial statements of a defendant, including confessions, made out of presence of another defendant, are not admissible as evidence against the latter and the jury should be so instructed.

12. Criminal law 🔑1169(5)

Admitting evidence of statements made by codefendant in absence of defendant did not prejudice the defendant's rights, where court cautioned jury not to consider any statements made by one defendant as evidence against the other unless made in presence of the latter.

13. Criminal law ⚿532(2)

Where defendant contended that so-called confession was not given voluntarily but was result of beatings administered by police officers but each of police officers concerned testified that at no time was any force or coercion used nor were any threats made or promises of immunity or reward given, question of voluntary character of defendant's statement was one largely within discretion of trial court for preliminary determination.

14. Criminal law ⚿519(3, 9)

The mere fact that confession was made to police or other officers of law while accused was under arrest or that confession was made in answer to questions does not render confession involuntary and inadmissible.

15. Criminal law ⚿532(2), 1144(12)

The trial court is clothed with considerable discretion in determining whether confession was free and voluntary, and where evidence is conflicting on subject it must be assumed that the testimony concerning defendant's confession was properly admitted.

16. Criminal law ⚿563

Corpus delicti may be established without proof that crime was committed by person charged therewith and slight evidence is sufficient to establish corpus delicti.

17. Criminal law ⚿563

Corpus delicti is established when it is proved that crime charged was committed and it is not required that it be proved that the crime was committed by defendant.

18. Criminal law ⚿535(2)

In first-degree robbery prosecution, evidence was sufficient to establish the corpus delicti without resort to extrajudicial statement of defendant.

19. Criminal law ⚿407(2)

Ordinarily when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in face of an accusation, circumstance of his silence may be taken against him as evidence indicating admission of guilt, but, if he promptly and fully denies the charge, the accusatory statements, standing alone, are not competent evidence of defendant's guilt. Code Civ.Proc. § 1870, subd. 3.

20. Criminal law ⚿404(4)

In first-degree robbery prosecution, where holster was found in room occupied by defendant to which he had taken officers, ring of victim was discovered under seat of police automobile in which defendant and codefendant had been riding, gun was found in hotel room to which officers had been directed by defendant and codefendant, and cartridges were taken from codefendant who was with defendant when they were arrested a short time after the robbery, such articles were properly admitted. Code Civ.Proc. § 1954.

21. Criminal law ⚿823(9)

Instruction in effect that defendant's failure to testify was not to be considered as an admission of guilt or of truth of anything testified to in trial, but that it might be considered with all circumstances in determining defendant's guilt or innocence and that such failure might be considered when it consisted in failure of defendant to explain evidence against him which he could reasonably be expected to explain, was proper when read in conjunction with remainder of charge to jury.

22. Criminal law ⚿1170½(5)
Witnesses ⚿277(4)

Where defendant testified on single issue of whether his extrajudicial statement was voluntary, permitting cross-examination which did not relate to the beatings and threats but did relate to voluntary character of the statement was not prejudicial error in view of the wide discretion which a trial court is permitted to exercise in determining the scope of cross-examination.

23. Criminal law ⚿369(2)

In prosecution for first-degree robbery, testimony with respect to defendant's tying up of store clerk at place of the crime was not objectionable on ground that it involved commission of independent offense of battery.

24. Criminal law ⚿369(2)

The rule against admission of evidence of other crimes does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to proof of crime for which defendant is being tried, and, when two or more offenses are part of the same transaction, every element of defendant's conduct in that transaction may be shown for purpose of illustrating motive or intent in committing the act which is the basis of the charge.

25. Robbery ⚷17(5)

Information charging first-degree robbery and alleging that defendants on the named day did take from the person and immediate presence of named individual certain described property in presence of such individual, which taking was without consent and against will of that individual and was accomplished by means of force used by the defendants on and against that individual, was not objectionable because of failure to allege ownership of property. Pen.Code, §§ 951, 952.

26. Robbery ⚷4

The gravamen of offense of robbery is the deprivation of possession of property and not ownership.

27. Criminal law ⚷238

Where, at preliminary examination before committing magistrate, victim gave direct testimony establishing corpus delicti of offense of first-degree robbery and testified that defendant resembled one of the men who took part in the robbery, and officer testified that defendant had voluntarily made a statement admitting participation in the robbery, and a codefendant in presence of defendant definitely involved the defendant as a participant in the affair, there was probable cause for believing that defendant was connected with commission of offense so that filing of information and commitment of defendant for trial was justified.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Ernest Wade and Willie James Goolsby were convicted of robbery in the first degree, and Willie James Goolsby appeals.

Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Appellant and defendant Wade were tried jointly before a jury on an information charging robbery in the first degree. Both were found guilty as charged. From the judgments of conviction and from the orders denying their motions for a new trial the appellant alone prosecutes this appeal.

The pertinent evidence disclosed by the record may be summarized as follows:

On the night of November 15, 1944, in accordance with a preconceived plan, appellant and his co-defendant Wade, together with a third man known as "Slim" or "Red Burton," entered a drug store in the city of Sacramento, with the intention of committing robbery. At the time of their entrance the proprietor, Frank Farrelly, was in the rear of the store arranging stock, and a clerk named Cesar Mondagna was in the front of the store. While Wade menaced Mondagna with a revolver, appellant tied up the latter with a cord which appellant had brought along apparently for this purpose. When Farrelly, hearing a commotion, came out to the front of the store, Wade turned the gun upon him, compelling him to remove a diamond signet ring from his finger and taking his wallet containing $110 from his pocket. Farrelly was then forced to open the cash register from which Wade took approximately $180. During this time appellant had taken Mondagna to the rear of the store out of sight of possible customers. Within an hour after the robbery appellant and Wade were picked up in a pool hall and placed under arrest. After they had been driven to Farrelly's home for identification the victim's ring was found under the seat which they had occupied in the police car. In a hotel room which appellant and Wade previously had rented was found a revolver identified as the one used in the commission of the offense; and in the room of another hotel where the men had been staying during the preceding week, police officers found the holster and overalls worn by Wade at the time of the robbery.

On two occasions, once to the police officers and again in a formal statement made before the deputy district attorney, appellant admitted complicity in the robbery, insisting, however, that he had expected the affair to be a strongarm holdup without the use of a deadly or dangerous weapon. Additional evidence of appellant's participation in the crime was furnished by Wade at the preliminary examination before the committing magistrate.

Appellant has made thirteen separate assignments of error, the first being that the evidence is insufficient to sustain the information. We find no merit in such contention.

[1-3] On the question of the sufficiency of the evidence to sustain the charge or the conviction or the judgment denying a motion for a new trial, the general rules by which appellate courts are governed are so firmly established and so well defined that, before it may be said that a case is without their purview, it must appear clearly and beyond a reasonable doubt that the evidence fails to meet the test of sufficiency which those rules prescribe—in other words "that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393. It is not enough that the "circumstances might also reasonably be reconciled with the innocence of the defendant." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, or that "the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence." People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821, 823. Unless there is presented a "reasonable basis for a declaration that the evidence is insufficient as a matter of law to meet the applicable standard, an affirmance must follow." People v. Mendez, 27 Cal.2d 30, 161 P.2d 929, 934. These rules are controlling where the commission of the offense charged is conceded and it is left to be determined only who was the perpetrator of the crime. People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631.

[4] In our opinion the evidence in the case at bar amply meets the test which the foregoing rules supply.

[5] Appellant's next contention is that "An aider and abettor must actually assist in the offense", his position apparently being that he himself must have handled the weapon or taken the property in order to be convicted of the offense charged. Under the provisions of section 31 and 971 of the Penal Code all persons concerned in the commission of a felony, whether they actually commit the act constituting the offense, or aid and abet in its commission, are principals and punishable as such. In People v. Benton, 32 Cal.App.2d 407, 89 P.2d 1089; People v. Soffer, 34 Cal.App.2d 301, 93 P.2d 183; and People v. Strauss, 75 Cal.App. 447, 243 P. 67, convictions of robbery in the first degree were affirmed, although the appellants therein merely stood by to help their accomplices make a getaway. Appellant's contention in this regard is precisely answered by the following language of the opinion in the case of People v. Stevens, 32 Cal.App.2d 666, 669, 90 P.2d 595, 596:

"When, therefore, two or more people associate themselves together for the purpose of robbery, thereby becoming principals, and when in furtherance of such plan and to consummate the crime, one of their number is armed with a dangerous weapon, all are concededly equally guilty, and therefore all should be punished in accordance with the statute which provides increased penalties for defendants who are armed at the time of the commission of the offense. Appellant, although not in actual physical possession of the weapon, was nevertheless aiding and abetting his armed accomplice who had the weapon, and therefore was properly accused, tried and punished for the acts of his accomplice."

In the case of People v. Benton, supra [32 Cal.App.2d 407, 89 P.2d 1090], a conviction of robbery in the first degree was sustained although there was no evidence that the appellant used or carried a deadly or dangerous weapon, and it appeared that his role in the affair was merely a passive one; yet the court observed: "The chief contention of appellant seems to be that because he did not actually enter the store with Suttle, he could not be convicted of the crime. We are of the opinion that there is ample evidence in the record to sustain the conviction." See also People v. Ward, 40 Cal.App.2d 143, 151, 104 P.2d 537; People v. Jones, 114 Cal.App. 91, 93, 299 P. 559; 46 Am.Jur., p. 150, sec. 25.

[6, 7] Appellant next complains that there is "No proof of criminal intent of appellant identical with that of defendant Wade, who actually committed the act." The surrounding facts and circumstances justified the jury in concluding that appellant entered the drug store with the same intent to steal as that which actuated his codefendant Wade when the latter entered the establishment. As the court stated in the case of People v. Fewkes, 214 Cal. 142, 148, 4 P.2d 538, 540:

"Intent is a question of fact which may be proved, like any other fact, by acts, conduct, and circumstances connected with the offense. Section 21, Pen.Code; People v. Richardson, 161 Cal. 552, 559, 120 P.

20; 8 Cal.Jur., p. 168, and cases cited." See People v. Collins, 60 Cal.App. 263, 268, 212 P. 701.

[8-10] There is nothing in the evidence in the case at bar, other than the explanation furnished by appellant (which the jury had a right to disbelieve), to warrant the inference that appellant was merely "going along for the ride." On the contrary there was ample evidence from which the jury could and did conclude that appellant associated himself with Wade in a common design to rob the proprietor of the premises at the point of a gun, which design was carried out according to plan, and that he therefore intended the ordinary consequences of his acts. People v. White, 5 Cal. App. 329, 90 P. 471. This would be true even if the full intent had not been formed until appellant entered the victim's establishment. In People v. Bond, 13 Cal.App. 175, 185, 186, 109 P. 150, the court observed that one may aid and abet without having previously entered into a conspiracy to commit a crime. While section 20 of the Penal Code provides that "in every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence," it is clear that the intent referred to is merely an intention to do the unlawful act. People v. Hartman, 130 Cal. 487, 62 P. 823. The rule as stated in 7 Cal.Jur., p. 853, par. 13, is: "If one does an unlawful act voluntarily and willfully, that is to say, by design or set purpose, he is presumed to have intended what he did, as well as all the natural, probable and usual consequences of his act, and the intent need not be alleged or proved."

[11, 12] Appellant strenuously contends that it was "prejudicial error to admit hearsay statements of Wade," as during Wade's confession he (appellant) was absent from the room for a portion of the time. It is true of course that the extrajudicial statements of a co-defendant, including confessions, made out of the presence of another defendant are not admissible as evidence against the latter, and that the jury should be so instructed. However, in the instant case it appears that the trial court was fully cognizant of this rule and properly apprised the jury of its duties in the premises. People v. Trotter, 120 Cal.App. 54, 62, 7 P.2d 731; People v. Burdg, 95 Cal.App. 259, 268, 272 P. 816; People v. Finley, 85 Cal.App. 670, 671, 672, 259 P. 1019. See People v. Wilson, 76 Cal.App. 688, 245 P. 781; People v. Swoape, 75 Cal.App. 404, 242 P. 1067; People v. Remington, 74 Cal.App. 371, 240 P. 526.

In this regard the record shows that on several occasions, both during the laying of the foundation for the reception in evidence of said statements and after the reading thereof, the court cautioned the jury not to consider any statement made by one defendant as evidence against the other unless made in the presence of the latter. The prosecuting attorney likewise asked the court in similar language to so instruct the jury. In addition, the prosecution's case was reopened for the purpose of taking further evidence on this question. It thus appears that appellant's rights were adequately protected.

[13-15] Appellant's next point is: "Alleged confession of appellant without proper foundation." His contention is that the prosecution failed to show that said confession was freely and voluntarily made. The confession was made to a deputy district attorney on November 17, 1944, while the defendants were being held for arraignment. Thereafter, both at the preliminary examination and at the trial, appellant maintained that his so-called confession was not given voluntarily but was the result of beatings administered by the police officers who had him in charge, and the fear of similar treatment should he refuse to make a statement. Each of the several police officers concerned in the matter testified clearly and unequivocally to the general effect that at no time was any force or coercion used nor were any threats made or promises of immunity or reward given. Under such circumstances the question of the voluntary character of appellant's statement was one largely within the discretion of the trial court for preliminary determination.

"The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary * * * a reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admission was properly admitted." People v. Lisenba, 14 Cal. 2d 403, 421, 94 P.2d 569, 578.

[16, 17] Appellant next contends that "The corpus delicti was not proven independently of the alleged confession of appellant." This contention is likewise without merit. It is well settled law that the corpus delicti may be established without proof that the crime was committed by the person charged therewith, and that slight evidence is sufficient to establish the same.

"The corpus delicti is established when it is proved that the crime charged was committed. It is not required that it be proved the crime was committed by the defendant. People v. Ward, 134 Cal. 301, 66 P. 372; People v. Bollinger, 196 Cal. 191, 237 P. 25; People v. Cowan [38 Cal. App.2d 231], 101 P.2d 125." People v. Wilt, 40 Cal.App.2d 124, 127, 104 P.2d 387, 388.

[18] In the instant case there was ample proof of the commission of the offense without resort to the extra-judicial statement of the appellant. People v. Cowling, 6 Cal.App.2d 466, 471, 44 P.2d 441; People v. Wiezel, 39 Cal.App.2d 657, 664, 104 P.2d 70; People v. Housman, 44 Cal.App.2d 619, 627, 112 P.2d 944.

[19] The contentions next advanced in appellant's brief read: "Appellant's statement not admissible because not an admission, as defined in section 1870, C.C.P. subd. 3." We have no fault to find with the decisions cited by appellant in support of the issues so raised, but we do not deem them to be in point on the situation presented herein.

"Ordinarily, when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt (citing authorities). But if he promptly and fully deny the charge, the accusatory statements, standing alone, are not in any sense competent evidence of the defendant's guilt (citing cases)." People v. Lapara, 181 Cal. 66, 71, 183 P. 545, 547.

In the case at bar the questions asked by the deputy district attorney were not accusations; and if some of them may be deemed to have been such, they may not be said to have been promptly and fully denied. A similar contention was made in the case of People v. Peete, 54 Cal.App. 333, 355, 202 P. 51, 61, wherein the appellate court stated:

"There is no merit in the objection that the statement did not consist alone of declarations made by defendant, but was in part made up of accusatory questions propounded to her by the deputy district attorney. Not only do the questions and answers constitute one entire and connected statement relating to the same subject-matter, and for that reason, if for none other, receivable in evidence, but the questions were admissible for the further reason that they come within the universally recognized rule that any incriminatory statements made to an accused person, and his replies thereto, may be admitted in evidence, unless his replies are denials free from equivocation and deceit. The accusatory statements are not direct evidence, but are admissible in connection with the replies for the purpose of showing the accused's reaction to the questions, or that his answers were not those of an innocent man, or were such as to implicate him in the commission of the crime with which he is charged. People v. Bradley, 23 Cal.App. 44, 136 P. 955; Commonwealth v. Spiropoulos, 208 Mass. 71, 94 N.E. 451; 16 C.J. p. 634. See, also, People v. Ammerman [118 Cal. 23, 32, 50 P. 15]."

[20] Appellant also has charged that the court committed prejudicial error in the reception of certain evidence, i.e., the diamond signet ring worn by the victim, the 32 caliber Colt automatic, the three cartridges and the holster. The holster was found in a room occupied by appellant to which he had taken the officers unaccompanied by Wade. The ring was discovered under the seat of the police car in which he and Wade had been riding. The gun was found in a hotel room to which the officers had been directed by appellant and Wade. Lastly, the cartridges were taken from Wade who was with appellant when they were arrested a short time after the robbery. Under such circumstances the articles were properly admitted. Such articles were certainly objects "cognizable by the senses" having "such a relation to the fact in dis-

pute as to afford reasonable grounds of belief" that they belonged to the defendants, and such objects therefore were items in the "sum of the evidence" properly "exhibited to the jury." Sec. 1954, C.C.P. See People v. Winthrop, 118 Cal. 85, 91, 50 P. 390; People v. Elliott, 104 Cal.App. 107, 110, 285 P. 401; People v. Raucho, 8 Cal.App.2d 655, 657, 47 P.2d 1108; 22 C.J.S., Criminal Law, § 712, pp. 1211-1212.

Appellant next complains of alleged "error in instruction that defendant could be found guilty because of failure to explain evidence against him." In support of this point he cites the concurring opinion of Mr. Justice Traynor in People v. Albertson, 23 Cal.2d 550, 145 P.2d 7. At pages 584 and 585 of said opinion in 23 Cal.2d, at page 24 of 145 P.2d, it appears that there were two principal vices in the instruction under attack in said case: (1) "It imposed no limitations on the jury as to what consideration it could give defendant's failure to testify and left the jury free to infer guilt from that fact alone"; (2) there was "no protection to the accused against the jury's weighing the evidence most heavily against him and drawing unfavorable inferences from his failure to explain matters of which he could not reasonably be expected to have cognizance."

However, in the case at bar, an examination of the instruction complained of at once reveals that the defects condemned in said opinion have been carefully avoided.

[21] The attacked instruction in the present case is as follows:

"A defendant in a criminal action is not required to take the stand and testify. His failure to take the stand and testify is not to be considered by you as an admission of guilt or of the truth of anything testified to in the trial of the case. The defendant is entitled to rely upon such evidence as is given in the case or upon the failure of the people to prove each and every material element of the charge against him. However, when a defendant has failed to explain evidence against him which he could reasonably be expected to explain the jury may consider this with all of the facts and circumstances in the case in determining the guilt or innocence of the defendant."

It readily appears from a reading thereof that definite limitations were imposed on the jury as to the consideration it could give appellant's failure to testify, first, that such failure was not to be considered as an admission of guilt or of the truth of anything testified to in the trial of the case, but it might be considered with all of the facts and circumstances in the case in determining his guilt or innocence, and second, that such failure might be considered when it consisted in the failure of defendant to explain evidence against him which he could reasonably be expected to explain.

As thus circumscribed, and particularly when read in conjunction with the remainder of the charge to the jury, the instruction was proper. See People v. Ottey, 5 Cal.2d 714, 56 P.2d 193.

[22] Appellant contends that "It was error to permit cross-examination of appellant on extraneous matters, when produced as witness on single issue of whether his 'statement' to district attorney was free and voluntary." The reference here is to certain questions which, over objection, the prosecution was permitted to ask on cross-examination when appellant took the stand to testify to the alleged beatings and threats, which he contended, made this extra-judicial statement to the deputy district attorney involuntary. These questions did not relate to the beatings and threats, but they did relate to the voluntary character of said statement—it being the theory of the prosecution that when appellant learned that Wade had held out on him as to the value of the property taken in the hold-up, he considered he had been double-crossed and would no longer withhold information detrimental to Wade's case. In view of the wide discretion which a trial court is permitted to exercise in determining the scope of cross-examination, People v. Thompson, 69 Cal.App.2d 80, 158 P.2d 213, it does not appear that said court committed prejudicial error.

[23, 24] Appellant also claims that "It was error to receive evidence of independent offense," referring to the testimony with respect to the tying up by appellant of Mondagna, the clerk, appellant's theory being that this involved the commission of a battery which was a separate and distinct offense from the robbery with which he was charged. Cited on this point are People v. Ranney, 213 Cal. 70, 1 P.2d 423; People v. Glass, 158 Cal. 650, 112 P. 281, and People v. Carpenter, 136 Cal. 391, 68 P. 1027. The decisions in these cases announce or apply the well established rule that distinct prior offenses cannot properly be shown, as such proof would merely prejudice the case of a defendant in the

eyes of the jury without tending to show that he is guilty of the offense for which he is being tried. This rule has nothing to do with the right of the people in a criminal case to adduce evidence of everything that transpired during the perpetration of the crime charged, including acts of a defendant that might constitute distinct offenses. The applicable principles in this regard are stated as follows in 8 Cal.Jur., pp. 60, 72, 73, secs. 168 and 175:

"The rule against the admission of evidence of other crimes does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which a defendant is being tried. * * *

"When two or more offenses are part of the same transaction, every element of the defendant's conduct in that transaction may be shown for the purpose of illustrating the motive or intent in committing the act which is the basis of the charge. It is essentially res gestae. * * * In a prosecution for robbery of one person evidence of the robbery of another at the same time is admissible as part of the res gestae. In proving robbery committed in a house, testimony as to the manner in which the defendant entered the house is admissible though it tends to prove burglary."

[25] Appellant next asserts "The information does not state a public offense." His theory is that ownership of the property is not sufficiently alleged. The information charges that the defendants on the day named "did then and there * * * take from the person and immediate presence of one Frank Farrelly the following described property * * * in the possession of Frank Farrelly, which said taking was then and there without the consent and against the will of the said Frank Farrelly, and was then and there accomplished, as aforesaid, by the defendants by means of force used by said defendants upon and against the said Frank Farrelly, and by said defendants then and there putting the said Frank Farrelly in fear * * *."

[26] This contention also is without merit. It is perfectly clear under numerous recent authorities that the information is amply sufficient in this respect, particularly in view of the 1927 amendment to Penal Code sections 951 and 952, liberalizing the rules of pleading, and in the light of the fact that the gravamen of the offense of robbery is the deprivation of possession and not ownership. People v. Covington, 1 Cal.2d 316, 318-320, 34 P.2d 1019; People v. Dozier, 35 Cal.App.2d 49, 53, 54, 94 P.2d 598; People v. Voiler, 2 Cal.App.2d 724, 726, 38 P.2d 833; People v. Sampson, 99 Cal.App. 306, 308, 278 P. 492. See also People v. Hicks, 66 Cal. 103, 4 P. 1093.

[27] Finally appellant argues that the "Trial court was without jurisdiction of appellant because committed for trial without reasonable or probable cause, and motion to set aside information was improperly denied." This contention fails to find support in the record. At the preliminary examination before the committing magistrate Frank Farrelly gave direct testimony establishing the corpus delicti. He testified also that appellant resembled one of the men who took part in the robbery. Officer Doyle testified that appellant had voluntarily made a statement to the deputy district attorney admitting participation in the robbery. Appellant's co-defendant Wade, in the presence of appellant, definitely involved the latter as a participant in the affair, while insisting that it was an innocent one. Wade's testimony without more would have been sufficient to establish probable cause for believing that appellant was connected with the commission of the offense. In re Schwitalla, 36 Cal.App. 511, 512, 172 P. 617; People v. Novell, 54 Cal.App.2d 621, 623, 624, 129 P.2d 453. The cases cited by appellant in support of this contention, Ex parte Schuber, 68 Cal.App.2d 424, 156 P.2d 944, and People v. Frey, 165 Cal. 140, 143-145, 131 P. 127, are inapplicable, for in those cases there was no evidence to show that a crime had been committed.

The judgment and order are affirmed.

ADAMS, P. J., concurs.

THOMPSON, J., deeming himself disqualified, did not participate.

71 Cal.App.2d 599

TEMPLE et al. v. CORPORATION OF AMERICA et al.

Civ. 14978.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1945.

1. United States 🔑53

The Home Owners' Loan Act was intended solely for benefit of home owners and the Home Owners' Loan Corporation was an agency of the federal government created during the world wide depression to afford relief to home owners in such financial distress as they could not discharge existing encumbrances on their homes. Home Owners' Loan Act of 1933, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

2. Contracts 🔑123(1)
United States 🔑53

The Home Owners' Loan Corporation would not refund a mortgage if creditor required a second lien to secure any portion of original debt unless debtor gave corporation reasonable assurance that he would be able to fulfill all obligations undertaken in exchange for original debt and in order to make such determination, it was necessary for corporation to be fully advised of amount and terms of any proposed second lien and any such second lien taken by creditor without corporation's knowledge would be void. Home Owners' Loan Act of 1933, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

3. Contracts 🔑141(3)

Evidence established that Home Owners' Loan Corporation was put on notice that mortgagee intended to take a second trust deed securing note for deficiency notwithstanding over three months elapsed between date of letter giving notice and consummation of transaction and filing of mortgagee's consent with escrow holder. Home Owners' Loan Act of 1933, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

4. Contracts 🔑123(1)

Failure of Home Owners' Loan Corporation to object to letter accompanying amended consent of mortgagee to accepting corporation's bonds for release of its mortgage debt on condition that mortgagor would make satisfactory adjustment for deficiency between amount of such bonds and amount of mortgage debt, justified trial court in inferring that corporation would not oppose the adjustment of the deficiency between the parties. Home Owners' Loan Act of 1933, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

5. Trial 🔑388(1), 397(1)

Where agreed statements consist of ultimate facts only, findings are not essential, but where the stipulation covers evidentiary facts it is trial court's duty to make findings.

6. Trial 🔑398

In action by mortgagor to cancel a note and second trust deed given as security therefor in addition to bonds given by Home Owners' Loan Corporation to secure release from original trust deed, findings adverse to mortgagors on issues involved were not contradictory to each other, or to inferences fairly deducible therefrom. Home Owners' Loan Act of 1933, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

7. Appeal and error 🔑931(1)

Where evidence was sufficient to support findings, all intendments must be resolved in favor of correctness of such findings and all reasonable inferences must be drawn in support thereof and fact that a contrary inference might have been deduced by trial court does not warrant a reversal.

8. Appeal and error 🔑931(1)

On appeal respondent must be granted the benefit of every inference that can reasonably be drawn in support of his judgment.

9. Accord and satisfaction 🔑1
Mortgages 🔑303
Novation 🔑1

Where mortgagor agreed to give mortgagee a note and deed of trust as part of consideration for their release from original mortgage debt because amount of bonds agreed to be accepted by mortgagee from Home Owners' Loan Corporation was less than amount of such indebtedness and appraised value of mortgaged dwelling, mortgagee's consent to take such bonds was not tantamount to agreement to accept bonds in full settlement of its claim so as to constitute an accord and satisfaction or novation. Home Owners' Loan Act of 1933, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

Appeal from Superior Court, Ventura County; Pat R. Parker, Judge.

Action by Charles Parker Temple and wife against Corporation of America and others for cancellation of a note and a trust deed given as security therefor. From an adverse judgment, plaintiffs appeal.

Affirmed.

William T. Selby and Loughman & Loughman, all of Ventura, for appellants.

Hugo A. Steinmeyer and J. A. Lazaroni, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Paintiffs sued for the cancellation of a note in the sum of $1,040, dated October 11, 1934, and a trust deed given as security therefor. The bases of the action were: (1) that the instruments were void because at the time of their execution no disclosure of their existence to the Home Owners' Loan Corporation was made by defendant; (2) that the execution and delivery on October 29, 1934, of a mortgagee's consent to take the bonds after delivery of the note and trust deed was a complete satisfaction of those instruments. These contentions are reasserted on appeal and in addition thereto appellants insist that the findings are not supported by the evidence.

For some time prior to July 20, 1934, appellants were indebted to the Bank of America in the principal sum of $6,500 evidenced by two promissory notes each of which was secured by a trust deed upon the home of appellants. In addition to that sum appellants owed interest, delinquent taxes and street assessments. In 1933 and 1934 demands for payment upon the debt were vainly made, Dr. Temple having more than once offered to convey the property in return for a release of the debt. Not until June of 1934 did their conversations take on the semblance of serious negotiations. Then the bank in order to relieve itself of an undesirable loan suggested the possibility of refinancing the loan through the Home Owners' Loan Corporation, hereinafter designated as the "corporation." Thereafter in July the bank was advised by the corporation that the latter's appraisal of the property was $5,200 and that it would deliver its bonds in the proximate amount of $3,600 in payment of the total obligation. In conferring with Dr. Temple upon the offer the bank's manager informed him of its unwillingness to accept the bonds offered in full satisfaction, and that if the corporation would not increase the amount of its bonds the bank would require a note with a second trust deed as security for the difference between the amount offered and the amount of the appraisal, and an unsecured note of the doctor for the balance of his debt. In such event the entire indebtedness would be still outstanding. Although no agreement was then reached, thereafter the bank endeavored to induce the corporation to increase the amount of its commitment but without avail. On July 20, the bank delivered to the corporation a "Mortgagee's Consent to Take Bonds" for the debt of appellants signed by the bank. With the "Consent" was a letter of the same date from the bank to the corporation which reads: "The amount that we are to receive as mentioned in our Consent is less than the total amount of indebtedness and the borrower has agreed to make satisfactory adjustment of the deficiency. We are therefore forwarding you this amended consent with the understanding and upon the condition that the borrower will make such adjustment."

No action was taken by the corporation upon these documents. However, negotiations continued between the bank and the doctor with reference to the refinancing. On October 9, 1934, without the knowledge of the corporation the bank's manager advised Dr. Temple that the federal agency would take over the loan on his home and give its bonds to the bank and had consented that the latter might take a second trust deed. Also he told Dr. Temple that the bank would accept the bonds if he and Mrs. Temple would execute a promissory note in the amount of the difference between the amount of the bonds issued by the corporation and the appraised value of the Temple home. To this Dr. Temple agreed and the amount of the note in favor of the bank was fixed in the sum of $1,040 to be secured by a deed of trust on the debtors' home. He thereupon advised his wife of his agreement and together they called at the office of the bank on October 11, 1934, and signed the note in the sum of $1,040 as well as the deed of trust, both of which were then delivered to the bank. The trust deed was not notarized until October 31. However, after the bank had deposited in escrow with a title company a "Mortgagee's Consent to Take Bonds" on

October 29 it then placed in the same escrow appellants' note for $1,040 and their trust deed with instructions to "record the trust deed one minute after the HOLC mortgage." Such trust deed was recorded immediately after the mortgage on November 27, 1934. The bank did not advise the corporation of its receipt of the note for $1,040 and the trust deed.

In view of the foregoing recitals we are to determine whether because of the belated consummation of the transaction the court below was justified in finding that the letter of July 20, 1934, was a sufficient notice to impart knowledge to the corporation that the bank would take a second lien upon the property to secure a portion of the original indebtedness due bank by appellants.

[1, 2] The Home Owners' Loan Corporation was an agency of the federal government created during the worldwide depression for the purpose of affording relief to home owners who were in such financial distress that they could not discharge existing encumbrances on their homes. Title 12 U.S.C.A. § 1461. The Act was intended solely for their benefit. The corporation would not refund a mortgage if the creditor required a second lien to secure any portion of the original debt unless the debtor gave the corporation reasonable assurance that he would be able to fulfill all obligations undertaken in exchange for the original debt. In order to make such determination it was necessary for the Home Owners' Loan Corporation to be fully advised of the amount and terms of any proposed second lien, and if such second lien should be taken by the creditor without the corporation's knowledge it would be void. Shiver v. Liberty Building & Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4.

[3] Appellants contend that the letter of July 20, 1934, was not notice of the bank's intention to take a second lien by reason of the time which elapsed between the date of that letter and October 29, 1934, the date of the filing of its mortgagee's consent with the escrow holder. They base their contention primarily upon the decision of McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800, which was the first judicial declaration of the nullity of a second lien as in violation of public policy when taken by the creditor who accepts bonds for his mortgage without first having made a disclosure to the Home Owners' Loan Corporation of his intention to require such lien for a portion of the debtor's obligation. But in that case the existence of a second lien was "kept secret" from the corporation and the defendant had threatened foreclosure of the original mortgage unless plaintiffs delivered their note for $1,300 and a second trust deed on their home.

[4] In view of the bank's letter of July 20 indicating its expectation to receive "a satisfactory adjustment of the deficiency" it cannot be said that the corporation was without notice. The contents of that letter were presumptively within the knowledge of the corporation at all times subsequent to its receipt. That it was sufficient to impart knowledge of the bank's intention to the corporation was not an unreasonable inference. According to custom that letter was necessarily a part of the file which contained all communications from the bank on the subject of Dr. Temple's property. It cannot be presumed that the corporation sealed that letter upon receipt of it or destroyed it or continued to ignore its contents. It was a part of the negotiations which began in July and continued to the date of the receipt by the escrow holder of all documents affecting the title of the Temple property. The trial court was justified in inferring from the silence of the corporation as to the letter of July 20, that the latter would not oppose the adjustment of the deficiency between the parties. The supreme court in McAllister v. Drapeau, 14 Cal.2d at page 110, 92 P.2d at page 916, 125 A.L.R. 800, approves of three cases arising in other jurisdictions which upheld second liens taken with knowledge on the part of the corporation.

From the cases cited herein it is evident that the corporation had had many experiences with mortgagees who had obtained secret second liens and that it was by reason thereof sensitive to any suggestion of a mortgagee that the latter must receive from its debtor something more than the bonds which it had offered for the bank's mortgage. Moreover, there is no evidence of any unfairness on the part of the bank.

The authorities cited by appellants (Woods v. Kern County Mutual Building & Loan Association, 34 Cal.App.2d 468, 93 P.2d 837; Richard R. Adams Company, Inc., v. Pacific States Savings & Loan Co., 34 Cal.App.2d 723, 94 P.2d 370;

Rockwood v. Brown International Investment Co., 51 Cal.App.2d 241, 124 P.2d 612; Morrison v. Landers, 56 Cal.App.2d 607, 133 P.2d 34) do not support their contention. In the first two no disclosure was made to the corporation. In the Rockwood case the trust deed was secretly taken and not recorded until a month after the transaction had been closed. In the Morrison case, while defendants obtained approval of a second trust deed for $750 they did not disclose that they were taking unsecured notes from the debtor in the sum of $1,145 which was the excess of the new loan over the appraised value of the property.

[5] The findings are attacked upon two grounds, namely: (1) they were unnecessary because of the "Settled Statement on Appeal"; (2) they are contrary to the facts declared in that statement. Neither attack is justified. Findings are not essential when the agreed statement consists of ultimate facts only, but where the stipulation covers evidentiary facts it is the duty of the court to make findings. Zimmerman v. Continental Life Insurance Co., 99 Cal.App. 723, 279 P. 464. The settled statement contains not only a recital of many probative facts but also the deposition of a witness and some eleven exhibits. From these and judicial knowledge the findings are amply supported.

[6] The eight findings attacked disclose no contradiction to the settled statement and the inferences fairly deducible therefrom, as will be observed from our resume of the proof and the substance of the criticized findings, which are as follows: The bank's consent of October 29 was a continuation of the refunding negotiations and it was required by the corporation for the purpose of making an adjustment of the amount to be paid to the bank; the letter of July 20 was sufficient to impart knowledge of the bank's intention; it is not true that the bank agreed to accept bonds of the corporation in full settlement of its claim against plaintiffs; it is not true that the bonds were given to the bank in consideration of the bank's agreement to take the corporations' bonds and release in full all claims against the Temple property; it is not true that the note and trust deed were executed to the bank without the knowledge of the corporation; it is untrue that the consideration for the note and trust deed was void; the terms and payment of the $1,040 note were fair and reasonable and within the spirit of the Act of 1933 and of the rules of the corporation; the note and trust deed were not a secret second lien. The court was not bound to decide the case upon the single item of proof that on October 29, 1934, the bank filed its consent to take the bonds "in full settlement" of its claim against appellants. On the contrary, it was a just inference from all the proof that the corporation had knowledge of the bank's intention to take a trust deed for a further sum.

[7, 8] There being sufficient evidence to support the findings, all intendments must be resolved in favor of their correctness; all reasonable inferences must be drawn in support of them. The fact that a contrary inference might have been deduced by the trial court does not warrant a reversal. Respondent must be granted the benefit of every inference that can reasonably be drawn in support of his judgment. Lorraine v. City of Los Angeles, 55 Cal.App.2d 27, 30, 130 P.2d 140; Herberts, etc., Inc., v. Laurel, etc., Corp., 58 Cal.App.2d 684, 690, 138 P.2d 43; Redmond v. City of Burbank, 43 Cal.App.2d 711, 713, 111 P.2d 375.

[9] Appellants contend under the language of McAllister v. Drapeau, supra, that the mortgagee's consent to take bonds was tantamount to an agreement to accept the bonds in full settlement of the creditor's claim and therefore constitutes an accord and satisfaction or a novation. The note for $1,040 having been executed on October 11 and the consent to take the bonds having been filed on October 29, appellants contend that the filing of the latter document was a complete release of the entire original indebtedness. But it must be remembered that the negotiations of the parties extended over more than three months. The filing of the "Consent to Take Bonds" was not an isolated and complete act in itself. It was only one of a series of events which terminated with the deposit in escrow of all the writings used in effecting the original purpose of the parties. The delivery of the $1,040 note and trust deed by appellants to the bank was also one act of that series. Considering it with all other steps in the negotiations it was fairly determinable that the bank delivered the consent on October 29, because appellants had already signed their note and trust deed and promised to acknowledge the lat-

ter. Inasmuch as appellants had agreed to give the bank the note and trust deed as a part of the consideration of their release from the original debt, the fact of their delivery into escrow subsequent to October 11 does not diminish their value as such consideration. Shiver v. Liberty Building & Loan Association, supra.

Judgment affirmed.

WILSON, J., and FOX, J. pro tem., concur.

71 Cal.App.2d 588

PEOPLE v. KLEIN et al.

Cr. 2362.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1945.

1. Gaming 🔑98(5)

Evidence sustained conviction for keeping a room with books, papers, and paraphernalia for purpose of recording debts. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑75(1)

Under the statute making it an offense to keep a room with books, papers, and paraphernalia for the purpose of recording bets, the gist of the offense is the occupation of the room. Pen.Code, § 337a, subd. 2.

3. Indictment and Information 🔑110(16)

An information charging, in words of statute, offense of keeping a room with books, papers and paraphernalia for purpose of recording bets was sufficient, even though it did not contain full copies of the books and papers involved. Pen.Code, § 337a, subd. 2; § 952.

4. Gaming 🔑98(5)

In prosecution for keeping a room with books, papers and paraphernalia for the purpose of recording bets, the corpus delicti may be proved by circumstantial evidence. Pen.Code, § 337a, subd. 2.

5. Gaming 🔑97(1)

In prosecution for keeping a room with books, papers and paraphernalia for purpose of recording bets, testimony of police officers concerning customary paraphernalia used by those engaged in bookmaking and identifying books, papers, records and paraphernalia taken from possession of defendants at time of their arrest, was admissible. Pen.Code, § 337a, subd. 2.

6. Gaming 🔑97(1)

In prosecution for keeping a room with paraphernalia for purpose of recording bets, testimony of police officer that while he was in the room occupied by accused officer answered telephone and that voice over phone gave him some betting numbers was admissible. Pen.Code, § 337a, subd. 2.

7. Criminal law 🔑202(1)

Where three counts of information were separately based on different subdivisions of statute, each of which specified a distinct offense in relation to bookmaking dismissal of counts two and three after trial and conviction on count one would not support a plea of double jeopardy. Pen. Code, § 337a, subds. 2, 4, 6.

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

Milton Klein and Joseph Lavoris were convicted of keeping a room with books, papers and paraphernalia for the purpose of recording bets, and they appeal.

Affirmed.

James G. Flaherty, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., Edmund G. Brown, Dist. Atty., and Alvin E. Weinberger, Asst. Dist. Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendants were tried to the court, sitting without a jury, upon an information charging the violation of section 337a of the Penal Code. The second and third counts of the information charging the recording and making of bets were dismissed. Both defendants were convicted on the first count charging a violation of subd. 2 of the section and have separately appealed on the same transcript and briefs.

The cause was tried by stipulation upon a certified copy of the transcript of the proceedings before the committing magistrate. Two police officers testified to the facts of their investigation and arrest of the defendants. No other testimony was taken. Neither defendant took the stand as a witness.

The evidence showed the customary set up of a cigar store in front and a room in the rear with counter and chairs to accomodate the customers. At the time of the arrest the police officers seized the regular betting paraphernalia consisting of cards, markers, run-down sheets, scratch sheets, and a rapid calculator which were found on the premises. As experts having had long experience in making arrests under this particular statute the police officers identified the exhibits taken from defendants' premises as the "books, paper or papers, apparatus, device or paraphernalia" used for recording or registering bets within the meaning of the code section.

[1] The evidence was sufficient in all respects to support the verdicts. People v. Hinkle, 64 Cal.App. 375, 221 P. 693; People v. Manning, 37 Cal.App.2d 41, 98 P.2d 748; People v. Steinfeld, 38 Cal.App.2d 280, 101 P.2d 89; People v. Roche, 68 Cal.App.2d 665, 157 P.2d 440; People v. Partee, 70 Cal. App.2d 736, 161 P.2d 586; and People v. Brown, 71 Cal.App. 166, 162 P.2d 300.

[2, 3] The appellants argue that the informations were defective because they did not contain full copies of the "books and papers" seized. They cite some ancient authorities holding that when a written document is relied on by the prosecution it must be pleaded either verbatim or in substance. The appellants have overlooked the amendment to section 952 of the Penal Code, enacted in 1927, and permitting the pleading of a criminal offense in the language of the statute. Here the offense charged was the keeping of a room with the books, papers, and paraphernalia "for the purpose of recording * * * bets." The gist of the offense is the occupation of the room. The information is in the words of the statute, and is sufficient under section 952. People v. Pierce, 14 Cal.2d 639, 96 P.2d 784.

[4] Appellants argued that the "corpus delicti" was not proved, and rely upon People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142, and People v. Newman, 37 Cal.App.2d 627, 99 P.2d 1067. The reviewing courts have consistently refused to follow the narrow rule of both of those cases. See People v. Newland, 15 Cal.2d 678, 685, 104 P.2d 778; People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633; People v. Mooney, 57 Cal.App.2d 1, 4, 133 P.2d 853; People v. Mix, 41 Cal.App.2d 177, 106 P.2d 21; People v. Hart, 46 Cal.App.2d 230, 233, 115 P.2d 546. It should be noted that the Fisk case was a prosecution under subdivision 2 of section 337a whereas the Newman case was one under subdivision 4, which relates to one who "records, or registers any bet" upon horse races. The judgment in the Fisk case was reversed entirely upon the ground of lack of sufficient evidence. The Newman case advanced the rule on "corpus delicti", upon which appellants herein rely, that the evidence that defendants were seen circulating among a group of men, making entries in note books and on slips of paper, and receiving money from the group on bets "to win" was insufficient to prove the "corpus delicti" because there was no "direct" evidence to show that the defendants were recording bets on horse races. In People v. Newland, 15 Cal.2d 678, 683, 104 P.2d 778, the Supreme Court followed the settled rule that the "corpus delicti" may be proved by circumstantial evidence. To the same effect see People v. Kaye, 43 Cal.App.2d 802, 810, 111 P.2d 679, and People v. Abraham, 67 Cal.App.2d 425, 428, 154 P.2d 450.

[5] Appellants assign error in the admission in evidence of the testimony of the two police officers concerning the customary paraphernalia used by those engaged in bookmaking, and identifying the books, papers, records and paraphernalia taken from their possession at the time of their arrest. They cite People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180, and People v. Davis, 47 Cal.App.2d 331, 117 P.2d 917. There is nothing in the Zammora case applicable to the question here presented. The rule of the Davis case was rejected by the Supreme Court in People v. Newman, 24 Cal.2d 168, 176, 148 P.2d 4, 152 A.L.R. 365, upon the point for which it is cited here. People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693; People v. Hatfield, 77 Cal. App. 212, 218, 246 P. 95; and People v. Derrick, 85 Cal.App. 406, 408, 259 P. 481, were all cited in the Newman case as supporting the contrary holding that the arresting officers were qualified by experience to testify as to the significance of the markings and entries in the books and papers taken from the possession of the accused, as they were used by those engaged in bookmaking, and also to testify as to the customary methods and equipment of the

places used for that purpose. See also People v. Pruitt, 55 Cal.App.2d 272, 130 P.2d 767; People v. Bateman, 57 Cal.App. 2d 585, 135 P.2d 192.

[6] It is argued that the court erred in permitting a police officer to testify that while he was in the room he answered the telephone and that the voice over the phone gave him some betting numbers. A concurring opinion in People v. Barnhart, 66 Cal.App.2d 714, 153 P.2d 214, is cited as authority. That opinion criticized and refused to follow People v. Joffe, 45 Cal.App. 2d 233, 113 P.2d 901, and People v. Reifenstuhl, 37 Cal.App.2d 402, 99 P.2d 564. But in People v. Kelley, 22 Cal.2d 169, 176, 137 P.2d 1, 5, we find this statement relating to the admissibility of the same character of testimony: "Since the conversations received by the officers after reconnecting the telephone were properly admissible to prove the use of the occupied premises (People v. Joffe, 45 Cal.App.2d 233, 113 P. 2d 901; People v. Reifenstuhl, 37 Cal.App. 2d 402, 99 P.2d 564), the messages received by the officer, excluding the terms which he explained, amply support the verdict of the jury." The same rule was followed in People v. Onofrio, 65 Cal.App.2d 584, 590, 151 P.2d 158. Though there seems to be some disagreement as to the admissibility of such testimony in a case tried under subdivision 4 of the code section, it must be taken as settled law that, in a prosecution for having the "paraphernalia" in possession (subd. 2), it is proper to admit testimony of the arresting officer at the time of the arrest that while listening on one of the telephones used in the room occupied by the accused he heard an unknown party send in betting information or ask for the entry of a bet on a horse race.

[7] Finally appellants argue, but not too seriously, that there is some hint of double jeopardy in that the information was framed in three counts, that counts two and three were dismissed before trial on count one, and that such dismissal effected an acquittal as to count one. Appellants rest their argument on a false premise. The record of the trial proceedings of March 22, 1945, shows:

> "Thereupon the Court made an order finding each of the Defendants Guilty to the charge contained in count one of the Information.
>
> "Thereupon the Court, upon motion of the District Attorney, made an order dismissing counts two and three as to each Defendant."

From the record it appears that the dismissal of counts two and three was made after the trial.

But the three counts of the information were separately based upon subdivisions two, four, and six respectively of section 337a of the Penal Code each of which specifies a separate and distinct offense in relation to bookmaking. If the appellants had been tried and acquitted of recording or registering a bet (subd. 4) or of making, offering or accepting a bet (subd.6) they could not claim double jeopardy upon a second trial for occupying or keeping a room for betting purposes (subd. 2). Hence a dismissal of counts two and three after trial does not support a plea of double jeopardy.

The judgments and orders are affirmed.

DOOLING, J., concurs.

71 Cal.App.2d 593

CARPENTER et al. v. TITLE INS. & TRUST CO.

Civ. 14974.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1945.

Rehearing Denied Nov. 27, 1945.

Hearing Denied Jan. 7, 1946.

1. Mortgages 🔑411

A beneficiary under trust deed is not estopped from rescinding his declaration of mortgagors' default and election to proceed under power of sale in deed and thereafter electing to pursue alternative remedy of enforcing obligation secured by filing action to foreclose deed as mortgage. Code Civ.Proc. § 725a.

2. Mortgages 🔑411

A trust deed securing note is in effect only a mortgage with power of sale, and grantee may have foreclosure thereof and sale of trust property under court decree without making sale under such power. Code Civ.Proc. § 725a.

3. Mortgages ⚷411

A beneficiary under trust deed securing note did not elect to foreclose deed as mortgage by giving notice of mortgagors' default and requesting trustee to record such notice and sell trust property at public sale under power in deed. Code Civ.Proc. § 725a.

4. Election of remedies ⚷1, 7(1)

Election of remedies is specific application of doctrine of estoppel, but change of remedies does not signify election, unless it involves prejudice to adversary.

5. Mortgages ⚷390

A beneficiary under trust deed securing note has two statutory concurrent remedies by legal action to foreclose deed as mortgage and by trustee's sale under power in deed, and he may proceed with either or both of such remedies at same time and effectively consummate that which he chooses to enforce, so that trustor in default has no authority to require trustee's sale instead of foreclosure. Code Civ. Proc. § 725a.

6. Mortgages ⚷335, 390, 509

A beneficiary under trust deed securing note is vested with right of enforcement and privilege of choosing remedy of foreclosure or trustee's sale, while trustor may neither designate time of foreclosure sale nor time when notice of trustor's default shall be recorded. Code Civ.Proc. § 725a.

7. Mortgages ⚷209

A trustee under trust deed securing note was not obligated to appear and defend beneficiary's action to foreclose deed as mortgage, as such trustee was not "interested trustee" in technical meaning of such term. Code Civ.Proc. § 725a.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Trustee".

8. Mortgages ⚷209, 415(1)

The trustee under ordinary trust deed is only a functionary of limited power under type of mortgage authorizing him to convey mortgaged property under prescribed conditions, and he has no right to complain if beneficiary ignores trustee and proceeds to foreclose deed as mortgage. Code Civ.Proc. § 725a.

9. Mortgages ⚷379

Persons executing trust deed securing their note cannot recover amount of deficiency in proceeds of sale of trust property on foreclosure of deed as mortgage or loss due to increase in value of property after such sale as damages for beneficiary's failure or refusal to proceed with sale under power in deed after recording of notice of trustors' default and beneficiary's election to sell under such power. Code Civ.Proc. § 725a.

10. Mortgages ⚷138

The provisions of statute declaring that trust beneficiaries take no estate or interest in trust property, but may enforce performance of trust, are inapplicable to problems arising under trust deeds, which are merely instruments of security, not express trusts for benefit of third persons. Civ.Code § 863 et seq.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by L. E. Carpenter and another against the Title Insurance & Trust Company to recover damages for defendant's failure or refusal to proceed with the sale of property described in a trust deed under which defendant was trustee, after recording of the beneficiary's notice of default and election to sell under the deed and delivery of the deed and note secured thereby to defendant. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

L. E. Carpenter and Margaret B. Carpenter in pro. per.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiffs brought this action against the trustee under a deed of trust to recover damages by reason of its failure or refusal to proceed with the sale of the property described in the conveyance after notice of default and election to sell under the instrument had been recorded and the note and trust deed had been delivered to the trustee. A general demurrer was sustained without leave to amend and the judgment of dismissal was entered from which comes this appeal.

The substance of the complaint is as follows: Plaintiffs executed a deed of trust to secure their promissory note in the sum of $7,500 dated April 24, 1935, in favor of one Hamilton, the beneficiary under the deed of trust; thereafter Hamilton recorded a notice of default and election to sell on May 29, 1937; the trustee did not mail a copy of the notice of default to plaintiffs; on August 24, 1937, the beneficiary executed and delivered to the trustee a "rescission of notice of breach and election to sell," which the trustee recorded and thereupon returned to Hamilton his deed of trust and note; on September 17, 1937, Hamilton brought an action to foreclose the deed of trust as a mortgage; pursuant to such action judgment was entered and the property was sold in satisfaction thereof on December 3, 1940; the trustee did not notify plaintiffs of the execution and recordation of the notice of default and election to sell or of the recordation of the rescission of such notice or of the return of the deed of trust and note to Hamilton, nor did plaintiffs learn of such facts until after the trial of the foreclosure suit, towit, on or about May 1, 1941; notwithstanding respondent was a defendant in the foreclosure action it made no defense; plaintiffs have been damaged by reason of the defendant's failure to proceed with the trustee's sale under the declaration of default in a sum exceeding $3,000 for costs and attorneys fees resulting from the foreclosure proceedings and in the sum of $11,000, the difference between the sum for which plaintiffs could have purchased the property at trustee's sale and the present reasonable market value of the property.

The theory and the argument of the appellants are that after the notice of default and election to sell had been recorded by the trustee it became mandatory upon the trustee to proceed with the sale of the trust property; that it had no power to rescind the notice of default and election to sell without the concurrent consent of both the beneficiary and the trustors; that trustors had the right to the benefit of any sale that might have been made of the trust property under the deed of trust and that the beneficiary was entitled to receive from the proceeds of such sale only the amount due under the note plus costs of sale; that the balance of such proceeds would have been payable to the trustors; that in executing the power of sale under a trust deed the trustee must proceed with the highest element of good faith to procure not only the amount due the beneficiary but also any sums possible over and above the latter's claim; that the beneficiary has no rights except to enforce the sale; that the trustee may not proceed in any manner except as expressly granted by the trust deed; that such instrument makes no provision for the abandonment of the sale after recordation of the notice of default and election to sell or for the abandonment of the sale on the trustee's own motion; that the beneficiary having elected to enforce payment of his note by a trustee's sale was estopped to renounce that remedy and proceed with foreclosure.

[1, 2] In a former action by the same plaintiffs to set aside the judgment which foreclosed the trust deed as a mortgage on the ground of fraud we had occasion to observe "that the beneficiary, under a deed of trust, by delivering to the trustee a declaration of default and election to proceed according to the power of sale contained in the trust deed, is not estopped from rescinding the declaration of default and thereafter electing to pursue the alternative remedy of enforcing the obligation, to secure which the deed of trust was executed, by filing an action to foreclose the deed of trust as a mortgage pursuant to the terms of section 725a of the Code of Civil Procedure." Carpenter v. Hamilton, 59 Cal.App.2d 146, 149, 138 P.2d 353, 354. It was similarly, though inversely, held in Mayhall v. Eppinger, 137 Cal. 5, 69 P. 489, that the trustee under a deed of trust might proceed with the sale of the property under the power of sale notwithstanding the pendency of an action to foreclose the instrument as a mortgage without the necessity of dismissing the court action. In Felton v. LeBreton, 92 Cal. 457, 28 P. 490, it was held that a deed of trust such as that before us is in effect only a mortgage with a power of sale, and the grantee may have foreclosure and sale thereof under a decree of court without making a sale under the power. Since Bell Silver & Copper Mining Co. v. First Nat. Bank, 156 U.S. 470, 15 S.Ct. 440, 39 L.Ed. 497, it has been customary in the form and content of such trust deeds to provide for the foreclosure thereof either by court action or by a trustee's sale at the option of the trustee or beneficiary. McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 236, 286 P. 693.

[3-6] By virtue of his giving notice of default and requesting defendant to record the notice and to sell the property at public

sale, Hamilton did not thereby elect to foreclose the trust deed by the trustee. The election of remedies is a specific application of the doctrine of estoppel, but a change of remedies does not signify an election unless the change involves a prejudice to the adversary party. Commercial Centre Realty Co. v. Superior Court, 7 Cal.2d 121, 129, 59 P.2d 978, 107 A.L.R. 714. Even before the enactment of section 725a, Code Civil Proc., the holder of a trust deed could foreclose it by either method. Since the advent of that section the beneficiary has two statutory concurrent remedies, one by legal action of foreclosure and the other by the trustee's sale. Flack v. Boland, 11 Cal.2d 103, 77 P.2d 1090. He may proceed with either or both at the same time and may effectively consummate that which he chooses to enforce. It follows that the trustor in default under a deed of trust has no authority to require enforcement by trustee's sale because that remedy may be more pleasing to him. The beneficiary is vested with the right of enforcement and the privilege of choosing the remedy while the trustor may neither designate the time of foreclosure sale nor the time when the notice of default shall be recorded. Flack v. Boland, supra. When the trustor becomes in default on his debt, if he does not program with his creditor in the matter of the sale of his property he may suffer an inconvenience of which he may in vain complain to the courts.

[7, 8] There was no obligation upon the trustee to appear and defend the foreclosure action. It was not an interested trustee in the technical meaning of that term. Under an ordinary trust deed the trustee is only a functionary of limited power, under a type of mortgage conferring upon him the power to convey under the prescribed conditions. He had no right to complain if the beneficiary ignores him and proceeds to foreclose the trust deed as a mortgage. Field v. Acres, 9 Cal.2d 110, 113, 69 P.2d 422.

[9] Appellants cite no authority for their demand for damages because of either the unpaid deficiency or the asserted loss due to the increase in value of their erstwhile property. On the contrary it is held that such sums are not recoverable. Scott v. Security Title Insurance and Guaranty Co., 9 Cal.2d 606, 72 P.2d 143, 117 A.L.R. 1049. At the maturity of their note appellants were privileged to pay the principal of the debt with accrued interest and thereby be relieved from all avoidable costs whatsoever. Sondel v. Arnold, 2 Cal.2d 87, 39 P.2d 793. Their misfortunes have stemmed solely from their own default in the performance of a simple obligation to pay money at a specified time. The unhappy predicament in which they found themselves as a result of what they deemed to be the fraud of others might readily have been obviated by the payment or the tender of payment of their debt without forfeiting any action for injustices theretofore suffered. Instead of pursuing this clearcut and simple course they have enlarged the records of the courts with numerous actions and appeals growing out of an ordinary transaction in which they have unsuccessfully sought relief through all the courts of this state, with petitions in some instances for review to the United States Supreme Court. Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397; Hamilton v. Carpenter, 15 Cal.2d 131, 98 P.2d 1027; Carpenter v. Hamilton, 311 U.S. 656, 61 S.Ct. 10, 85 L.Ed. 420; Carpenter v. Superior Court, 312 U.S. 705, 61 S.Ct. 825, 85 L.Ed. 1138; Hamilton v. Carpenter, 52 Cal.App.2d 447, 126 P.2d 395; Hamilton v. Carpenter, 52 Cal.App.2d 449, 126 P.2d 397; Carpenter v. Hamilton, 59 Cal.App.2d 146, 147, 138 P.2d 353; Carpenter v. Hamilton, 59 Cal.App.2d 149, 138 P.2d 355; Carpenter v. Hamilton, 24 Cal.2d 95, 147 P.2d 563, 153 A.L.R. 733.

[10] The sections of the Civil Code as well as the authorities cited by appellants, Civil Code, section 863 et seq.; Tyler v. Granger, 48 Cal. 259; In re Estate of Delaney, 49 Cal. 76; Ward v. Waterman, 85 Cal. 488, 24 P. 930; Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43; Blackburn v. Webb, 133 Cal. 420, 65 P. 952; Gilbert v. Penfield, 124 Cal. 234, 56 P. 1107; 25 Cal.Jur. sec. 67, p. 83, do not apply to problems arising under trust deeds. They relate to express trusts for the benefit of third persons whereas a deed of trust is merely an instrument of security. Touli v. Santa Cruz County Title Company, 20 Cal.App.2d 495, 67 P.2d 404; Blair v. Blair, 44 Cal.App.2d 140, 146, 112 P.2d 39.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

BALLARD v. PACIFIC GREYHOUND LINES.

Civ. 14931.

District Court of Appeal, Second District, Division 1, California.*

Oct. 31, 1945.

Hearing Granted Dec. 27, 1945.

1. New trial ⚷163(2)

An order granting new trial which is entered in minutes is only record of trial court's action, and order is to be measured by its terms and not by reasons which court may give for it.

2. Appeal and error ⚷717
Judgment ⚷526
Motions ⚷62

The deliberations of courts are conclusively merged in their orders or judgments, and the oral or written opinions of trial judges may not be considered for purpose of reversing such judgments or orders.

3. Appeal and error ⚷662(1), 933(6)
New trial ⚷163(2)

The minute order granting new trial must govern, and it must be conclusively presumed to set forth the action taken by trial court upon the motion.

4. Appeal and error ⚷716

Where it is contended that order granting new trial does not disclose real ground upon which it was predicated, appellate court must give consideration to oral statements of trial judge made from bench at time the order was made.

5. Appeal and error ⚷716, 933(6)

Where statements made by trial judge at time of entry of minute order granting defendant's motion for new trial on ground of insufficiency of evidence, did not exclude assumption that judge was of opinion that evidence was legally insufficient to prove some essential element of plaintiff's case, minute order would govern, and it would be conclusively presumed to set forth the action taken by court upon the motion, notwithstanding that it could also be inferred from trial judge's statement that he believed that he had committed an error of law during the trial. Code Civ.Proc. § 657, subd. 7.

6. Appeal and error ⚷977(3)

Where new trial is granted upon insufficiency of evidence, the question presented to appellate tribunal is not whether there is in the record sufficient evidence to support the judgment on appeal, but whether it clearly appears that in granting the motion there has been abuse of discretion.

7. Appeal and error ⚷977(3)

Unless trial court's determination involves a manifest abuse of discretion or there is no substantial conflict in the testimony on material issues, or evidence as a whole is insufficient to support a verdict in favor of moving party, an appellate court is without power to interfere with trial court's order granting a new trial.

8. Carriers ⚷316(1)

Proof of an injury to a passenger on a bus, caused by operation of the bus, casts upon carrier the burden of proving that injury was occasioned by some cause which human care and foresight could not prevent. Civ.Code, § 2100.

9. Carriers ⚷295(1)

A carrier is liable to passenger for any injuries which could have been avoided by driver of vehicle in careful operation thereof. Civ.Code, § 2100.

10. Carriers ⚷300

A bus driver was bound to anticipate that other automobiles might be on highway at any point, and to keep his machine under such control as would enable him to avoid a collision, as regards carrier's liability for injuries to passenger. Civ.Code, § 2100.

11. Appeal and error ⚷1002

Mere statement of defendant's bus driver that he did everything in his power to miss automobile parked in highway, after testimony tending to show negligence on part of defendant's driver in failing to avoid striking automobile, did not create a material conflict in the evidence, within meaning of rule which would support a finding based thereon. Civ.Code, § 2100.

12. Appeal and error ⚷1002

More than a mere conflict of words is required to constitute a conflict of evidence within meaning of settled rule which would support a finding based thereon, and a real and substantial conflict is required.

13. Carriers ⚷318(7)

Evidence established as matter of law that defendant's bus driver was guilty of negligence in failing to avoid striking automobile parked on highway, so as to render defendant liable for injuries sustained by one of its paying passengers in the collision. Civ.Code, § 2100.

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* Subsequent opinion 170 P.2d 465.

14. Carriers ⚷315(1)

In action by paying passenger against common carrier for injuries sustained when bus in which plaintiff was riding collided with automobile parked on highway, sole question was whether bus driver was guilty of negligence which proximately contributed to the accident, and question as to negligence, if any, of person who was responsible for position of automobile struck by bus was not in issue. Civ.Code, § 2100.

15. Appeal and error ⚷1015(2)

An order granting defendant's motion for new trial after verdict in favor of plaintiff could not be sustained on ground that there was conflict in evidence as to extent of plaintiff's injury, where no claim was made that damages awarded were excessive.

16. Appeal and error ⚷933(1, 4)

All intendments are in favor of validity of an order granting a new trial and that it was properly made, and, hence, even though order could not be sustained on ground specified therein, if it was proper on any of the other grounds upon which motion was made, it will not be reversed on appeal.

17. Appeal and error ⚷901, 1032(2)

One who complains of a ruling excluding proffered evidence must not only show that such ruling was erroneous, but must also assume burden of showing resultant prejudice. Code Civ.Proc. § 475.

18. Appeal and error ⚷1031(4)

Appellate court could not assume that defendant's rights were prejudicially affected by ruling excluding testimony of a physician, in absence of an offer of proof or at least a statement showing wherein physician's testimony was material. Code Civ.Proc. § 475.

19. Appeal and error ⚷933(4)

An order granting defendant's motion for new trial after verdict in favor of plaintiff could not be sustained on ground that trial court committed prejudicial error in depriving defendant of right to examine physician, where defendant made no offer of proof nor a statement to trial court showing wherein physician's testimony was material. Code Civ.Proc. §§ 475, 1881, subd. 4.

20. Appeal and error ⚷977(3, 5)

Appellate courts are reluctant to reverse orders granting or refusing new trials.

21. Appeal and error ⚷1015(1)
New trial ⚷70

Trial court, in passing upon motion for new trial on ground of insufficiency of evidence, is not bound by jury's findings if there is sufficient evidence to sustain a contrary finding, but, where there is substantial evidence upon which a contrary verdict or judgment could be founded, the order granting a new trial cannot be sustained upon appeal.

22. New trial ⚷70

The granting of defendant bus company's motion for new trial after verdict in favor of passenger who was injured when bus collided with automobile parked on highway on ground of insufficiency of evidence was an abuse of discretion, in view of the evidence.

DORAN, J., dissenting.

Action by Mabel Ballard against Pacific Greyhound Lines for injuries sustained by plaintiff when bus operated by defendant, upon which plaintiff was a paying passenger, collided with an automobile parked on the highway. From an order granting defendant's motion for new trial after jury had returned a verdict in favor of plaintiff, the plaintiff appeals.

Reversed.

Wm. J. McNichols and Josiah Coombs, both of Los Angeles, for appellant.

Bryce P. Gibbs and Kenneth K. Scott, both of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff appeals from an order granting defendant's motion for a new trial. Plaintiff received personal injuries when a bus operated by defendant corporation upon which she was a paying passenger collided with an automobile parked on the highway over which defendant's bus was traveling. The jury returned a verdict in favor of plaintiff and defendant moved for a new trial. The minute order in connection therewith, as reflected by the clerk's transcript on appeal, reads in part as follows: "Said motion is argued and is granted on the grounds of the insufficiency of the evidence."

Appellant asks us to look to the record of proceedings which led to the entry of the aforesaid order, insisting that such record conclusively indicates that the real ground upon which the new trial was granted was "error in law, occurring at the trial and excepted to * * * by the defendant" (Code Civ.Proc. § 657, subd. 7), and not for insufficiency of the evidence to justify the verdict.

[1-3] The rule with reference to interpretation of orders granting a new trial is thus stated in Newman v. Overland Pac. Ry., 132 Cal. 73, 75, 64 P. 110, 111: "The order which is entered in the minutes is the only record of the court's actions, and is to be measured by its terms, and not by the reasons which the court may give for it." See also Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 621, 75 P. 332, and Frost v. Los Angeles Ry. Co., 165 Cal. 365, 369, 132 P. 442. The deliberations of courts are conclusively merged in their orders or judgments and the oral or written opinions of trial judges may not be considered for the purpose of reversing such judgments or orders. DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444; Southern California, etc., Lines v. San Diego, etc., Ry. Co., 66 Cal.App.2d 672, 676, 152 P.2d 470. "The minute order must govern, and it must be conclusively presumed to set forth the action taken by the court upon the motion." Condon v. Ansaldi, 203 Cal. 180, 181, 263 P. 198, 199.

That the rule relied upon by respondent is not without exception, however, is evidenced by the case of Krebs v. Los Angeles Ry. Co., 7 Cal.2d 549, 552, 61 P.2d 931, 932, wherein it was held that therein an appellate tribunal should consider the record of proceedings which led to the entry of the order to determine the real ground upon which it had been made. In that case the court discussed some of the hereinbefore cited cases, saying the rule therein announced is reasonable, but that it would be unreasonable to apply it in the Krebs case, wherein, after both plaintiffs secured judgments on verdicts in their favor for damages resulting from an automobile accident assessed at $10,000 and $2,000 respectively, the trial court made its order granting a new trial as to both plaintiffs "on the ground of excessive damages." On appeal of both plaintiffs from said order, the Supreme Court said, 7 Cal.2d at page 552, 61 P.2d at page 932: "The remarks of the court made at the very time he rendered his order orally from the bench, when considered in the light of what he had said on the preceding day, indicate that he granted the new trial as to both plaintiffs on the ground of excessive damages to Grace Krebs alone." For that reason, the order granting a new trial was affirmed as to Grace Krebs and reversed as to the other plaintiff.

[4] In view of the holding in the case just cited, it would appear to be the duty of the court in the instant appeal, where it is contended that the order made does not disclose the real ground upon which it was predicated, to give consideration to the oral statements of the trial judge made from the bench at the time the order appealed from was made. In that regard, the record reveals that after argument on the motion for a new trial the following transpired:

"The Court: There is no question about that. Well, I think I made a mistake, gentlemen, so far as Dr. Gerty was concerned. It may not have made any difference, so far as this jury was concerned, but I think I should have let him testify. I am one that will always admit a mistake if I have made one, if I find any reason to sustain it.

"Mr. Scott: The Court at that time was a little in doubt about it. If I had had the case which I just read to the Court, I am confident the Court would have permitted Dr. Gerty to testify.

"Mr. McNichols: I don't think those cases are in point at all. The fact that she came in there under mistake forbids him from testifying. Her mental condition would not have changed that verdict one dollar.

"The Court: It might have increased it.

"Mr. McNichols: It is possible.

"Mr. Scott: No. He would have testified it had nothing to do with it.

"The Court: Well, that is a disputed question. I think I made a mistake, gentlemen, and I will admit it, and therefore grant the motion for new trial. Maybe you can straighten it out again.

"Mr. Scott: Will the Court designate the grounds upon which he grants the motion?

"The Court: Insufficient evidence.

"(Discussion off the record)

"The Court: The motion for new trial is granted upon the grounds of insufficient evidence in this case of Ballard v. Pacific Greyhound Lines."

[5] While the foregoing statements made by the trial judge evidence an inclination upon his part to believe that he had committed an error of law during the trial, such statements when taken as a whole do not exclude the assumption that he was also of the opinion that the evidence was legally insufficient to prove some essential element of plaintiff's case or to sustain the judgment in her favor. Under these circumstances, the minute order must govern, and it must be conclusively presumed to set forth the action taken by the court upon the motion.

[6, 7] When a new trial is granted upon the ground of insufficiency of the evidence, the question presented to the appellate tribunal is not whether there is in the record sufficient evidence to support the judgment on appeal, but whether it clearly appears that in granting the motion there has been an abuse of discretion. Anderson v. Dahl, 121 Cal.App. 198, 8 P.2d 883. Hence the fact that if the appeal herein were one taken from the judgment entered on the verdict in favor of plaintiff, it would be held that the evidence was legally sufficient to sustain such judgment, is not controlling. Unless the determination of the trial court involves a manifest abuse of discretion or there is no substantial conflict in the testimony on material issues, or the evidence as a whole is insufficient to support a verdict in favor of the moving party, an appellate court is without power to interfere with the trial court's action. In Dempsey v. Market St. Ry. Co., 23 Cal.2d 110, 113, 142 P.2d 929, 930, the rule is thus succinctly set forth: "* * * The rule has long been settled that where the evidence is in substantial conflict the lower court's discretion to grant a new trial on the ground of insufficiency of the evidence will be upheld on appeal." But it is also established law that the conflict must be substantial, and upon material points, not simply apparent or fanciful and not related to controlling issues. Zibbell v. Southern Pac. Co., 160 Cal. 237, 241, 116 P. 513.

Appellant herein advances the contention that there is no conflict in the evidence as to any essential or controlling fact in issue. It is admitted by the pleadings that defendant is a corporation engaged in the business of operating bus lines for the purpose of carrying passengers for hire; that about 6:30 a.m. on January 3, 1943, plaintiff "was a paying passenger on a bus owned and operated by" defendant; that the bus was at said time on a paved highway between Salinas and San Luis Obispo, driven by "an agent, servant and employee" of defendant "acting within the scope of his employment". Allegations contained in the complaint and put in issue by the answer of defendant are that, at said time and place, "said bus * * * swung around a curve on the highway * * * at a high rate of speed, and at about 40 or more miles per hour; that by reason of said high rate of speed, and the careless, negligent and unlawful operation of said bus by * * * an employee of said corporation, it struck an automobile, on said highway, which caused the said bus to run into an embankment at the side of said highway, and to thereafter overturn, injuring the plaintiff * * *; that the proximate cause of the said injuries to the plaintiff was the negligent, careless and unlawful operation of said bus, as alleged above"; that the plaintiff suffered specified physical injuries and loss of earning capacity.

The uncontroverted evidence shows that, at said time and place, the bus in which plaintiff and her two sons were passengers from Salinas to Los Angeles, after completing a wide curve, collided with an automobile, climbed an embankment on the right hand side of the highway, and turned over. The evidence further shows, without conflict, that the accident occurred on a two lane paved highway, with a white line in the center and with no noticeable grade, which highway was dry and in good condition, upon which there was no other traffic, either ahead or behind the bus; that the night was only medium dark; that the driver was experienced and familiar with the highway; that there was no failure of mechanical controls of the bus until after it collided with the automobile; and that the automobile with which the bus collided was not moving, had two wheels off the pavement and one almost off, and, therefore, projected onto the highway less than its own width, which necessarily left ample room on the pavement for the bus to pass to its left. It is also uncontroverted that the driver saw the car when the bus was 100 feet from it, and that he did not apply or attempt to apply the brakes. That in said accident plaintiff was injured is also uncontroverted.

[8, 9] "A carrier of persons for reward must use the utmost care and diligence for their safe carriage * * * and must exercise to that end a reasonable degree of skill." Civ. Code, § 2100. Under the facts of the case at bar there can be no claim of contributory negligence. Proof of an injury to a passenger on a bus caused by the operation of the bus casts upon the carrier the burden of proving that the injury was occasioned by some cause which human care and foresight could not prevent. Lynch v. Market St. Ry. Co., 130 Cal.App. 433, 438, 19 P.2d 1009. The carrier is liable to a passenger for any injuries which could have been avoided by the driver of the vehicle, in the careful operation thereof. 2 Cal.Jur.Supp. 542; Duran v. Pickwick Stages System, 140 Cal.App. 103, 108, 35 P.2d 148; Holt v. Yellow Cab Co., 124 Cal. App. 385, 391, 12 P.2d 472; Leonard v. Pickwick Stages System, 120 Cal. 512, 516, 517, 7 P.2d 1059.

Respondent in its brief discusses the doctrine of res ipsa loquitur and cites cases claimed to be authority for its contention that the doctrine cannot be applied to the facts in the instant action. What was said in Seney v. Pickwick Stages System, 82 Cal.App. 226, 232, 255 P. 279, 281, is applicable to the case with which we are here concerned. In the cited case the court said: "We believe the evidence in this case absolutely establishes the negligence of the defendants, with or without the application of the doctrine of res ipsa loquitur."

In the last cited case, wherein a petition by appellant to have the cause heard in the supreme court after judgment in the district court of appeal was denied, the driver of the stage testified that "he was driving around a right-hand curve where he could not see the road more than 15 feet ahead, at a speed of 12 to 15 miles per hour, when he saw a two-by-four stick in the road about 12 feet ahead, projecting 2½ or 3 feet into the road, which was 20 feet in width; that he drove around the stick with the front wheels of the car, but, on account of the curve in the road the hind wheels struck the two-by-four, and skidded off the road, and that the car overturned. * * *" The court said: "It is evident that the driver made no effort to apply the brakes when he first saw the obstruction, but that he attempted to drive around it without reducing his speed. * * * It is a significant fact that the marks on the roadway caused by the application of the brakes were after the driver had turned to avoid the obstacle. * * * Under the facts involved in this case the stage would not have left the road and overturned, except for the negligence of the defendant, and such negligence is not a risk assumed by the plaintiff."

[10] The evidence in the instant case shows without conflict that the driver of defendant's bus, when he saw the automobile 100 feet ahead of him, failed to apply his brakes and thereby slacken his speed, and that he made no attempt to slow down until after the collision with the automobile, which collision, according to the driver's testimony, broke the air line, made the brakes useless, and caused the bus to go "out of control". The failure of the bus driver to apply his brakes under the conditions present was negligence. Poe v. Lawrence, 60 Cal.App.2d 125, 132, 140 P.2d 136; Boccalero v. Wadleigh, 113 Cal.App. 376, 379, 298 P. 526, 527. The bus driver was bound to anticipate that other cars might be on the highway at any point and to "keep his machine under such control as will enable him to avoid a collision". Boccalero v. Wadleigh, supra; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125.

In Yates v. Morotti, 120 Cal.App. 710, 8 P.2d 519, 521, where defendant's automobile traveling "at 35 to 45 miles an hour", collides with plaintiff's automobile which was at the time parked on the wrong side of the street, and concerning which defendant said: "I was seventy-five feet away from it when I first saw it was not moving", the court affirmed judgment for plaintiff, and at page 715 of 120 Cal.App., at page 521 of 8 P.2d, said: "This was ample space within which to turn the course of his car so as to avoid the parked vehicle. Evidently he neither slackened the speed of his car nor attempted to change its course. * * * Under such circumstances, it may not be reasonably said the defendants were not guilty of negligence", and on page 718 of 120 Cal.App., at page 522 of 8 P.2d, "The driver of the defendants' car actually saw the parked car and realized it was stationary when he was 75 feet away. There was no other traffic obstructing the street. He then had ample time, in the exercise of ordinary care, to avoid the accident. The doctrine of the last clear chance will therefore support the findings and judgment of the court. * * *"

In the case of Gambrel v. Duensing, 127 Cal.App. 593, 16 P.2d 284, judgment for plaintiff was affirmed. Defendant, in order to avoid a horse and rider at the edge of the pavement on her side, pulled left and collided with plaintiff's automobile. The court at page 598 of 127 Cal.App., at page 286 of 16 P.2d, said: "* * * the obstruction which led to the collision in this case * * * was on the side of the highway being used and occupied by the defendant; that under such circumstances it was necessary that the defendant should have her automobile under such control as to enable her to prevent injury to person or property. * * * there is testimony to the effect that there was a clear passage afforded * * * which, had the defendant reduced the speed of her car so as to have proper control thereof, she might have passed the horses without injury to anyone. If, by reason of not having reduced her speed sufficiently to have her automobile under the required control, the defendant * * * lost control of her car, and was unable to propel the same along the clear passage afforded * * * the question of defendant's negligence was established and her responsibility for all attendant injuries fixed."

In Pate v. Pickwick Stages System, 125 Cal.App. 670, 14 P.2d 174, a stage struck the two automobiles of the two plaintiffs which had stopped at an angle blocking the highway after a slight collision between them. The court affirmed judgments for plaintiffs, and at page 673 of 125 Cal.App., at page 175 of 14 P.2d, said: "If the driver of the stage did see the Dodge and Ford cars standing on the highway when he came in view of them, he was guilty of negligence in not then applying his brakes * * *."

In Boynton v. Richfield, 117 Cal.App. 699, 700, 4 P.2d 614, judgment on directed verdict was reversed, the court saying "The precautionary measure of stopping, defendants did not take, and as a result the accident was not avoided."

Respondent contends that the record discloses substantial conflicts on the issue of defendant's negligence in the instant action in the following particulars: (1) The testimony of the bus driver and that given by Jack Ballard, plaintiff's son, "created a conflict as to whether the driver swung out to miss the parked car or hit it while driving straight ahead"; (2) the testimony of the driver that he "was traveling approximately 35 miles an hour" conflicts with the testimony of Jack Ballard that "we was going along at a speed, I would say, of about 45 when we hit * * *"; (3) the printed reports of the accident filled in and signed by Jack and Raymond Ballard at the request of the driver at the time of the accident in which they respectively answer the question "Who do you consider to blame for accident?" as follows: "Car in road" and "The car that was parked on the highway"; and (4) the following testimony of the bus driver during redirect examination: "Q. Mr. Hobert, after you had discovered the car in the position it was in, that is, the car that was parked, did you do everything that was in your power to miss that car? A. I did."

[11, 12] The mere statement by the bus driver that he "did everything" in his power "to miss that car" (the fourth asserted conflict) amounts only to a mere conclusion on his part and certainly does not create a real or substantial conflict with the testimony of such driver wherein, when asked the question, "You didn't make any effort to slow down; just turned out and kept on going?" he answered, "Yes," and again, when asked the question, "And you cut too short, is that it?" he answered, "I didn't cut enough to miss it." When asked, "That is right, you didn't cut enough to miss it, and you had all that room, and there was no other traffic on the highway either behind you or coming toward you?" he replied, "That is right." Nor does the foregoing claim of the bus driver that he "did everything" in his power "to miss that car" overcome the other detailed and positive evidence heretofore narrated concerning the occurrence of the collision. It does not create a material conflict in the evidence within the meaning of the settled rule which would support a finding based thereon. Ventre v. Tiscornia, 23 Cal.App. 598, 604, 138 P. 954. More than a mere conflict of words is required to constitute a conflict of evidence. Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650. A real and substantial conflict is not created by evidence that is slight and tenuous.

[13] The uncontroverted facts in the instant action evidence an accident which could not have happened except for the negligence of the bus driver and they are sufficient to show negligence as a matter of law regardless of the first and second claimed conflicts. Under the conditions here present, whether the bus was traveling

35 or 45 miles per hour, and whether the parked car was struck by the bus while traveling straight ahead or while swinging to the left, the driver, having seen the car standing on the highway when the bus was 100 feet away and not having reduced his speed or applied his brakes to more easily avoid it, was negligent.

[14] In this action by a passenger against a common carrier we are not concerned with the negligence of parties other than defendant corporation. The negligence, if any, of the person who was responsible for the position of the car struck by the bus is not here in issue. The sole question is whether the bus driver was guilty of negligence which proximately contributed to the accident. Consequently we disregard the aforesaid third asserted conflict. Furthermore, the statements therein mentioned are mere conclusions of the declarant and possess no evidentiary value.

We are forced to conclude that in the instant action there is no appreciable, material or substantial conflict in the evidence on the issue of defendant's negligence, and that the care and skill, if any, allegedly exercised by the bus driver in his claimed attempt to avoid hitting the parked car falls so far short of that high degree of care and skill owed by defendant corporation to its paying passengers that there is no room for a reasonable divergence of opinion. The disregard by defendant's bus driver of the standard of conduct required of persons under the circumstances here present is so obvious that his negligence was established as a matter of law, because reasonable minds could draw from the evidence but one inference, and that points unerringly to the bus driver's negligence as the proximate cause of the injury to plaintiff.

[15] Respondent's contention that there was a conflict in the evidence as to the extent of appellant's injuries is without merit, because there is no claim made that the damages awarded were excessive, and a reading of the record impresses us that the amount thereof could not be held to have been influenced by passion or prejudice.

[16] All intendments are in favor of the validity of an order granting a new trial and that it was properly made. Therefore, even though it cannot be sustained on the ground specified therein, if it was proper on any of the other grounds upon which the motion was made it will not be reversed on appeal. Although the motion herein was predicated upon twelve grounds, the only one other than the foregoing urged in the trial court or presented on appeal is that the court erred in excluding the testimony of Dr. Alvin Gerty, a witness produced on behalf of the defendant. In that regard, the record reflects that after he had been qualified, but before he gave any evidence of or concerning plaintiff and her injuries, the doctor stated to the court, "I don't believe, in all fairness to the patient, that I have the right to communicate information that she consulted me about," to which the court replied, "You may stand on the privilege if you so desire." Thereupon the following ensued:

"The Witness: I don't believe that I should testify in this case myself, for the patient consulted me. I gave her my opinion, if she justifiably tells here what she thinks is right to say, and I told her about her case. That is up to her.

"The Court: Does the plaintiff waive the privilege?

"Mr. Coombs (attorney for plaintiff): No, we do not, your Honor.

"The Court: You may stand on your privilege, if you so desire, Doctor."

Thereupon the court sustained objections to any question being asked the witness concerning his consultation with plaintiff as a patient, and his diagnosis of or treatment prescribed for her. If the proffered testimony was material, the ruling was clearly erroneous. Subdivision 4 of section 1881 of the Code of Civil Procedure, which has to do with privileged communications between physician and patient, clearly and specifically provides "that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify."

However, the foregoing provisions of the statute provide that the plaintiff who institutes an action such as the instant one shall thereby be deemed to have waived the privilege as to any physician who has prescribed for or treated such plaintiff "and whose testimony is material in said action". The trial court was not apprised, nor can we ascertain from the record, whether the testimony of this doctor was "material in said action." No offer of proof was made, nor did respondent at any time indicate to the court wherein the testimony of this witness was material. From the doctor's answers to qualifying questions we learn that since 1931 he "specialized in neurology and psychiatry," which is commonly and generally understood to mean that branch of medical science dealing with nervous and mental diseases. It also appears that this witness, in April, 1934, examined appellant at the request of her physician, Dr. Robert S. Ward, who testified at considerable length during the trial, both on direct and cross-examination. But nowhere in the testimony of Dr. Ward was he interrogated concerning his reference of appellant to Dr. Gerty for examination. Dr. Ward was questioned concerning his reference of appellant to two ear specialists because of her complaint that since the accident her sense of hearing was injuriously affected, and he was permitted to testify as to the findings and diagnosis of the ear specialists, but not one word was said to him regarding his reference of appellant to Dr. Gerty, a specialist in neurology and psychiatry. Dr. Ward was cross-examined as to appellant's sleeplessness, and nervous condition, as well as the anxiety she had about her injuries and he testified that he prescribed sedatives "for her nervous condition, and also for her pains".

[17-19] No citation of authority is necessary for the statement that one who complains of a ruling excluding proffered evidence must not only show that such ruling was erroneous, but must also assume the burden of showing resultant prejudice. Section 475 of the Code of Civil Procedure enjoins upon the trial court the duty at every stage of an action, which includes proceedings upon motion for a new trial, to "disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties"; and the same section is authority for the statement that there is no presumption that error is prejudicial, or that any injury was done if error is shown. Even though it be conceded that the ruling was erroneous, it cannot be conceded that the same was prejudicial unless the testimony was "material in said action". In the absence of an offer of proof, or at least a statement to the court showing wherein the testimony of Dr. Gerty was material, we cannot assume, nor can we say, that the rights of respondent were prejudicially affected by the court's ruling. We have painstakingly read the reporter's transcript of the trial, and must confess that from a reading thereof we are unable to perceive wherein any testimony sought from this neurologist and psychiatrist was material to the issues framed by the pleadings or presented by the proof in this cause. At no time did respondent intimate to the court, nor is it pointed out on appeal, wherein the testimony of Dr. Gerty was "material in said action," nor wherein the ruling of the court prejudicially affected the substantial rights of respondent to a fair trial. Under such circumstances the order granting a new trial cannot be sustained on the ground that the court committed prejudicial error under the provisions of subdivision 4, section 1881 of the Code of Civil Procedure, in depriving respondent of the right to examine Dr. Gerty.

[20-22] We have in mind the reluctance with which appellate courts reverse orders granting or refusing new trials, and we are not unmindful of the rule that the trial court, in passing upon such motion, is not bound by the findings of the jury if there is sufficient evidence to sustain a contrary finding; nevertheless, where, as in the case at bar, there is no substantial evidence upon which a contrary verdict or judgment could be founded, the order granting a new trial cannot be sustained upon appeal. The granting of the motion for a new trial under the circumstances presented by the record herein amounted to an abuse of discretion.

For the foregoing reasons, the order granting a new trial and vacating and setting aside the verdict and judgment, is reversed.

YORK, P. J., concurs.

DORAN, Justice.

I dissent:

Whether a conflict exists in the evidence is beside the only issue presented by the appeal. That issue is whether there is substantial evidence to sustain the order. Either one of two conclusions may be drawn from the evidence, one, the manner of operating the vehicle amounted to negligence, and two, it did not. The jury reached one conclusion and the court the other. In my opinion, the evidence supports either, hence, the court's action finds support in the record and therefore, under the well established doctrine on appeal, must be upheld. The wisdom of the trial court's action may not be taken into account. And the action of the trial court in granting the motion cannot be assigned as an error occurring at the trial.

This is not an appeal from the judgment; consideration is limited to the grounds specified in the clerk's minutes of the order granting the new trial. Mazzota v. Los Angeles Ry. Co., 25 Cal.2d 165, 153 P.2d 338, and In re Green's Estate, 25 Cal.2d 535, 154 P.2d 692.

71 Cal.App.2d 669

PEOPLE v. BROWN.

Cr. 2343.

District Court of Appeal, First District, Division 1, California.

Nov. 15, 1945.

1. Criminal law 🔑1023(12, 13)

Orders denying accused's motions to set aside verdict of jury and in arrest of judgment are not appealable.

2. Criminal law 🔑415(3), 419(1)

In sex cases generally, evidence consisting of recital of facts by victim to third party is inadmissible as hearsay, but fact that a complaint of commission of particular offense was made is admissible upon theory that it is a spontaneous exhibition, without compulsion, of victim's physical condition or mental attitude following perpetration of unusual and unnatural act. Pen.Code, § 286; St.1937, p. 1033, § 702.

3. Infants 🔑20

In prosecution for contributing to delinquency of minor, admissibility of evidence of complaint of commission of offense depends upon particular facts. St. 1937, p. 1033, § 702.

4. Criminal law 🔑1158(4)
Infants 🔑20

In prosecution for contributing to delinquency of minor, if accused attacks sufficiency of evidence on ground that no complaint was made by victim, then the people should be permitted to prove that a complaint was made, and it is for trier of facts to determine if such complaint has any evidentiary value. St. 1937, p. 1033, § 702.

5. Infants 🔑20

In prosecution for contributing to delinquency of minor, if people deem it necessary to introduce evidence of a complaint as tending to prove truthfulness of another charge in information on theory that victim may be an accomplice, such complaint must be recent to be considered as corroborative evidence; the word "recent" meaning at the earliest practical moment, as soon as possible, promptly, or immediately. St.1937, p. 1033, § 702.

See Words and Phrases, Permanent Edition, for all other definitions of "Recent".

6. Infants 🔑20

In prosecution for contributing to delinquency of minor, in determining admissibility of victim's conplaint of commission of offense, due consideration should be given to opportunity to complain, to the age, sex, and mentality of victim and to person to whom complaint was made, and the matter of whether complaint was a voluntary statement or was obtained by use of violence, threats, artful coaxing, or enticement. St.1937, p. 1033, § 702.

7. Infants 🔑20

In prosecution for contributing to delinquency of minor, testimony that minor complained to prosecutor some two months after commission of alleged offense regarding facts which would warrant prosecution under section 288a, was inadmissible as being too remote from date of alleged offense. St.1937, p. 1033, § 702; Pen.Code, § 288a.

8. Criminal law 🔑365(1), 415(1)

Evidence of another offense committed as part of or continuation of crime charged may be admissible as part of res gestae, but evidence of conversation covering an offense not included in information upon the theory of "making a complaint" of the offense charged is inadmissible.

9. Criminal law 🔑742(1)

In prosecution for contributing to delinquency of minor boy, boy's veracity was for jury. St.1937, p. 1033, § 702.

10. Criminal law 🔑418(2)

When an out of court accusation is made, it is not the accusation, but the conduct of accused, that is evidence, and accusation is merely admitted to explain conduct of accused.

11. Criminal law ⚷418(2)

Where accused denies an out of court accusation, the accusation should not be admitted unless admissible on other grounds.

12. Criminal law ⚷406(2), 418(2)

An accusation and denial of guilt of alleged offense are inadmissible, but a denial followed by admission of special facts or circumstances tending to prove guilt is relevant.

13. Criminal law ⚷369(2), 406(5), 1169(11, 12)

In prosecution for contributing to delinquency of minor boy, admission of evidence that accused also violated Section 288a with which accused was not charged, and admission of accused's alleged statement "fellows like me should be shot", in reply to question "Why do you men fool around with boys?" constituted prejudicial error where without such evidence boy's evidence was not corroborated and boy's veracity was questioned by people's representatives. St.1937, p. 1033, § 702.

◆

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Benton H. Brown was convicted of causing and contributing to the leading of an idle, lewd, dissolute, and immoral life by a 14-year-old boy, and from the judgment, an order denying a motion for new trial, and order denying a motion to set aside the verdict and a motion in arrest of judgment, he appeals.

Appeals from orders denying motion to set aside the verdict and motion in arrest of judgment dismissed, and judgment and other order appealed from reversed and cause remanded for new trial.

Joseph P. Lacey, Harmon D. Skillin, and George Olshausen, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., for respondent.

WARD, Justice.

[1] The information filed in this case charged in two counts a violation of Penal Code section 286 (the crime generally referred to as sodomy), and also a violation of section 702 of the Welfare and Institutions Code, St.1937, p. 1033, alleged to have been connected in its commission with the first offense. Defendant was acquitted on the first count and convicted on the second. The latter set forth certain acts, based on the first count, which, according to the allegations, caused and contributed to the leading of an idle, lewd, dissolute and immoral life by a fourteen year old boy. The appeal is from the judgment, from an order denying a motion for a new trial and orders denying a motion to set aside the verdict and a motion in arrest of judgment. Only the judgment and the first designated order are appealable.

The minor boy testified that he had graduated from the high seventh grade in a junior high school but had run away from home about May 8, 1944, following which admittedly he maintained himself with money paid him for permitting acts of the character of those charged in the first count. On August 27, 1944, the boy was accosted by the defendant, a stranger, and requested to carry some packages. The boy acquiesced and was thereafter asked by defendant to "come up to my room." On the witness stand the boy related the details of a story which if it did not tend to show a violation of section 286 of the Penal Code, at least, if true, constituted a violation of Welfare and Institutions Code, sec. 702.

Appellant bases a claim of prejudicial error on (1) admission of hearsay testimony in relation to a complaint made by the boy subsequent to the offense; (2) the reception in evidence of an accusatory statement after proof of denial by defendant; (3) admission of evidence tending to show alleged misconduct of defendant with other boys.

[2-4] In sex cases generally, evidence consisting of a recital of the facts by a victim to a third party is a violation of the hearsay rule, but the fact that a complaint of the commission of the particular offense was made is admissible upon the theory that it is a spontaneous exhibition, without compulsion, of the victim's physical condition or mental attitude following the perpetration of an unusual and unnatural act. People v. Mayes, 66 Cal. 597, 6 P. 691, 56 Am.Rep. 126; People v. Lee, 55 Cal.App.2d 163, 130 P.2d 168. The admissibility of such evidence depends upon the facts in each particular case. If the defendant on the trial attacks the sufficiency of the evi-

dence upon the ground that no complaint was made by the alleged victim, then the People should be permitted to prove that a complaint was made, and it may be left to the trier of the facts to determine if such complaint has any evidentiary value under the circumstances disclosed.

[5, 6] If the People deem it necessary to introduce evidence of a complaint as tending to prove the truthfulness of the charge in the first count of the information, upon the theory that the victim may be an accomplice, then it has been said that such complaint must be recent to be considered as corroborative evidence. People v. Adams, 14 Cal.2d 154, 93 P.2d 146; People v. Ewing, 71 Cal.App. 138, 234 P. 917. Expressions held as coming within the scope of the relative word "recent" are "at the earliest practical moment," "as soon as possible," "promptly," "immediately." Due consideration should be given to the opportunity to complain, People v. Hubbell, 54 Cal.App.2d 49, 128 P.2d 579, to the age, sex and mentality of the victim and to the person to whom the complaint was made. There should also be considered the matter of whether the complaint was a voluntary statement or was obtained by the use of violence, threats, People v. Ewing, supra, artful coaxing or enticement. The attitude of the victim in making a complaint of the commission of one offense, when in fact it develops on the trial that two distinct offenses were committed, is important in determining the relevancy and competency of the complaint. On motion for new trial and on appeal another problem may be considered, namely, the acquittal on one charge and conviction upon the other.

[7, 8] In the present case the boy was fourteen years of age at the time of the commission of the offense; he had passed the seventh grade in school; he had sufficient ingenuity to build a rough shack to house himself for several months after he had run away from home, and he had devised a means—unfortunately immoral—of obtaining money to buy food. This condition continued for a period of over four and a half months. A physician specializing in psychiatry testified that the boy knew the difference between right and wrong. The offense in question was committed on the 27th day of August, 1944; the boy was apprehended a few days later as a delinquent and told a story upon which a complaint was filed alleging violations of Penal Code section 286 and Welfare and Institutions Code section 702, but no charge alleging an offense under section 288a was ever filed. On the trial the complainant related facts that would warrant a prosecution under the latter section. He thought he had told a specified member of the police the facts relating to section 288a. This was denied by the officer. The boy then claimed that he had related the matter to the district attorney a day or two before the trial. The admission of the fact of complaint to the prosecutor some two months later was too remote from the date of the alleged offense. Evidence of another offense committed as a part of or continuation of the crime charged may be admissible as part of the res gestae, but evidence of a conversation covering an offense not included in the information upon the theory of "making a complaint" of the offense charged is error.

[9] In the present case the district attorney elicited the evidence that in addition to a violation of section 286 there had also been a violation of section 288a. The district attorney asked "Did you tell any one what happened in the room?" Assuming that such evidence of an additional offense was admissible as part of the res gestae, and that the evidence of a "complaint" of the additional offense, though erroneous, would ordinarily be unimportant, it happens that in this case the question of the complaint of the additional offense was important as it developed that the official to whom the boy claimed he made a complaint of a violation of sec. 288a denied that any such complaint had ever been made. The veracity of the boy was a question for the jury, but if there is other error in the record that may be prejudicial it gives color to appellant's contention that the boy "made up his story as he went along." With this background it is advisable to scrutinize the record for error that may be prejudicial.

[10, 11] At the time of the arrest of the defendant, the police officer accused him of committing sodomy upon the boy. The defendant denied the accusation. In People v. Zoffel, 35 Cal.App.2d 215, 223, 95 P.2d 160, 164, it was said: "When an out of court accusation is made, it is not the accusation, but the conduct of the accused that is evidence, and the accusation is merely admitted to explain the conduct of the

accused. Where the accused denies the accusation, the accusation should not be admitted at all, unless admissible on other grounds." See, also, People v. Teshara, 134 Cal. 542, 66 P. 798; People v. Weber, 149 Cal. 325, 86 P. 671; People v. Lee, 55 Cal.App.2d 163, 130 P.2d 168; People v. Lapara, 181 Cal. 66, 183 P. 545; People v. Albertson, 23 Cal.2d 550, concurring opinion 581, 584, 145 P.2d 7; People v. White, 44 Cal.App.2d 183, 112 P.2d 60.

Respondent calls attention to the record as follows: "Q. Did this man say anything—I will withdraw that—Mr. Lacey: Why don't you ask him if he denied this thing, to be fair? Mr. Bodisco: I don't think that is admissible. Mr. Lacey: It would be, to be fair. Mr. Bodisco: Q. Did this man say anything in response to that? A. Yes, he denied it." Following the above the district attorney asked: "Did this man say anything else?" This was followed by an objection and a ruling permitting the evidence. Finally the police officer witness said: "I made the statement I couldn't understand what was the trouble with you kind of men who fool around with boys." The defendant, according to the witness, replied "Fellows like me should be shot." When the question—why do you men fool around with boys—and the answer are considered together, notwithstanding defendant's denial of the commission of this particular offense, it may be construed as an admission that the defendant had been fooling around with other "boys."

[12] An accusation and a denial of guilt of an alleged offense are not admissible, but a denial followed by an admission of special facts or circumstances tending to prove guilt is relevant. For instance, an accused may deny the commission of a criminal offense but subsequently acknowledge that he was at the scene of the crime. The latter statement would be admissible but a denial followed by a confession that the accused was in fact a person of a specified type, for instance, a sex pervert, would be error. Under our method of criminal procedure an accused is not convicted because he is a robber but only upon evidence of guilt of a robbery. In this case no claim is made that the commission of other specified crimes would tend to prove intent, so that theory may be eliminated.

In People v. Wyett, 49 Cal.App. 289, 193 P. 153, this court held in a sodomy case that evidence of other acts committed upon other persons than the complaining witness constitutes evidence of a distinct crime. At page 292 of 49 Cal.App., at page 154 of 193 P., the court said: "We are of the opinion that the error of the trial court in the admission of this evidence was sufficiently prejudicial to compel a reversal in the present case. The defendant was convicted upon the testimony of the prosecuting witness alone, whose evidence, while it would seem to be sufficient to uphold the verdict, was in some respects quite uncertain, and was doubtless strongly supported in the minds of the jury by the corroborating evidence as to similar acts of the defendant committed upon the person of the boy Menasco. We are therefore of the opinion that section 4½ of article 6 of the Constitution cannot be given application to the case at bar." People v. Singh, 121 Cal.App. 107, 8 P.2d 898; People v. Hartwell, 37 Cal.App. 799, 175 P. 21; People v. Asavis, 22 Cal.App.2d 492, 71 P.2d 307; People v. Rogers, 26 Cal.App.2d 371, 79 P.2d 404; People v. Huston, 45 Cal.App.2d 596, 114 P.2d 607; People v. Adams, 76 Cal.App. 178, 244 P. 106; People v. Bowen, 49 Cal. 654. Referring to cases of this general type, in People v. Anthony, 185 Cal. 152, 158, 196 P. 47, 49, involving a lewd and lascivious act, the court said: "Our rule confining the testimony to the crime charged in the information has only been relaxed so far as to permit testimony of similar conduct with the complaining witness." If the evidence was admissible on the sec. 286 charge, we are confronted with the fact that defendant was acquitted on that charge.

[13] In the present case when the erroneously admitted evidence is disregarded, the evidence of the boy stands alone in support of the verdict of the jury. His evidence was not only "quite uncertain," People v. Wyett, supra, but his veracity was questioned by the representatives of the people. In view of this and other evidence of the sordid details of this criminal offense (which need not be related here), it appears that there was not only error but that it was prejudicial error.

The orders denying defendant's motion to set aside the verdict of the jury and motion in arrest of judgment are not appealable orders. The purported appeals therefrom are hereby dismissed. The appeal from the judgment of conviction and the order denying defendant's motion for a new trial are reversed and the cause remanded for a new trial.

PETERS, P. J., and OGDEN, Justice pro tem., concur.

71 Cal.App.2d 390

WHITE v. WHITE.

Civ. 14949.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1945.

As Modified Nov. 16, 1945.

Rehearing Denied Nov. 16, 1945.

Hearing Denied Dec. 27, 1945.

1. Parent and child 🔑3(1)

Mother is charged equally with child's father to protect, nurture, and educate the child. Civ.Code, §§ 138, 139, 196.

2. Divorce 🔑324

In divorce action, award of custody of child to mother and requirement that father pay money for child's support did not absolve mother from a parent's obligation to protect, nurture, and educate the child. Civ.Code, §§ 138, 139, 196.

3. Divorce 🔑305

Where divorce decree, which awarded mother custody of child, specified as a condition of award that father be privileged to visit child, mother's violation of the decree by removal of child from state without compliance with conditions upon which removal was permitted did not enlarge her rights, and mother could not demand continuance of father's contribution toward child's support.

4. Contempt 🔑80

One who willfully frustrates a valid judgment cannot receive relief therefrom.

5. Divorce 🔑305

Where mother of minor child, in opposing motion by father to be relieved from obligation to contribute to support of child while mother kept child out of state in violation of a court order, failed to show that child was in need or even that any hardship was suffered by mother, order relieving father of the obligation was sustained. Civ.Code, §§ 138, 139, 196.

6. Divorce 🔑305

Where original custody order in divorce case directed that mother should not remove child from Southern California, father's appeal from a subsequent order permitting removal of child upon certain conditions stayed proceeding upon order appealed from, so that mother's removal of child from state was in direct violation of the then existing order. Code Civ.Proc. § 949.

7. Divorce 🔑306

As between parents, under ordinary circumstances, where both have separate estates, or father only has his separate estate, or there is no fund except community estate or earnings, and a separation occurs, father will be obliged to make provision for minor children. Code Civ.Proc. § 949.

8. Divorce 🔑305

Where mother removed child from state at a time when there was in effect an order prohibiting such removal, trial court had authority to enter an order relieving father of obligation to contribute to support of child so long as mother kept child out of state, even if there had been no former order of contempt against mother.

9. Divorce 🔑305

Ordinary purpose of order relieving father of obligation to contribute to support of child so long as mother keeps child out of state in violation of a court order is to deny mother benefit of father's assistance so long as order is violated.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Angela M. White against McDonald White for divorce, wherein a decree was entered granting plaintiff a divorce and custody of a minor child. From an order relieving defendant of obligation of supporting minor child of parties until such time as plaintiff purged herself of contempt and returned child to state after child had been removed from state in violation of a court order, plaintiff appeals.

Affirmed.

See also 157 P.2d 415.

George I. Devor, of Los Angeles, for appellant.

Gerald E. Kerrin, of Los Angeles, and James C. Bone, of Arcadia, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the trial court abused its discretion in relieving a husband of the obligation to contribute to the support of his minor child as provided by the decree of divorce, after the wife removed the child from this state contrary to the decree and subsequent orders.

Following the entry of the interlocutory decree awarding to appellant custody of the daughter, Nancy, she was ordered on July 31, 1940, not to remove the child from Southern California. On May 23, 1944, pursuant to her application an order was entered permitting the mother to remove Nancy from the state upon three conditions, namely, (1) the current school term must first be completed; (2) the father must be continuously advised of the address of his daughter's domicile; (3) the wife must co-operate in making reasonable arrangements for the father to visit his child.

Pursuant to an order to show cause on October 19, 1944, appellant was adjudged "guilty of contempt of court and until such time as plaintiff purges herself of contempt and returns the child to California, defendant will be relieved of the obligation of supporting the minor child." The quoted order was upon a review of the contempt proceeding by this court held to be valid. Olcott v. Superior Court, 68 Cal.App.2d 603, 157 P.2d 36.

[1-4] Notwithstanding the foregoing events appellant boldly contends that her sins and derelictions should not be visited upon her innocent child; that, although she had contemned the orders of the court, the chancellor should have made provision that she should suffer no financial discomfort despite her disobedience of a decree in equity. Such contention is based upon wholly selfish considerations. She is entitled to no more than the orders of the court provided for her. The mother is charged equally with the child's father to protect, nurture and educate their infant progeny. Civil Code, secs. 138, 139, 196. The award of Nancy's custody to appellant and the requirement that respondent pay money for her support did not absolve appellant from a parent's obligation. The very decree that awarded her the custody specified as a condition of such award that respondent be privileged to visit Nancy. Her violation of that decree could not have enlarged her rights. If it did not, she is in no position to demand privileges. After spurning the court's decree by removing Nancy from the state she was in no better position to demand a continuance of respondent's contribution toward the child's support than she would be had the father been removed from this mundane sphere. Releasing respondent from the duty to make the payments resulted solely from appellant's rebellion against the decree which had been made for her benefit. One who wilfully frustrates a valid judgment pleads in vain for relief therefrom.

[5] She now argues for her own advantage while pretending an interest solely for the child. But protestations in behalf of the daughter are unavailing for the reason that in the absence of a showing that the child is in need she will not be considered a party to such a proceeding. That showing was not made. As a plea for her own interests appellant's brief is a vain clamor, for it does not disclose any hardship to have been suffered by appellant. On the contrary she is basking in the chosen liberty of a new life, free from the agencies of the Superior Court of this state, both of which she preferred rather than compliance with its judgments. The order of which she now complains, viz., withholding payment of monthly sums from her, until such time as she purges herself of contempt and returns the child to California, is not capricious, arbitrary or unreasonable but in view of the record was made in the exercise of a sound discretion.

In support of her thesis that "decency demands that the father perform the duty of supporting his own child" appellant cites Laumeier v. Laumeier, 237 N.Y. 357, 143 N.E. 219, 32 A.L.R. 654; Zirkle v. Zirkle, 202 Ind. 129, 172 N.E. 192; Arbuckle v. Jones, 292 Ill.App. 643, 11 N.E.2d 867; Metson v. Metson, 56 Cal.App.2d 328, 132 P.2d 513. They are not pertinent. Mrs. Laumeier brought an action in New York on behalf of her post-divorce-born child notwithstanding the divorce had been granted in Missouri. At the time of the Zirkle decree in Indiana the wife resided in Illinois and she was not required to keep the child within the court's jurisdiction. The Arbuckle case announces nothing more than the duty of a husband to support his child even though the wife had disobeyed the decree. The Metson case involved the contention that the court had no jurisdiction to entertain the application of the wife for extra moneys to pay for dental services in the absence of an allegation from her petition that the allowance awarded in the decree was insufficient. After stating that it was not necessary for "the evidence" to be alleged in such petition, the court observed that the divorce court retains "continuing jurisdiction to modify or alter its orders in reference to the custody and maintenance of the children. § 138, Civ. Code." [56 Cal.App.2d 328, 132 P.2d 515.]

Inasmuch as the order appealed from was within the discretion of the court, it is an effectual modification of the decree and is in fact an adjudication of appellant's contempt and a punishment therefor.

The order is affirmed.

WILSON, J., and FOX, Justice pro tem., concur.

On Petition for Rehearing.

PER CURIAM.

Without the slightest pretense of contrition or conciliation for her flouting the order of the court plaintiff, still ensconced in her Pennsylvania home with her child by her side, demands through her counsel a rehearing to the end that it might be adjudged by this court that she had been guilty of only a technical contempt of court and hence her deprivation of the monthly payments was unjust. The situation may have been better understood if we had set forth even more fully the history of appellant's litigious efforts to effect her purposes.

Following the events narrated in the second paragraph of the opinion, appellant accompanied by Nancy departed from California. On September 15, 1944, defendant filed his affidavit setting forth that he had appealed from the order of May 23, 1944, but that plaintiff had removed Nancy from California to the home of her new husband at Cheney, Pennsylvania. Pursuant to the order to show cause issued upon such affidavit hearing was had thereon at the same time with plaintiff's motion for an order requiring defendant to pay sums for attorney's fees and costs. After granting her motion the court made the order quoted in the third paragraph of the opinion, which is the order appealed from. The affidavit of defendant before the court at the time contains the averment that pending the appeal of defendant from the order of May 23, 1944, and without further order of the court and without the knowledge or consent of defendant, plaintiff took Nancy out of California. Just prior to the time of adjudging plaintiff guilty of contempt the parties stipulated (1) that plaintiff and minor child are out of California; (2) that the record discloses that plaintiff had no authority to remove the child; (3) that the child should not have been removed until the end of the current school term.

[6] While it is true that there is no evidence that Nancy was removed from this state prior to the close of the school term, yet plaintiff knew that defendant had taken appeal from the order of May 23rd. The language of section 949, Code Civil Procedure, could not be more explicit in its provision that "* * * the perfecting of an appeal stays proceedings in the court below upon the * * * order appealed from." Contending that the order of September 15, 1944, was void plaintiff sought by a review to have that order annulled. In declining to grant such order we then held that because of the appeal from the order of May 23 the parties remained as they were under the order of July 31, 1940. Olcott v. Superior Court, 157 P.2d 36. Ignoring that decision plaintiff carried on after a fashion most pleasing to herself. She neither sought to make amends to defendant nor attempted to do any act that might minimize the contempt which had evidently been a factor in causing the court to impose the order appealed from.

[7] This court decided the Olcott case on March 29, 1945. Although that was a determination of the validity of the order now on appeal, without deigning in any respect to comply therewith plaintiff proceeded with the present appeal as though the only question involved was whether a father is under any and all conditions solely responsible for the support of his child. It is conceded that as between the parents under ordinary circumstances, where the parents both have separate estates, or the father only has his separate estate, or there is no fund except the community estate or earnings, and a separation occurs, the father will be obliged to make provision for the minor children. But this is not an ordinary case. The child was born in Los Angeles County and had been reared there

from birth. All of her relatives including all grandparents reside in the same community. When the question of custody first arose the parties stipulated that the court might include in its order that defendant visit Nancy on all Wednesdays, take her to his own home every other Friday to remain until Sunday and might have her at Thanksgiving and for the summer vacations, so long as he made "some plan for some member of his family or friends to assist him in caring for the child," and that she should not be taken out of Southern California. Such evidence, stipulation and order indicate that there was some good reason for keeping Nancy near her father. Plaintiff having chosen to disregard the rights of the father by keeping his child some 3000 miles away from him, no such situation is presented as requires the court to force defendant to support the child while she remains out of California. With her mother she is housed in the Olcott home in Pennsylvania. Nothing indicates that plaintiff is without funds or that withholding the $30 monthly payments will do more than deprive her of luxuries which she might enjoy but for her duty to her child.

That the trial court did not abuse its discretion in making the order is clear.

[8, 9] The contention that the adjudication of contempt became functus officio upon the affirmance by this court of the order of May 23 is without merit. The various orders affecting the conduct of these parties have no relevancy except to disclose the necessity of imposing some hardship upon plaintiff for the free rein she takes and for her evident disregard of defendant's rights which the court below has attempted to protect. The order before us might in different words have been made even if there had been no former order of contempt. Its primary purpose was to deny plaintiff the benefit of defendant's assistance so long as she keeps Nancy out of this state. That she had exhibited a recalcitrance before the order of September 15 is merely some of the evidence in support of the order. The authorities cited (Fremont v. Merced Mining Company, 1858, 9 Cal. 18; Canavan v. Canavan, 18 N.M. 640, 139 P. 154, 51 L.R.A.,N.S., 972, Ann.Cas. 1915D, 1007; State v. Neveau, 236 Wis. 414, 295 N.W. 718; Salvage Process Corporation v. Acme Tank Process Corporation, 2 Cir., 86 F.2d 727; Republic Electric Company v. General Electric Company, 3 Cir., 30 F.2d 99, 100) are not pertinent. Plaintiff is not here on an order convicting her of violating an injunction. It is merely an order relieving defendant from the necessity of making the monthly payments.

Rehearing denied.

Hearing denied; CARTER, J., dissenting.

71 Cal.App.2d 550

PEOPLE v. NYMER et al.

Civ. 14918.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1945.

Licenses ⚷30, 32(1, 2)

Under statute, an additional assessment for sales tax did not become final until notice of board's decision denying taxpayer's petition for reassessment was served on taxpayer, the additional assessment did not become delinquent until 30 days thereafter, and action to recover additional assessment brought within three years from delinquent date was not barred by limitations. Gen.Laws 1937, Act 8493, §§ 17, 20, 21, 30.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by the People of the State of California against Ralph J. Nymer and Samuel Reichler to recover sales taxes allegedly due under the Retail Sales Act. Judgment for defendants, and plaintiff appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for appellant.

Samuel A. Miller, of Los Angeles, for respondents.

FOX, Justice pro tem.

This is an action by the People to recover upon an alleged liability for sales taxes under the California Retail Sales Tax Act of 1933, as amended, Gen.Laws 1937, Act

8493. From a judgment in favor of the defendants the People have appealed.

From April 1, 1935, to and including April 30, 1936, defendant Nymer engaged in the sale of tangible personal property at retail in the city of Los Angeles. During this period he filed quarterly retail sales tax returns and paid the tax shown to be due thereon. From April 1, 1936, to June 29, 1937, defendant Nymer also engaged in the sale of tangible personal property at retail in the city of San Diego. He filed quarterly retail sales tax returns for the latter business from April 1, 1936, to and including March 31, 1937, but did not file a return for the period commencing April 1, 1937, to and including June 29 of that year. The State Board of Equalization was not satisfied with the returns filed by Nymer and made an audit of the businesses conducted by him during the aforesaid periods. Under the authority granted by section 17 of the Retail Sales Tax Act, the Board made an additional assessment of tax due from his operations at each place. From his Los Angeles business the additional tax assessed was $558.10, together with $55.65 interest and a 10% penalty of $55.82 for negligent or intentional disregard of the Retail Sales Tax Act. From Nymer's San Diego business the additional tax assessed was $1372.88, together with $47.29 interest and a penalty of $39 for his failure to file a return for the fractional quarter ending June 29, 1937.

Within the time allowed by the Act Nymer filed a petition for reassessment of each of the above assessments. On September 29, 1938, the Board denied his request for adjustment of said assessments. Notices thereof were mailed to Nymer by the Board on October 10, 1938. Nymer failed to pay the assessments within thirty days after service upon him of the notices of reassessment and a penalty of 10% of the amount of the tax was added to each assessment under the authority of section 20 of the said Act. No part of these assessments having been paid the People filed this action to collect the same on March 12, 1941.

The trial court found that the three-year statute of limitations provided by section 30 of the Act commenced to run on August 27, 1937, the date of mailing of the original notices of assessment to Nymer, and that since this action was not filed within three years from that date the plaintiff's right to recover on said assessments was barred. The People, however, contend that the statute of limitations did not begin to run until thirty days from October 10, 1938, the date upon which the notices of reassessment were mailed Nymer because, they argue, it was at that time that the tax, penalty and interest assessed against him became final, due and payable, and the penalty for nonpayment attached. Hence the statute of limitations had not run. The position of the People must be sustained.

Section 30 of the Retail Sales Tax Act, as it existed at the time of the assessments upon which this action is based, provided in part as follows: "At any time within three years after the delinquency of any tax, the board may bring an action in a court of competent jurisdiction in the name of the people of the State of California to collect the amount delinquent, together with penalties." (Deering's Gen.Laws, 1937, Act 8493, p. 3903.)

The primary question then is: When does a tax become delinquent within the meaning of this section?

In conformity with the provisions found generally in taxing statutes where the tax is originally determined by the taxpayer who is required to file a return together with a remittance of any tax shown to be due thereon, the Legislature has recognized the practical necessity for allowing a fixed period within which the agency administering the tax may review the taxpayer's return in order to determine whether or not the proper amount of tax has been declared and paid. So, in section 21 of the Act we find the following provision: "Except in the case of a fraudulent return, or neglect or refusal to make a return, every notice of additional tax proposed to be assessed hereunder shall be mailed to the retailer within three years after the return was filed." (Deering's Gen.Laws, 1937, Act 8493, sec. 21, p. 3899.)

Thus the Legislature has provided a three-year period (except where the retailer neglects or refuses to make a return, or files a fraudulent return) for an audit of the tax returns by the State Board of Equalization and for the making of any additional investigation which the Board deems necessary with respect to the amount of tax actually due from the retailer. If the Board is not satisfied with the tax return made by a retailer, it is authorized by section 17 of the Act to make an additional assessment of tax due from such retailer upon facts set forth in the return or upon any information which it has or may obtain. The Board is required by this latter section to give the retailer written notice of such additional assessment. As previously noted the Board made additional assessments against Nymer for both of his places of business. Notice thereof was mailed to him on August 27, 1937. Since the earliest return filed by the retailer in this case was for the second quarter of 1935, the notices of the assessment were mailed well within the three-year period fixed by section 21, supra, of the Act. Consequently, the timeliness of the assessments is clear.

These assessments, however, were not then final. The retailer still had the right to petition, within thirty days, for a reassessment. He filed such petition. Section 20 of the Act then becomes applicable. The material portion of said section reads as follows:

"Any retailer against whom an assessment is made by the board under the provisions of section 17 or 18 hereof may petition for a reassessment thereof within thirty days after service upon the retailer of notice thereof. If a petition for reassessment is not filed within said thirty day period the amount of the assessment becomes final at the expiration thereof.

"If a petition for reassessment is filed within said thirty day period the board shall reconsider the assessment, and if the retailer has so requested in his petition, shall grant said retailer an oral hearing and shall give the retailer ten days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

"The order or decision of the board upon a petition for reassessment shall become final thirty days after service upon the retailer of notice thereof.

"All assessments made by the board under the provisions of section 17 or 18 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent of the amount of the tax." (Deering's Gen.Laws, 1937, Act 8493, pp. 3898, 3899.)

Since the retailer filed a petition for reassessment under section 20 the assessment did not become final until thirty days after service upon him of the Board's decision on said petition. Such notice was served on Nymer on October 10, 1938. The assessments also became due and payable at the time they became final, and if not then paid an additional penalty of 10% of the tax was thereby incurred because of such nonpayment. (Section 20, supra.) It thus follows that since the assessments against Nymer became final, due and payable, and the penalty for nonpayment attached thirty days from October 10, 1938, the said assessment did not become delinquent until that time. In other words, the assessments did not become delinquent until the date on which the penalty for nonpayment attached. People v. Hochwender, 20 Cal.2d 181, 186, 124 P.2d 823. Such penalty did not attach until in November, 1938. Therefore the three-year statute of limitations provided in section 30, supra, did not commence to run until this later date. Since this suit was filed on March 12, 1941, the causes of action therein alleged are not barred by the statute of limitations.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

71 Cal.App.2d 555

PEOPLE v. SMITH.

Cr. 3925.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1945.

Jury 🔑29(6)

Where defendant stated that he was waiving a jury trial and defendant's counsel stipulated that the only question involved was as to the degree of the offense, both defendant and his counsel sufficiently expressed consent to waiver of jury. Const. art. 1, § 7.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

William J. Smith was convicted of burglary while armed with a deadly weapon, and he appeals.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was accused by information with the crime of burglary while armed with a deadly weapon. A trial by jury was duly waived and a trial by the court resulted in a judgment of guilty, from which defendant appeals.

It is contended on appeal that, "the defendant was denied a trial by jury without having duly waived the same in violation of his constitutional rights."

The record reveals the following:

"The Court: People against William J. Smith. Are you waiving a jury trial in this matter?

"The Defendant: Yes.

"The Court: Is this satisfactory to the District Attorney?

"Mr. Hopkins: Yes.

"Mrs. Ellner (Defendant's Attorney): We are going to stipulate that the transcript of the preliminary as it is now, be considered as evidence and the only question involved is as to the degree.

"Mr. Hopkins: We will agree to the stipulation to submit it on the preliminary transcript.

"The Court: Very well. I will read the transcript and it may be considered in evidence and made a part of the reporter's transcript on any appeal."

It is argued that, "No where in the proceedings did Mrs. Ellner, defendant's attorney, waive a trial by jury in behalf of the defendant or herself. Defendant was entitled to representation by counsel and was being represented by counsel, and unless defendant's counsel joined in the waiver, there could be no waiver of trial by jury by the defendant alone while he was so being represented by counsel." Appellant relies on Article I, Section 7 of the California Constitution, which reads as follows:

"The right of trial by jury shall be secured to all, and remain inviolate; * * *. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, * * *."

Defendant's counsel's stipulation that, "the only question involved is as to the degree," was for all practical purposes an admission of guilt by defendant's counsel, for, upon a plea of guilty to the offense of burglary, the court determines the degree. Thus a jury was, in effect, waived. The constitution does not provide how the "consent," referred to therein shall be expressed, whether in writing, orally, directly, indirectly or otherwise. The record as quoted above, sustains the trial court's obvious conclusion that the expression contemplated by the constitution was clearly manifested by defendant's counsel. To hold otherwise would be attributing nonsense to an apparently serious statement of defendant's counsel. In People v. Bastio, 55 Cal.App.2d 615, 131 P.2d 614, 616, the court declared: "No stereotyped language expressing such waiver need be used by the parties, it being necessary only that the words used in their ordinary meaning show an intention to submit the case to a court without a jury."

There being no errors the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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71 Cal.App.2d 641

BRUCE v. BRUCE.

Civ. 12971.

District Court of Appeal, First District, Division 2, California.

Nov. 13, 1945.

Rehearing Denied Dec. 13, 1945.

Hearing Denied Jan. 10, 1946.

1. Marriage 🔑58(7)

A marriage may be annulled for fraud only if fraud relates to matter which the state deems vital to marriage relationship.

2. Marriage 🔑58(7)

A woman's secret intention, concealed from her husband at time of marriage, never to live with him in any home provided by him, constitutes a fraud going to very essence of marriage relation and so vital as to constitute ground for annulment of marriage.

3. **Husband and wife** ⟹3(1)

A husband has right to choose any reasonable living place, to which wife must conform. Civ.Code, § 156.

4. **Fraud** ⟹12
Marriage ⟹58(7)

To constitute ground for annulment of marriage, fraudulent intent not to perform a duty vital to marriage state must exist in offending spouse's mind at very moment that marriage contract is made, as promise made without present intention of performing it constitutes fraud.

5. **Fraud** ⟹50, 58(1)

Fraud is never presumed, but must be proved by clear and convincing evidence.

6. **Appeal and error** ⟹996

Where evidence will support different inferences, choice of inferences is for trial court, whose finding, based on inference drawn, cannot be disturbed on appeal.

7. **Marriage** ⟹60(7)

In husband's suit to annul marriage, evidence did not require trial court to draw inference that defendant wife intended at time of marriage never to live with plaintiff, so that court's denial of annulment was not error.

8. **Marriage** ⟹60(7)

In husband's suit to annul marriage as induced by wife's fraud in promising to leave her mother's home and live with plaintiff without intending to perform such promise, exclusion from evidence of mother's letters to plaintiff, which were not shown to relate to wife's state of mind at moment of marriage, was not error.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Walter M. Bruce against Marie Claudine Bruce for annulment of the parties' marriage. Judgment for defendant, and plaintiff appeals.

Affirmed.

Wm. E. Most, of Oakland, for appellant.

Ralph E. Hoyt, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and Douglas R. Dunning, Deputy Dist. Atty., all of Oakland, amici curiae supporting judgment of trial court.

DOOLING, Justice.

This appeal is taken from a judgment denying the plaintiff an annulment of his marriage to defendant. The complaint charged that the marriage was induced by the fraud of the defendant in that she promised that upon her marriage she would leave her mother's home and live with plaintiff without any intention of performing her promise, and that in fact she had persistently refused to live with plaintiff in the home provided by him. The defendant defaulted and after hearing the evidence produced by plaintiff the court entered the judgment here under attack. The defendant is not represented on this appeal, but the district attorney of Alameda County has filed an amicus curiae brief in support of the judgment.

[1] It is settled law in this state that a marriage may only be annulled for fraud if the fraud relates to a matter which the state deems vital to the marriage relationship. Bragg v. Bragg, 219 Cal. 715, 729, 28 P.2d 1046; Marshall v. Marshall, 212 Cal. 736, 738, 739, 300 P. 816, 75 A.L.R. 661; Mayer v. Mayer, 207 Cal. 685, 695, 279 P. 783; Foy v. Foy, 57 Cal.App.2d 334, 134 P.2d 29. Under this rule our courts have held that the following were sufficient to justify an annulment of the marriage: The fact, concealed from the husband at the time of marriage, that the wife did not intend to have sexual relations with him, Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184; the fact that the wife concealed from the husband that at the time of their marriage she was pregnant by another man, Hardesty v. Hardesty, 193 Cal. 330, 223 P. 951; the known fact of sterility concealed from the other spouse at the time of marriage. Aufort v. Aufort, 9 Cal.App.2d 310, 49 P.2d 620; Vileta v. Vileta, 53 Cal.App.2d 794, 128 P.2d 376.

[2, 3] No case has been cited to us dealing with the particular fraud here involved but we have no hesitation in holding that the secret intention of a woman concealed from her husband at the time of marriage never to live with him in any home provided by him would be a fraud going to the

very essence of the marriage relation and of such a vital character as to constitute ground for annulment. We do not consider it necessary to elaborate the reasons for this conclusion further than to point out that the dwelling together of husband and wife in a common home is a major factor in the development of our entire civilization and a commonplace of our daily life assumed and taken for granted by all without question. The right of the husband to choose any reasonable place of living to which the wife must conform was recognized at the common law and is codified in Civil Code, section 156. While directed to a wholly different question the discussion of the social importance of the home in Miller v. Board of Public Works, 195 Cal. 477, 492, 493, 234 P. 381, 38 A.L.R. 1479, may properly be noticed here.

[4] In order to constitute ground for annulment the fraudulent intent not to perform a duty vital to the marriage state must exist in the mind of the offending spouse at the very moment that the contract of marriage is entered into. Millar v. Millar, supra, 175 Cal. 797, 803, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184; Mayer v. Mayer, supra, 207 Cal. 685, 688, 279 P. 783; Osbon v. Osbon, 240 N.W. 894, 185 Minn. 300, Harding v. Harding, 11 Wash.2d 138, 118 P.2d 789; Allen v. Allen, W.Va., 28 S.E.2d 829. It is the promise made without the present intention of performing it which constitutes the fraud.

[5, 6] We cannot say on the record before us that the evidence was such as to compel the trial court to find that at the time of their marriage the defendant had the present intention never to live with the plaintiff. It is axiomatic that fraud is never presumed but must be proved by clear and convincing evidence (12 Cal.Jur. 816, 832); and where the evidence will support different inferences the choice of inferences is for the trial court, and its finding based on the inference drawn cannot be disturbed on appeal. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; Juchert v. California Water Service Co., 16 Cal.2d 500, 506, 106 P.2d 886.

[7] There is no direct evidence of the intention of the defendant at the time of the marriage. Plaintiff testified that defendant's mother opposed the marriage; that after their marriage defendant told him that she wanted a larger home than he then had, and would possibly like to have her mother live with them; that he secured a larger home and furnished it according to her wishes, she picking out the furniture and choosing the colors for the interior decorations; that defendant then stalled him along telling him that it was difficult to arrange it with her mother; that she began going out with other men and later wrote him a letter stating that she had fallen in love with another man. The only other witness testified that shortly after their marriage he met plaintiff and defendant and congratulated them and that the defendant said "she hoped that everything would work out all right, but there was a lot of hurdles to get over, and that was her job, she said, to be able to get over them."

From this evidence the trial court was not bound to draw the inference that defendant at the time of the marriage intended never to live with plaintiff. It will support the contrary inference that she intended to get over "the hurdles" and live with her husband. Her picking out the furniture and selecting the colors for the new home is more consistent with the inference of good faith than bad. The facts are at least as consistent with the inference that defendant intended to live with plaintiff and changed her mind when she fell in love with another man as they are with the inference that she wilfully deceived him at the time of marriage.

[8] Appellant complains that two letters written him by defendant's mother were not received in evidence. The letters from the mother, even if admissible, are not shown by the record to relate to defendant's state of mind at the moment of marriage, which was admittedly concealed from the mother at that time.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

71 Cal.App.2d 584

PEOPLE v. GILSON.

Cr. 2360.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1945.

1. Gaming ⚿75(1)

The offense of occupying a room with papers and paraphernalia for recording bets on horse races is complete when accused occupies a room for the purpose of recording bets on results of horse racing, even though he does not take bets. Pen. Code, § 337a, subd. 2.

2. Gaming ⚿98(5)

Evidence sustained conviction of occupying a room with papers and paraphernalia for recording bets on horse racing. Pen.Code, § 337a, subd. 2.

3. Criminal law ⚿317, 656(7)

The trial judge may comment on failure of defendant to testify and to explain or deny by his testimony any evidence against him, and such failure may be considered by the court or the jury. Pen.Code, §§ 1093, 1127, 1439; Const. art. 1, § 13.

4. Criminal law ⚿787(1)

Instruction that jury might draw its own conclusions from defendant's failure to testify, when read in connection with instruction on reasonable doubt, amounted to no more than instruction that jury might consider such failure to testify and was not erroneous. Pen.Code §§ 1093, 1127, 1439; Const. art. 1, § 13.

5. Criminal law ⚿1169(1)

Where defendant voluntarily admitted occupancy of a room and use of the three telephones in such room for recording bets on horse racing, admission of testimony of telephone company's employee concerning installation of telephones in defendant's room and in adjoining room where police officers listened in on defendant's conversations was not prejudicial to defendant. Pen.Code, § 337a, subd. 2.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

George Gilson was convicted of keeping and occupying a room with papers and paraphernalia for recording and registering of bets on horse races in violation of Penal Code, § 337, subd. 2, and from the judgment of conviction and an order denying a new trial, he appeals.

Judgment and order affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Miriam E. Wolff, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant was tried to a jury on an information charging a violation of subdivision 2 of section 337a of the Penal Code. Upon a verdict of guilty a judgment followed and the defendant's appeal is taken from the judgment and from an order denying a motion for a new trial.

The information charged that on August 16, 1944, defendant kept and occupied a room at 468 Hickory Street with papers and paraphernalia for the purpose of recording and registering bets on horse races. The testimony presented was to the effect that on August 16, 1944, two police sergeants with a police stenographer and an agent of the telephone company, went to a flat at 534 Buchanan Street where they remained from 9 a.m. to 5 p.m. Previous to that time it had been ascertained that the telephone wires to 530 and 534 Buchanan Street had been tapped, extra wires led off these to the premises at 468 Hickory Street, and hence the latter premises had three telephones. The agent attached two headsets to the wires at 534 Buchanan Street so that the telephone conversations on that line could be intercepted and heard. The stenographer listened on one headset and wrote down the conversation she heard in shorthand, a transcript of which was introduced in evidence. The police officers who listened in identified one of the voices as that of defendant. The conversations related to bets on horse races, showing that defendant was receiving bets on the races by telephone and was giving out certain horse-race results. When the defendant came out of the premises at 5 p. m. one of the officers arrested him and took from him papers identified as records of bets and run-down sheets. The officer, who has had five years' experience in such cases, testified that these records were the types used by a person who takes bets from individual bookmakers. Defendant's admission to the police was introduced in evidence to the effect that he had been in the premises on Hickory Street, that he had been using the three telephones, that the betting markers and run-down sheets were in his handwriting and that he had been operating the book and registering bets for the last three days. During the trial the district attorney stipulated "that there was no actual taking of bets." Finally, a witness testified that he resided at 468 Hickory Street, that defendant occupied a room there during the day, that he had heard defendant give race results over the three telephones but that he had not heard him take any bets.

[1, 2] Appellant argues that the evidence is insufficient to support the verdict because it does not show that any bets were taken. He was not tried for such a violation of the code section. He was charged with a violation of subdivision 2 under which the offense is complete when it is shown that the accused occupied a room for the purpose of recording bets on the results of horse racing. The foregoing statement of facts discloses evidence clearly sufficient to sustain the verdict under this section. People v. Hinkle, 64 Cal.App. 375, 221 P. 693; People v. Manning, 37 Cal.App.2d 41, 98 P.2d 748; People v. Steinfeld, 38 Cal.App.2d 280, 101 P.2d 89; People v. Roche, 68 Cal.App.2d 665, 157 P.2d 440; People v. Partee, 70 Cal.App.2d 736, 161 P.2d 586; and People v. Brown, 71 Cal.App.2d 166, 162 P.2d 300.

[3, 4] Appellant criticizes the instruction, "The defendant had a legal right to take the stand as a witness or not to do so, just as he pleased, or as his counsel may have advised, and you may draw your own conclusions from his testimony or his failure to testify." He states this might be error but gives no reason and cites no authority in support of his argument. The trial judge is authorized to comment on the failure of a defendant to take the stand, and his failure to explain or deny by his testimony any evidence against him, and such failure "may be considered by the court or the jury." Constitution, Article I, sec. 13; Penal Code, sections 1093, 1127, 1439. The statement in the instruction that the jury could draw its "own conclusions" from defendant's failure to testify would seem to imply nothing more than the jury could "consider" such failure of the defendant to deny by his own testimony the positive testimony of certain material facts then in evidence and standing uncontradicted. There is no substantial difference between a statement that the jury may "draw your own conclusions" from defendant's failure to testify and a statement that the jury may "consider" such failure when read in connection with other portions of the instructions which informed the jury that in reaching its determination of the guilt or innocence of the defendant it must be satisfied that the evidence prove guilt beyond a reasonable doubt.

[5] Finally, the appellant complains of the rulings admitting over his objections testimony of an employee of the telephone company concerning the installation of telephone sets in the premises occupied by the appellant and in the neighboring room where the police officers listened in on the conversations conducted by the appellant. The appellant does not indicate how this testimony may be deemed prejudicial to his defense. It was merely preliminary to the testimony of the police officers and of the shorthand reporter concerning the conversations which they heard. Proof of the use of these telephones by the appellant as part of the "paraphernalia, for the purpose of recording or registering any bet or bets" (Penal Code, sec. 337a, subd. 2) was made by other evidence and by the admissions of the appellant. The manner in which these telephones were installed and the method by which the police officers listened to the conversations conducted by the appellant was merely a part of the whole story which was completed by appellant's admission of his use of the telephones for the purposes charged in the information. And since the appellant voluntarily admitted his occupation of the room in question and his use of the three telephones for the purposes charged in the information the evidence of the system and methods of installation of the telephones could not have been prejudicial.

The judgment and order are affirmed.

GOODELL and DOOLING, JJ., concur.

71 Cal.App.2d 570

NYE & NISSEN, Inc., et al. v. CENTRAL SURETY & INS. CORPORATION.

Civ. 12869.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1945.

1. Insurance ⇨665(2)

Finding that plaintiff corporation had no right to maintain action to recover on indemnity bond covering employees of plaintiff and its "financially controlled organizations or enterprises" for defalcations of employee of another corporation because financial control of other corporation was in persons who owned the stock of both corporations could not be sustained, where uncontradicted evidence showed that stockholders conducted business affairs of both corporations through plaintiff corporation. Code Civ.Proc. §§ 367, 369.

2. Insurance ⇨146(3)

An ambiguous contract of insurance must be interpreted against insurer.

3. Insurance ⇨629(1)

Finding that there was no pleading or evidence that plaintiff brought action to recover on indemnity bond covering employees of plaintiff and its "financially controlled organizations or enterprises" for defalcations of employee of another corporation as "trustee" for other corporation could not be sustained, where complaint alleged that other corporation was included as an assured under the bond of indemnity, and such allegation was not denied in the answer, and no demurrer for uncertainty was interposed. Code Civ.Proc. §§ 367, 369.

4. Insurance ⇨665(4)

Finding that there was no proof to support allegation that loss to corporation covered by indemnity bond was caused through defalcations of its employees could not be sustained, where uncontradicted evidence disclosed exact amount of loss sustained by corporation covered by bond, and that one who caused the loss by reason of his defalcations was one of its employees.

5. Evidence ⇨314(1)

In action on bond indemnifying against employees' embezzlement, testimony as to conversation between local manager of company covered by bond and defaulting employee in which employee gave in detail shortages in individual customers' accounts was not inadmissible as "hearsay". Code Civ.Proc. §§ 1851, 1870, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

6. Trial ⇨90

Where testimony was received by stipulation subject to a motion to strike it out, and a subsequent motion to strike was not made, objection to admissibility of the testimony was waived.

7. Evidence ⇨597

Evidence of a particular fact until contradicted or overcome by other evidence is prima facie evidence of that fact, and cannot be arbitrarily rejected. Code Civ.Proc. § 1833.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Nye & Nissen, Inc., and another, against Central Surety & Insurance Corporation, to recover on a bond of indemnity covering the employees of named plaintiff and its "financially controlled organizations or enterprises". From a judgment for defendant, the plaintiffs appeal.

Reversed.

Freed & Freed, of San Francisco (Wm. F. Cleary, of San Francisco, of counsel), for appellants.

Worthington, Park & Worthington, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued to recover on a bond of indemnity covering the employees of Nye and Nissen, Inc., and its "financially controlled organizations or enterprises." The complaint alleged that through defalcations of an employee of Puget Sound Egg Packers Corp., Inc. (hereinafter referred to as Puget Sound), a loss of over $4,000 was sustained, that due proof of loss was made in accordance with the terms of the bond, and that payment was refused. Recovery was sought in the sum of $2,500, the maximum amount covering a single employee under the bond. Judgment went for defendant upon findings which the plaintiffs attack as being contrary to law and the evidence.

The complaint was grounded upon the theory that, though the indemnity bond named Nye and Nissen as the insured it also was made applicable to the organizations and enterprises "financially controlled" by Nye and Nissen, and hence was a contract expressly made for the benefit of a third party—the Puget Sound Egg Packers Corp., Inc.—upon which Nye and Nissen was authorized to sue under the provisions of section 369 of the Code of Civil Procedure.

[1] The trial court found on this issue that Nye and Nissen exercised some supervisory control over their co-appellant, that the defaulting employee was an employee of Puget Sound "according to the requirements of the bond," but that Nye and Nissen had no right to maintain this action because the "financial control" was in Baum and Moncharsh who were the owners of the stock of Puget Sound, and that there was no pleading or evidence that Nye and Nissen brought this action as "trustee" for their co-appellant.

The finding cannot be sustained. The ownership of the stock does not in itself determine the question of the control of the enterprise. The uncontradicted evidence is that Baum and Moncharsh were located in New York, that they owned the stock of both corporations, but that the business affairs of both were conducted in San Francisco under the supervision and control of Nye and Nissen. The question of the capacity of Nye and Nissen to sue in behalf of its co-appellant is settled by these two factors: the contract of indemnity was expressly made for the benefit of Puget Sound, but, if there is any uncertainty in this respect the contract must be so interpreted against the insurer.

That, at the time the bond and its renewals were executed, the parties were fully informed of the financial and business management of the two corporations is not disputed. Nor does it appear that any other "organizations or enterprises" were "financially controlled" by Nye and Nissen or that any other such organizations were within the contemplation of the parties at that time. To the contrary when the original bond was issued in June 1939 it contained as an integral part an excess indemnity endorsement which read: "It is agreed that, subject to the terms of the bond to which this endorsement is attached, the amount of excess indemnity on the Employees performing the duties of the following positions (which are covered by said bond) shall be the amount set opposite the names of those positions respectively."

"Positions, President, Puget Sound Egg Packers, Inc., Tacoma, Washington...... $25,000."

Thus by the terms of the bond the insurer stipulated that the employees of Puget Sound "are covered by said bond." No stronger language was necessary to convey to the insured the intention of the insurer to accept Puget Sound as one of the "financially controlled organizations." Hence, the contract of indemnity was one made for the benefit of Puget Sound and was a contract contemplated in sections 367 and 369 of the Code of Civil Procedure, wherein it is provided that "Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this code." Sec. 367. "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." Sec. 369.

[2] This conclusion seems inescapable, but if there be any doubt as to the "express" terms of the contract the result is the same because it is the settled rule that a contract of insurance must be interpreted against the insurer when ambiguous. Here the insured definitely caused the insured to understand that all the employees of Puget Sound were covered in the bond and that is sufficient to make that organization one for whose "benefit" the contract was made.

[3] Respondent relies upon the finding: "that there is no adequate pleading nor evidence presented before this Court indicating that the Plaintiff, Nye and Nissen, Inc., is bringing this action as trustee for the Puget Sound Egg Packers, Inc., a corporation." This finding has no legal or evidential support. The complaint alleges that the "Puget Sound Egg Packers, Inc. is included as an assured under said agreement." This was, in legal effect, a pleading that the contract was one made "for the benefit" of Puget Sound. It was not denied in the answer, and no demurrer for uncertainty was interposed. If the finding was made on the theory that the complaint should have used the word "trustee" it is

nevertheless error because section 369, supra, supplies that terminology when the pleading discloses that the contract in suit was one "made for the benefit" of the third party in whose behalf the suit is maintained.

The portion of the finding stating that there was no adequate evidence "indicating" the relation of trustee cannot be sustained. The bond of indemnity, the endorsements attached to it, and all the other documentary and oral evidence showed without any conflict that Nye and Nissen was suing on behalf of Puget Sound and that it was by reason of the defalcations of an employee of Puget Sound that the latter organization suffered a loss of $4,273.48 as alleged in the complaint.

[4] Appellants criticize the finding that "The evidence is wholly lacking of any substantial fact or proof indicating that the "Puget Sound Egg Packers, Inc. sustained a loss of Four Thousand Two Hundred Seventy-Three and 48/100 ($4,273.48) Dollars, or any other sum. The evidence fails to support the allegation that Joe Stemp had caused the Puget Sound Egg Packers, Inc. any loss of money or personal property as alleged in Paragraph VII. That all of the proof offered as to the matters referred to in this paragraph is of a hearsay character and is excluded by the Court in making its findings herein." This finding cannot be sustained. The uncontradicted evidence, both oral and documentary, disclosed the exact amount of the loss sustained by Puget Sound, that Joe Stemp was one of its employees, that he caused the loss by reason of his own defalcations, and that he fully confessed his acts in that regard. The record also discloses that additional documentary evidence was offered to prove the various accounts and the shortages in cash but that such evidence was rejected by the trial court upon a ruling that sufficient facts were already proved.

For a number of years Joe Stemp had been an employee of Puget Sound. He was given a designated territory within which he solicited, sold, and delivered eggs to some forty-five grocery stores in the city of Tacoma, Washington. William Moncharsh was the president and local manager of Puget Sound in Tacoma. The books of the concern were kept under his direction and in December, 1940, a check of the books disclosed that Stemp had charged these customers with deliveries which he had not made. Moncharsh called Stemp before him and the latter made a complete confession that he had sold the eggs to others and retained the proceeds. Thereafter checks were made of the accounts of the regular customers and, with the aid of Stemp, the Puget Sound books were checked and this disclosed that Stemp had defaulted in the sum of $4,273.48. Testimony disclosing these circumstances was given by the witness Moncharsh who had in his possession in the court room delivery tags, invoices, ledger cards, and other books of account showing the shortages in eggs taken out by Stemp and falsely charged to the various regular customers. At the suggestion of the court these documents were not received in evidence and the proof of loss theretofore filed with the surety company was accepted in lieu of the records of Puget Sound to show the losses occurring from Stemp's transactions. It was thereupon stipulated that the "proof of loss" theretofore filed with the surety under the requirements of the bond should be accepted as a full list of the accounts of Puget Sound as shown on the books of the concern and which were examined and checked by the witness and Stemp, and which disclosed the defalcations of Stemp according to his confession and admissions made to the witness at the time the check was made.

[5] When the witness was asked to repeat the conversation with Stemp in which he gave in detail the shortages in the individual customers' accounts the objection was made that the testimony was hearsay. Following an argument the respondent suggested that the testimony be received subject to a motion to strike out. This was agreed to by the court and respective counsel and the testimony was admitted. No motion to strike this testimony was made. Following it an employee of Nye and Nissen testified, without objection, that he had personally examined the books of Puget Sound and had interviewed each of the twenty-six customers of Stemp and checked with them their paid invoices as compared with their accounts appearing on the books of Puget Sound. The respondent elicited from this witness on cross-examination that the witness had prepared the figures appearing in the "proof of loss" after checking with the various groceries, checking their balances and their paid invoices.

The trial court found: "That all of the proof offered as to the matters referred to in this paragraph is of a hearsay character and is excluded by the Court in making its findings herein."

Appellants argue that this conclusion is contrary to law and cites sections 1851 and 1870, subdivision 7 of the Code of Civil Procedure, and also Piggly Wiggly Yuma Co. v. New York Indemnity Co., 116 Cal. App. 541, 542, 3 P.2d 15. Section 1851 provides: "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties." Subdivision 7 of section 1870 makes admissible: "The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty." The rule in the Piggly Wiggly case rests upon an interpretation of these sections in a case involving the admissibility of a statement of a defaulting employee in a suit such as this brought by the employer to recover upon an indemnity bond. In holding the evidence admissible under the code sections the court said: "The testimony offered was the statement made by the defaulting employee at the time he was first accused by plaintiff of his embezzlement. His appropriation of plaintiff's funds was the foundation for this suit and his statement in relation thereto comes within the rule announced." The same principle is followed in Butte County v. Morgan, 76 Cal. 1, 18 P. 115; and in Langley v. Zurich General Accident & Liability Ins. Co., 219 Cal. 101, 104, 25 P.2d 418. It is true that the books of the employer were offered in evidence in the Piggly Wiggly case, and that other evidence was offered corroborating the testimony of the employee's confession, but the principle found in the interpretation of the code sections is a complete answer to the question raised here.

[6] But the exclusion of this testimony was error for another reason because all the testimony was received by stipulation subject to a motion to strike it out. Such motion not having been made the objection to its admissibility must be deemed waived. In re Estate of Wempe, 185 Cal. 557, 564, 197 P. 949; Fraher v. Eisenmann, 94 Cal. App. 48, 52, 270 P. 704; DeTray v. Higgins, 31 Cal.App.2d 482, 488, 88 P.2d 241.

[7] Respondent makes answer that possibly the court rejected all this evidence as untrue and that this was an act within the discretion of the court and not subject to review. But evidence of a particular fact "until contradicted and overcome by other evidence" is prima facie evidence of that fact. Code of Civil Procedure, section 1833. Such evidence cannot be arbitrarily rejected. In Gomez v. Cecena, 15 Cal.2d 363, 366, 101 P.2d 477, 478, the Supreme Court said: "While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact." (Citing cases)

The judgment is reversed.

GOODELL and DOOLING, JJ., concur.

Ex parte PAYTON.*

Cr. 3914.

District Court of Appeal, Second District,
Division 2, California.

Nov. 8, 1945.

Hearing Granted Dec. 6, 1945.

1. Pardon 🔑10

An order suspending a parole is invalid unless cause of the suspension is stated in the order. Pen.Code, § 3063.

2. Pardon 🔑10

An order by Board of Prison Terms and Paroles that petitioner's parole be "cancelled, suspended and/or revoked", which stated only "due cause being shown by parole officer", was void because of failure to state cause of suspension. Pen.Code, § 3063.

3. Pardon 🔑10

The omission of statement of cause in order by Board of Prison Terms and Paroles purporting to suspend petitioner's parole was not a mere clerical error that could be corrected by a subsequent order. Pen. Code, § 3063.

4. Criminal law 🔑1216(6)
Pardon 🔑10

If petitioner's parole had been legally canceled, suspended, or revoked, petitioner was a "fugitive from justice" while at large, and the period intermediate the date of suspension and his return to prison could not be credited as a part of his term of imprisonment. Pen.Code, § 3063.

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* Subsequent opinion 169 P.2d 361.

See Words and Phrases, Permanent Edition, for all other definitions of "Fugitive from Justice".

5. Criminal law ⚿1216(6)

Petitioner during the time he was lawfully at liberty on parole was in legal contemplation a prisoner under control of State Board of Prison Directors, and such time would be credited on term of his sentence.

6. Criminal law ⚿1216(6)

Where order purporting to suspend petitioner's parole was void because of failure to state cause of suspension, petitioner was entitled to credit on term of his sentence for period intervening between date of void suspension order and date when petitioner was returned to state prison. Pen.Code, § 3063.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Proceeding in the matter of the application of Frank C. Payton for a writ of habeas corpus. From an order discharging petitioner, the Attorney General appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

Alexander L. Oster, of Los Angeles, for petitioner.

WILSON, Justice.

Upon his conviction of a felony petitioner was sentenced to the state prison on June 28, 1939. He was received there on January 27, 1940, and his term of imprisonment was fixed at five years by the Board of Prison Terms and Paroles. In the absence of any untoward occurrence his term would have expired January 27, 1945. The question before us is whether, by reason of the facts hereinafter related, said term was interrupted and the terminal date deferred until after February 9, 1945, the date of the last purported suspension of petitioner's parole which is here under review. Petitioner was discharged from custody by the superior court on a writ of habeas corpus and the attorney general has appealed from that order.

On November 12, 1941, petitioner was released on parole. He was arrested on a charge of assault on May 29, 1943, and on a report of his arrest said board made an order on June 14, 1943, that his parole be "cancelled, suspended and/or revoked." He was convicted on the charge of assault on June 24, 1943, and on July 20, 1943, he was returned to the state prison. Charges of violation of his parole were filed upon which he was given a hearing before the Board of Prison Terms and Paroles in August, 1943. He pleaded guilty to some of the charges and was found guilty on others, whereupon the board made an order finding him guilty and adopted a resolution that its "action had on June 14, 1943, is hereby affirmed." On March 2, 1944, he was again released on parole. The Adult Authority suspended the latter parole on December 8, 1944, but its action was held invalid by this court in an opinion filed on February 6, 1945, for the reason that the cause of suspension was not stated in the order. In re Payton, 67 Cal.App.2d 835, 155 P.2d 837. On February 9, 1945, the Adult Authority made a second order purporting to suspend petitioner's parole, stating its reasons therefor. A warrant was issued for petitioner's arrest and he was placed in custody.

Section 3064 of the Penal Code provides as follows: "From and after the suspension or revocation of the parole of any prisoner and until his return to custody he shall be deemed an escape and fugitive from justice and no part of the time during which he is an escape and fugitive from justice shall be part of his term." Hence if the order of June 14, 1943, purporting to suspend or revoke petitioner's parole was valid he was a fugitive from justice from that date until July 20, 1943, the date of his return to the state prison, a period of 35 days. If we so hold, said period was not a part of the term of imprisonment and said term would not have expired until after February 9, 1945, the date of the last order suspending petitioner's parole. On the other hand, if the order of June 14, 1943, was not valid, petitioner was not a fugitive from justice and his term expired on January 27, 1945. In such case he was out of the jurisdiction of the Adult Authority when the order of February 9, 1945, was made.

[1, 2] "No parole shall be suspended or revoked without cause, which cause must be stated in the order suspending or revoking the parole." Penal Code, sec. 3063; In

re Knaesche, 22 Cal.App.2d 667, 669, 72 P.2d 216; In re Payton, supra. The order of June 14, 1943, contained recitals and an order in substantially the same words as appear in the order of December 8, 1944, quoted in full and declared void by this court in In re Payton, supra. The same objection applies to each order—the cause of suspending or revoking the parole was not stated.

[3] It requires no study of semantics to reach the conclusion that section 3063 of the Penal Code was not complied with by the recital in the order of suspension. The phrase in the order, "due cause being shown by the State Parole Officer," is not a statement of the cause of suspension, and the reference to the parole officer's report is ineffective for any purpose. The board made no finding as to the correctness of the meager statement in the parole officer's report that petitioner had been arrested. (Whether or not he was guilty of the charge had not then been determined.) The omission was not, as claimed by appellant, a mere clerical error that could have been corrected by a subsequent order or that was corrected by the order made in August, 1943. There were two separate orders: The first is described above and was made without findings of fact or a statement of cause; the second was made after a formal hearing upon written charges accusing petitioner of several acts in violation of his parole, upon which the board made findings of fact and purported to confirm the void order of June 14.

That the error complained of was not clerical but that the order was in the form customarily employed by the board is indicated not only by the fact that the order of June, 1943, was in the same language as that of December, 1944 (In re Payton, supra), but by appellant's lament that a "literal construction" of section 3063 of the Penal Code will render void all previous orders suspending or revoking paroles in which the cause was not specifically stated, and that many persons whose paroles have been revoked will be entitled to discharge. Neither an argument of expediency nor the result that may befall others weighs against the rights of a prisoner who is legally entitled to his release from custody.

[4, 5] If petitioner's parole had been legally cancelled, suspended "and/or" revoked, whichever was done and whatever that expression may mean, he was a fugitive from justice while at large, and the period intermediate the date of suspension and his return to prison cannot be credited as a part of his term of imprisonment. In re Sommers, 135 Cal.App. 541, 543, 27 P.2d 649; In re Falconi, 22 Cal.App.2d 604, 606, 71 P.2d 948; In re Forbes, 108 Cal.App. 683, 686, 292 P. 142; In re Daniels, 110 Cal.App. 638, 639, 294 P. 735. But during the time when he was lawfully at liberty on parole he was, in legal contemplation, a prisoner "under the control of the state board of prison directors." Such time must be credited on the term of his sentence. In re Stanton, 169 Cal. 607, 610, 147 P. 264; Ex parte Casey, 160 Cal. 357, 358, 116 P. 1104; In re Falconi, supra, 22 Cal.App.2d at page 605, 71 P.2d 948.

[6] It follows that the order of June 14, 1943, was void, and that petitioner was legally entitled to his liberty during the period of 35 days intervening between that date and July 20, 1943, when he was returned to the state prison. Giving him credit to which he is entitled for said period, his term of imprisonment expired on January 27, 1945, and the order of February 9, 1945, was a futile attempt to extend a sentence already expired.

The order discharging petitioner from custody is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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71 Cal.App.2d 660

REDSTED v. WEISS et al.

Civ. 12899.

District Court of Appeal, First District, Division 2, California.

Nov. 14, 1945.

Rehearing Denied Dec. 14, 1945.

Hearing Denied Jan. 10, 1946.

1. **Attorney and client** 🔑86

The code section pertaining to attorney's authority was not intended to enlarge or abridge authority of attorney, but only to prescribe manner of its exercise by requiring the agreement mentioned in the section to be filed with the clerk or entered upon the minutes. Code Civ.Proc. § 283.

2. **Attorney and client** 🔑86

An attorney has authority to enter into a stipulation provided the subject matter of the agreement falls within his authority as an attorney. Code Civ.Proc. § 283.

3. Attorney and client ⇨77

The implied authority of an attorney ordinarily does not extend to the doing of acts which will result in the surrender or giving up of any substantial right of the client. Code Civ.Proc. § 283.

4. Attorney and client ⇨86

An attorney has the general, implied or apparent authority to stipulate with respect to procedural or remedial matters as appear in the progress of the cause to be necessary for the advancement of his client's interest or to accomplishment of purpose for which attorney was employed. Code Civ.Proc. § 283.

5. Attorney and client ⇨86

In suit to quiet title to real property, attorney had authority to bind his client by stipulation in any of the steps of the action. Code Civ.Proc. § 283.

6. Attorney and client ⇨103

Mere fact that stipulation is beyond attorney's authority does not relieve client of the binding effect thereof since, where client has received and retained benefits of stipulation, lack of antecedent authority is supplied by such subsequent ratification and acceptance of benefits. Code Civ.Proc. § 283.

7. Attorney and client ⇨86

An attorney's act in entering into a stipulation beyond his statutory authority which may be subsequently ratified by client may also be specially authorized by act of client consenting to stipulation. Code Civ. Proc. § 283.

8. Attorney and client ⇨86

Where stipulation which was allegedly beyond attorney's statutory authority to make, before it was filed, was exhibited to clients and explained to them and clients assented to its terms in open court or, in any event, did not object, attorney had authority to make stipulation. Code Civ.Proc. § 283.

9. Appeal and error ⇨1024(1)

Conflicts in testimony with respect to attorney's authority to enter into a stipulation are matters for trial court. Code Civ. Proc. § 283.

10. Appeal and error ⇨1024(1)

On motion of litigants to be relieved of a stipulation executed by their former attorney on ground that stipulation was beyond attorney's authority, consideration of affidavit of adversary in opposition to motion indicating that litigants had authorized attorney to stipulate was for trial court. Code Civ.Proc. § 283.

11. Appeal and error ⇨640

Where appellants designated papers they desired incorporated in clerk's transcript and respondent designated particular affidavit as a paper she desired incorporated, and clerk followed both requests and prepared a complete transcript, and transcript did not show a certificate of trial judge, reviewing court would presume that no hearing was had on objections and that transcript was settled under clerk's certificate, and that appellants waived all objections to transcript as certified by clerk. Rules on Appeal, rules 5a, 5b, 8a, 8b.

12. Appeal and error ⇨640

Waiver of objection to transcript as certified by clerk by failure to request a correction of record within ten days after the mailing by clerk of notice of completion of clerk's and reporter's transcripts covers all objections which could have been made to the time and manner of filing transcript, since those were questions which should have been addressed to trial judge. Rules on Appeal, rules 5a, 5b, 8a, 8b.

13. Appeal and error ⇨939

Where record disclosed that affidavit was on file before entry of order appealed from and transcript did not contain a certificate of trial judge, indicative that no objection was made to clerk's transcript, reviewing court would assume that trial court in its consideration of motion, used entire record on file at time of its decision. Rules on Appeal, rules 5a, 5b, 8a, 8b.

14. Appeal and error ⇨891

Applications to produce additional evidence before reviewing court, when made for purpose of a reversal of judgment, will be granted only in exceptional cases. Code Civ.Proc. § 956a.

15. Appeal and error ⇨891

On appeal from an order denying motion to be relieved from a stipulation entered into by appellants' former counsel, where evidence proffered to reviewing court would merely tend to show that stipulation was an improvident one, motion to produce additional evidence was denied. Code Civ.Proc. § 956a.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action by Belle Redsted against Abraham L. Weiss, true name Albert L. White, and others to quiet title to certain real property wherein defendant Reva L. White cross-complained. From an order denying the motion of defendants and of cross-complainant to be relieved from a stipulation of their former counsel to impound rents from the real property in controversy until final judgment, which motion was made after entry of a judgment for defendants and cross-complainant, and an appeal therefrom by plaintiff, defendants and cross-complainant appeal.

Affirmed.

A. Don Duncan, of San Francisco, for appellants.

Phil F. Garvey and George Olshausen, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by defendants and cross-complainant from an order denying their motion to be relieved from a stipulation of their former counsel to impound rents from the real property in controversy until final judgment.

Plaintiff sought to quiet title to certain real property in San Francisco consisting of a three story building with a grocery store on the ground floor. On February 8, 1944, she filed a complaint against Abraham L. Weiss, whose legal name is now Albert L. White, and his daughter Reva L. White. The complaint alleged that plaintiff executed a deed of the property to defendant Reva L. White, as trustee for A. L. White, which deed was intended to be a mortgage securing a debt in the sum of $600. On February 25, 1944, the attorneys for the opposing parties entered into a stipulation which was filed with the clerk of the court four days later. The portion of the stipulation under attack reads as follows: "It is further stipulated and agreed by and between the parties hereto that all rental or rentals for the store building located on the ground floor of the premises described in plaintiff's complaint on file herein, which shall become due and payable from the tenant or lessee of said store, shall be paid by said lessee or tenant to his attorney, Melbert B. Adams, an Attorney at Law, Monadnock Building, in the City and County of San Francisco, State of California, to be held and retained in trust by the said Melbert B. Adams, and by him paid over to the prevailing party in the above entitled action when the judgment in the above entitled action shall have become final."

On March 29, 1944, defendants filed an answer to the amended complaint and Reva L. White filed a cross-complaint seeking to quiet title to the property. At the same time defendants and cross-complainant made a substitution of attorneys, substituting their present attorney for W. Lindley Abbott who had entered into the stipulation in question. On August 10, 1944, after a trial on the merits, judgment was rendered in favor of defendants and cross-complainant. Plaintiff filed her notice of appeal and the cause on the merits is now pending in this court.

On August 29, 1944, defendants and cross-complainant filed their notice of motion for an order relieving them from the aforementioned stipulation of their former counsel. The motion was heard on September 8, 1944, at which time W. Lindley Abbott testified as to the events surrounding the signing of the stipulation. The court allowed defendant and cross-complainant Miss White one week to file her affidavit as to any facts pertinent to the motion; that affidavit was filed on September 14, 1944. Included in the clerk's transcript on appeal is an affidavit of plaintiff filed on September 8, 1944, in opposition to the motion and her reply affidavit filed on September 18, 1944. On September 22, 1944, the court entered its order denying the motion of defendants and cross-complainant to be relieved from the stipulation and it is from this order that the present appeal is prosecuted.

The sole legal issue involved on this appeal is the authority of the appellants' former attorney to enter into the stipulation impounding the rents during the pendency of the action. Appellants contend that the stipulation was made without their consent and waived a substantial right, hence they argue that it is not binding upon them and that they should be relieved from it by the court.

[1, 2] Section 283 of the Code of Civil Procedure provides in part as follows: "An attorney and counselor shall have authority: 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise; * * *." The leading case

on the interpretation of this code section is Preston v. Hill, 50 Cal. 43, at page 53, 19 Am.Rep. 647, wherein the court stated: "It was not intended to enlarge or abridge the authority of the attorney; but only to prescribe the manner of its exercise, by requiring the agreement to be filed with the clerk or entered upon the minutes." See also Wall v. Mines, 130 Cal. 27, 42, 62 P. 386; Reclamation Dist. No. 535 of Sacramento County v. Hamilton, 112 Cal. 603, 609, 44 P. 1074. The question as to whether an attorney has the power or authority to enter into a stipulation depends, therefore, upon whether the subject matter of the agreement falls within his authority. 3 Cal.Jur. 660.

[3] On the one hand it is a well-settled rule of law that "the implied authority of an attorney ordinarily does not extend to the doing of acts which will result in the surrender or giving up any substantial right of the client * * *." 7 C.J.S., Attorney and Client, § 79, p. 897, and this rule has been followed in California. Price v. McComish, 22 Cal.App.2d 92, 97, 70 P.2d 978; 3 Cal.Jur. 667. The courts of this state have held that an attorney by virtue of his general authority cannot enter into an agreement depriving his client of the right of appeal, Wuest v. Wuest, 53 Cal.App.2d 339, 127 P.2d 934, cannot confess judgment against his client, Pfister v. Wade, 69 Cal. 133, 10 P. 369, cannot pass his client's rights or title to land which is the subject matter of the litigation, Ryan v. Tomlinson, 31 Cal. 11, and cannot accept the amount tendered by the adverse party in full satisfaction of a claim for money due. Ferrea v. Tubbs, 125 Cal. 687, 58 P. 308.

[4] On the other hand, however, it is just as well settled that an attorney has "the general implied or apparent authority to enter into or make such agreements or stipulations, with respect to procedural or remedial matters, as appear, in the progress of the cause, to be necessary or expedient for the advancement of his client's interests or to accomplishment of the purpose for which the attorney was employed * * *." 7 C.J.S., Attorney and Client, § 100, p. 917. The courts of California have recognized this principle and the distinction between the two rules. In Witaschek v. Witaschek, 56 Cal.App.2d 277, 283, 132 P.2d 600, 604, referring to the authority of an attorney under section 283, subdivision 1, of the Code of Civil Procedure, the court said: "* * * later pronouncements have indicated instances where the rule is relaxed, e.g., to vest the attorney with complete charge and supervision of the procedure to be adopted, the conduct of the trial and all cognate subjects, provided only the attorney does not impair, compromise or destroy his client's cause of action or subject matter of the litigation without his client's consent. * * *"

[5] But the case presented here differs from all the cited cases in that rentals to be paid on the property were not made the "subject matter" of the litigation. The suit was one to quiet title to real property and, under section 283 of the Code of Civil Procedure, an attorney would have the authority to bind his client by stipulation "in any of the steps of (the) action." Whether this authority extends to a stipulation binding the client as to any collateral matter which might be the source of other litigation does not appear to have been decided in any case called to our attention.

[6-8] But if we assume that the stipulation was beyond the authority of the Code section it does not follow that it was invalid or that the client is not now bound by it. Thus we held in Fidelity & Casualty Co. v. Abraham, 70 Cal.App.2d 776, 161 P.2d 689, on the authority of Webster v. Webster, 216 Cal. 485, 490, 14 P.2d 522, and other cited cases, that a party who has received and has retained the benefits of such a stipulation should be estopped to deny his counsel's authority to make it. The theory of estoppel in such a case is that lack of antecedent authority is supplied by subsequent ratification and acceptance of the benefits. But, manifestly, that which may be subsequently ratified may be specially authorized by the act of the principal consenting to the stipulation made by his agent, or attorney. Here the respondent by affidavit averred that, before the stipulation was filed, it was exhibited to Reva L. White, and fully explained to her by her counsel while the parties were all present in open court during one of the hearings relating to an application for an injunction in this proceeding, and that appellants thereupon agreed and consented to its terms. The attorney who signed the stipulation for these appellants testified at the hearing of the motion for relief that he explained the stipulation to Mr. White, and that it was agreeable to him. This brings the case squarely within the rule of Cathcart v. Gregory, 45 Cal.App.2d 179, 185, 187,

113 P.2d 894, where the court held that, under somewhat similar facts, the presence of the client in court at the time the stipulation was made, and her failure to make objection, was an implied authorization to her attorney to execute it.

[9-12] It is true that the testimony as to Reva L. White does not stand uncontradicted. But the conflict was a matter for the trial court to decide. It is also true that appellants object to the consideration of the affidavit. But that too is a matter outside the realm of this appeal. The point is that the hearing on the motion was ended September 8, 1944, with an order allowing these appellants one week within which to file their affidavit, "and upon the filing of that affidavit, the matter will be submitted." On September 8th the respondent filed an affidavit stating on information and belief that appellants consented to the stipulation; on September 14th appellants filed their affidavit; and, on September 18th, respondent filed the affidavit which is now under attack. The order appealed from was entered on September 22d. Appellants argue (1) that the affidavit was not filed in proper time, and (2) that it does not appear that the affidavit was "used" upon the consideration of the motion. Both grounds are answered by reference to the Rules on Appeal, and decisions prior to the enactment of the rules are not helpful. Acting under Rule 5a the appellants designated the papers which they desired incorporated in the clerk's transcript. Acting under Rule 5b the respondent designated this affidavit as a paper which she desired incorporated. The clerk followed both requests and prepared a complete transcript. Appellants state in their brief that they made objection to this request but that the trial court allowed the inclusion of the affidavit in the transcript. No record is made of such proceeding. If no objection is made within the time prescribed "the clerk shall certify the record as correct." (Rule 8a.) If objections are made the trial judge, after a hearing thereon, shall determine the request for correction and "shall certify the transcripts as correct." (Rule 8b.) Since the clerk's transcript does not show a certificate of the trial judge we must presume that no hearing was had and that the transcript was settled under Rule 8a. Hence the appellants must be deemed to have waived all objections to the transcript as certified by the clerk. Such waiver covers all objections which could have been made to the time and manner of filing since those were questions which should have been addressed to the trial judge.

[13] The question whether this affidavit was "used" is not open to debate. The record as it stands shows that it was on file before the decision. This presents a different case from Thomas v. Thomas, 66 Cal.App.2d 818, 821, 153 P.2d 389, where objection was made to the inclusion of papers in the record which were filed several days after the entry of the order. But, since the Rules on Appeal provide a complete scheme for the preparation of the clerk's transcript, and since they dispense with the certificate of the trial judge unless objection is made under Rule 8, we must assume here that, in its consideration of the motion, the trial court "used" the entire record on file at the time of its decision.

[14, 15] Appellants made a motion during pendency of the appeal to introduce two affidavits, which motion was continued for disposition with the appeal. The purpose of the affidavits is to show that the tenant of the ground floor premises has not paid his rent during the present year and that the stakeholder is not pressing him for payment. Applications to produce additional evidence under the provisions of section 956a of the Code of Civil Procedure when made for the purpose of a reversal of the judgment will be granted only in exceptional cases. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. This is not such a case. Such proffered evidence would merely tend to show that the stipulation was an improvident one—a question which is not involved in the order on appeal. It would not affect the question of the right of appellants to be relieved from the stipulation, and that is the only issue presented here. Accordingly the motion is denied.

The order appealed from is affirmed.

GOODELL and DOOLING, JJ., concur.

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PEOPLE v. GORDON et al.

Cr. 3882.

District Court of Appeal, Second District,
Division 2, California.
Nov. 9, 1945.

Rehearing Denied Nov. 20, 1945.
Hearing Denied Dec. 6, 1945.

1. Conspiracy ⇨43(9)

A count of indictment, charging conspiracy in that defendants confederated and agreed to cheat and defraud by criminal means and obtain money and property by false pretenses and promises, with fraudulent intent not to perform such promises, and to commit grand theft, sufficiently charged public offense. Pen.Code, §§ 950–952.

2. Conspiracy ⇨43(6)

An indictment for criminal conspiracy need not detail acts to be performed by each conspirator in execution of enterprise. Pen.Code, §§ 950–952.

3. Indictment and Information ⇨101

Omission of names of intended victims of criminal conspiracy from indictment therefor is not fatal, in view of statutory requirements that accused be furnished with copy of indictment and testimony before grand jury. Pen.Code, §§ 925, 950, 951, 988.

4. Indictment and Information ⇨59

An indictment, setting forth in intelligible language notice of offense charged, is sufficient. Pen.Code, §§ 950–952.

5. Indictment and Information ⇨60

One indicted for criminal conspiracy is not entitled to description of particular circumstances which he may get from his copy of testimony before grand jury or committing magistrate. Pen.Code, §§ 870, 925, 950–952.

6. Conspiracy ⇨28

The gist of crime of conspiracy is unlawful agreement to commit crime and overt act done in furtherance of such agreement.

7. Indictment and Information ⇨75(1)

An indictment is not insufficient because of any defect or imperfection in form, if no substantial right of accused is prejudiced on merits of case. Pen.Code, § 960.

8. Indictment and Information ⇨60

The validity of indictment, charging specific public offense, without details, in ordinary and concise language, cannot be questioned if defendant is furnished copy of accusatory testimony. Pen.Code §§ 870, 925, 950–952.

9. Indictment and Information ⇨60

The form of indictment, presenting in sufficient substance facts constituting crime charged, is not important, whether indictment be regarded substantially and actually as charging substantive crime or as charging conspiracy. Pen.Code, §§ 950–952.

10. Conspiracy ⇨37

The validity of count of indictment charging conspiracy is not affected by fact that conspirators may have succeeded in committing crimes constituting objects of conspiracy.

11. Criminal law ⇨1186(4)

A judgment on conviction cannot be reversed for error in form of indictment, unless appellate court is of opinion, after examining entire cause, including evidence, that such error resulted in miscarriage of justice. Pen.Code, § 960; Const. art. 6, § 4½.

12. Constitutional law ⇨265

An indictment drawn pursuant to statutes, as interpreted by state courts, is not invalid as denying "due process of law". Pen.Code, § 950 et seq.; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

13. Constitutional law ⇨251

"Due process of law" means no more than law in its regular course of administration, according to prescribed forms and general rules for protection of individual rights. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

14. Constitutional law ⇨257

"Due process of law" is complied with if provision is made for reasonable notice and opportunity to be heard. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

15. Conspiracy ⇨47

Where evidence supported jury's finding of conspiracy between two defendants to commit grand thefts by false pretenses, as charged in one count of indictment, and conviction of one defendant for grand thefts charged in other counts, as to which evidence was limited in application to such defendant before receipt of proof of conspiracy, judgments on convictions will not be reversed as to codefendant on ground of insufficient proof. Pen.Code, § 484.

16. False pretenses ⚷49(1)

Evidence sustained convictions of grand thefts by false and fraudulent representations or pretenses as to value and oil content of desert lands sold by defendants and promises that lands would be sold or leased to major oil companies within short time at great profit. Pen.Code, § 484.

17. False pretenses ⚷15

False representations by vendors to purchasers of desert lands that lands were potential oil lands, that major oil companies would lease lands and pay bonuses, that purchasers' investments would be returned with profits in 90 days, that investments would be doubled, and that lands were adjacent to or near productive oil land, constituted actionable fraud, not mere predictions and opinions, so as to justify vendors' convictions of grand theft by fraudulent representations or pretenses. Pen.Code, § 484; Civ.Code, § 1572.

18. Fraud ⚷12

An unconditional promise, made without intention of performing it, is actionable "fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

19. False pretenses ⚷7(5)

A promise is expression of present intent, which is a fact, and promisor having no intention to perform his promises deceives persons relying thereon, and hence is guilty of actionable fraud justifying his conviction of grand thefts by fraudulent representations or pretenses. Pen.Code, § 484.

20. False pretenses ⚷51

Whether a promise was dishonest, so as to justify promisor's conviction of grand theft by fraudulent representation or pretense, is question for jury. Pen.Code, § 484.

21. False pretenses ⚷49(4)

Evidence that persons, representing that desert lands sold by them were oil lands, knew or had good reason to believe that lands were outside productive limits of oil field, did not believe that lands were underlain with oil in commercial quantities, or were in far better position to judge than unsophisticated public, including purchasers, warranted jury's finding that vendors committed thefts by false pretenses. Pen.Code, § 484.

22. False pretenses ⚷7(3)

Fraud founded on utterances is not confined to mere statements of fact and dishonest promises, but includes assertion of one's belief or opinion in bad faith, and, when criminal purpose of one accused of grand thefts by false pretenses is demonstrated by numerous acts of taking victims' money by means of false promises, jury is not required to be too sensitive to fine distinctions in his favor. Pen.Code, § 484.

23. False pretenses ⚷49(1)

Where two clever salesmen, by pretending to be wise concerning subject of their vending, to give friendly advice, and to afford their customers extraordinary opportunities, gain confiding people's confidence by dangling before them golden opportunities to gain wealth, proof of explicit statements by such salesmen is not as essential to warrant their conviction of grand thefts by false pretenses as in transactions between men dealing at arm's length. Pen.Code, § 484.

24. False pretenses ⚷7(5)

The fact that persons charged with grand theft by false pretenses in sale of lands combined false promises of future acts with statements of existing facts, without intention to perform such promises, did not overcome effect of their false pretenses concerning present facts. Pen. Code, § 484.

25. False pretenses ⚷7(5)

A false promise by one who knows that he will not perform it states his present intent, which is a fact, so as to warrant his conviction of grand theft by fraudulent representation or pretense. Pen.Code, § 484.

26. False pretenses ⚷7(3)

Opinions of vendors of desert lands as to values thereof for oil producing purposes were opinions as to facts inaccessible to vendees, so as to warrant vendors' convictions of grand thefts by false pretenses, especially in view of their prophecies of new oil discoveries and sales and leases to major oil companies, pretenses that they were able to sell lands because of owners' embarrassments, and vendees' reliance on such prophecies and pretenses. Pen.Code, § 484.

27. False pretenses 🔑51

In prosecution for grand thefts by fraudulent representations or pretenses in sale of lands by defendants, whether vendees were warranted in relying on defendants' opinions as to value of lands was for jury. Pen.Code, § 484.

28. Fraud 🔑11(1)

A dishonest opinion, expressed to one entitled to rely thereon, is actionable "deceit".

See Words and Phrases, Permanent Edition, for all other definitions of "Deceit".

29. False pretenses 🔑7(3)

A person's taking of another's property by force of opinion, asserted in bad faith with design to mislead, is "false pretense". Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "False Pretense".

30. Fraud 🔑11(2)

Where seller of land possesses or assumes to possess superior knowledge of property and asserts such knowledge to vendee, who has not had equal opportunity to gain knowledge, seller's asserted opinion as to value of land may be equivalent to affirmation of fact and hence actionable fraud.

31. False pretenses 🔑49(5)

Express testimony of victim of false pretense that he was induced to part with his money by fraudulent statements of one accused of such pretense is not essential to conviction of grand theft by false pretense, but evidence from which inference of such reliance may be drawn is sufficient. Pen. Code, § 484.

32. Conspiracy 🔑40

Existence of conspiracy between two persons renders both guilty of any act done in furtherance thereof. Pen.Code, § 182.

33. Conspiracy 🔑47

Evidence was sufficient to sustain conviction of criminal conspiracy to commit grand thefts by false pretenses and promises that desert land sold by defendants were underlain with petroleum. Pen.Code, §§ 182, 484.

34. Conspiracy 🔑47

A criminal conspiracy may be proved by a conspirator's testimony, as well as by conspirators' conduct and circumstances of their dealing. Pen.Code, § 182.

35. Conspiracy 🔑28

Conspiracy to commit crime is distinct offense of which parties thereto may be guilty, though convicted of substantive crime. Pen.Code, § 182.

36. Conspiracy 🔑47

The purpose of evidence in conspiracy case is to establish participants' illicit concord, and conspiracy is established by evidence that participants entertained mutual design to commit offense designated as their aim and committed overt act in pursuance of such design. Pen.Code, § 182.

37. Conspiracy 🔑47

Testimony of one or two alleged conspirators as to their secret agreement to obtain money and property by false pretenses and promises in sale of desert lands, falsely represented by them to be underlain with petroleum, and purchasers' testimony as to numerous overt acts in furtherance of such conspiracy, substantially supported conviction of criminal conspiracy. Pen. Code, §§ 182, 484.

38. Conspiracy 🔑23

Consummation of conspiracy is not necessary to conviction therefor. Pen. Code, § 182.

39. Conspiracy 🔑27

To sustain conviction for conspiracy, overt act need not be criminal. Pen.Code, § 182.

40. Conspiracy 🔑45

Evidence tending to show successive steps in formation of criminal conspiracy by persons accused thereof is admissible if it tends to prove their criminal accord, though facts disclosed arose long before conspirators' agreement. Pen.Code, § 182.

41. Conspiracy 🔑47

Proof of one overt act is sufficient to support conviction of conspiracy. Pen. Code, § 1104.

42. Conspiracy 🔑47

The erstwhile existence of criminal conspiracy may be proved by one of conspirators. Pen.Code, § 182.

43. Conspiracy 🔑45

Establishment of conspiracy to commit crimes renders all evidence of substantive crimes admissible against all conspirators. Pen.Code, § 182.

44. Conspiracy 🔑48

In prosecution for criminal conspiracy, questions whether conspiracy existed and alleged overt acts occurred were for jury. Pen.Code, § 182.

45. Conspiracy 🔑37

Conviction of defendant for alleged thefts by false pretenses as to value of lands sold by him did not relieve him of guilt in entering into conspiracy with codefendant to commit such thefts. Pen. Code, §§ 182, 484.

46. Conspiracy 🔑45

A showing that all fraudulent acts of persons charged with theft by false pretenses as to the value of land sold by them were committed within three years before return date of indictment for such thefts and conspiracy to commit them was not essential to competency of evidence thereof. Pen.Code, §§ 182, 484.

47. Conspiracy 🔑45

A conspiracy may be proved by evidence of its gradual formation and acts occurring long before criminal compact. Pen.Code, § 182.

48. Conspiracy 🔑45

In prosecution for grand theft by false pretenses as to value of lands sold by defendants, evidence of sales to certain prosecuting witnesses over three years before return date of indictment was competent to prove conspiracy. Pen.Code, §§ 182, 484.

49. Criminal law 🔑508(2)

Testimony of accomplice, who has confessed his guilt of numerous crimes, must be regarded with suspicion, especially where he has been encouraged to expect immunity or only slight punishment for crime under investigation, but his testimony is received with all its vices as in case of any witness.

50. Criminal law 🔑508(9)

An accomplice's testimony against accused will support verdict of conviction if not inherently incredible.

51. False pretenses 🔑47

In prosecution for false pretenses, defendants' suppression of fact material to transaction is proper subject of proof. Pen. Code, § 484.

52. Conspiracy 🔑45
False pretenses 🔑44

In prosecution for grand thefts and criminal conspiracy to commit grand thefts by false pretenses as to value of lands sold by defendants, evidence that lands cost defendants much less than amounts for which they sold them was admissible to show defendants' bad faith in advising purchasers to invest therein and representing that lands were potential oil lands and defendants' stealthy suppression from purchasers of material facts as to prices to be paid for such lands by defendants. Pen.Code, §§ 182, 484.

53. Criminal law 🔑720(1)

In prosecution for grand thefts and conspiracy to commit grand thefts by false pretenses as to values of land sold by defendants, facts in evidence as to prices paid by defendants for lands and much higher prices for which defendants sold them were proper subjects for discussion by prosecutor in argument to jury and for jury's consideration. Pen.Code, §§ 182, 484.

54. Criminal law 🔑1171(2)

In prosecution for grand thefts and conspiracy to commit grand thefts by false pretenses as to value of lands sold by defendants, deputy district attorney's reference in opening statement to jury to actual costs of lands to defendants was not prejudicial to them. Pen.Code, §§ 182, 484.

55. Criminal law 🔑703

The prosecutor's outline of evidence which he intends to introduce in his opening statement to jury is not evidence and has no binding force, and any force it has is presumed to have been dispelled by instruction to consider as evidence only that received as such.

56. Criminal law 🔑1171(2)

The prosecutor's outline of state's evidence in his opening statement to jury is not prejudicial to defendant, though not followed by actual proof, in absence of showing of bad faith.

57. Criminal law 🔑1171(2)

Any failure of prosecutor to present testimony of living witnesses in support of his outline of state's evidence in opening statement to jury is cured by jury's obedience to instruction to be guided by evidence received.

58. Criminal law ⇨370, 371(1)

Evidence of defendants' transactions similar to those charged in indictment is admissible to show guilty knowledge or intent if they contain material elements of main case.

59. Criminal law ⇨370, 371(1, 3), 372(6, 9)

In prosecution for grand thefts and criminal conspiracy to commit grand theft by false representations and pretenses in sale of lands to prosecuting witnesses, evidence that defendants made substantially same representations to other persons purchasing lands from defendants was admissible to show definite prior design, guilty knowledge, plan and scheme to defraud, and knowledge of falsity of representations to such witnesses or criminal intent. Pen. Code, §§ 182, 484.

60. Criminal law ⇨1169(1)

Where evidence clearly established defendant's guilt of grand thefts by false pretenses in sales of land, admission of evidence as to land sales by defendant to persons not named in indictment was not prejudicial to defendant, if erroneous. Pen. Code, § 484; Const. art. 6, § 4½.

61. Criminal law ⇨1171(3)

A reference to defendant's creed in response to his own cross-examination of prosecuting witness, which he followed with offer of letter written by such witness to defendant at his own request in effort to forestall prosecution, did not warrant reversal of conviction, in absence of any statement by prosecuting attorney implying that defendant ever attended a church or synagogue.

62. Criminal law ⇨829(1)

A trial judge, having given instruction stating applicable principle of law, is not obliged to repeat it in verbiage and phraseology of defendant's offered instructions.

63. Conspiracy ⇨48

In prosecution for criminal conspiracy, defendant was not entitled to instruction that circumstantial evidence relied on by state must be irreconcilable with defendant's innocence to warrant conviction, where one of conspirators testified as to progressive steps of conspiracy from its incipiency to attainment of its final objective. Pen.Code, § 182.

64. Criminal law ⇨824(1)

Generally, accused's counsel, deeming instruction to jury on any issue or feature of issue or controversy necessary, owes duty to request trial court to give such instruction.

65. Criminal law ⇨824(1)

The statute providing that court, in charging jury, must state all matters of law necessary for their information, does not require court to charge jury without reference to counsel's request, in view of amendatory statute providing that court may instruct jury and that either party may present and request giving of any written charge on law and statute providing that judge may charge jury on pertinent points of law and must do so if requested by either party. Pen.Code, §§ 1093, 1127.

66. Criminal law ⇨834(1)

In prosecution for grand thefts by false pretenses in sale of lands, trial court's modification of defendants' offered instruction that prices for which lands were sold must not be considered as evidence of fraud, though jury felt that prices were disproportionate or excessively high, by inserting, after words "must not", words "of itself and apart from other circumstances in evidence", was not error as nullifying offered instruction. Pen.Code, § 484.

67. False pretenses ⇨52

In prosecution for grand thefts by false pretenses in sale of lands, defendants' offered instructions, bearing on sales of land at excessive prices and right to sell lands to which seller subsequently acquired title, were not erroneous as inconsistent with trial judge's statement that jury would consider cost prices of lands, proof of which was admitted, in view of court's admonitions that jury was not to infer court's opinions as to accused's guilt or innocence from rulings during trial and that jury were sole and exclusive judges of facts.

68. Criminal law ⇨1172(1)

In prosecution for grand thefts by false pretenses as to value of lands sold by defendants, instructions to jury that theft may be committed by larceny, embezzlement, or false pretense or representations, and that theft is committed if one is induced to part with his property by another's material false pretenses as to past or existing fact, were not prejudicial to defendant as misleading. Pen.Code, § 484.

69. False pretenses ⚿52

Where evidence showed beyond reasonable doubt that defendants, by their statements and suggestions, induced prosecuting witnesses to believe they were paying for lands so near oil production that they must overlie oil bearing structure, instruction that false representation concerning quality, value, nature, or other incident of article or property offered for sale, whereby purchaser is defrauded, is violation of law, was not erroneous as not supported by testimony. Pen.Code, § 484.

70. False pretenses ⚿52

In prosecution for grand thefts by false pretenses as to value of lands sold by defendants, instruction that false representation concerning solvency of party to contract for sale of property, whereby purchaser is defrauded, is violation of law, was not erroneous as not supported by evidence. Pen.Code, § 484.

71. Criminal law ⚿823(18)

An instruction that false representation concerning quality, value, nature, and other incident of article or property offered for sale or solvency of party to contract for sale thereof, whereby purchaser is defrauded, is violation of law, was not prejudicial to defendant, even if there was no evidence of such false representations, where jury was clearly instructed to be governed by evidence only. Pen.Code, § 484.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

James M. Gordon and Harry White were convicted of grand thefts and conspiracy to commit grand theft by false pretenses and promises, and defendant Gordon appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan and H. L. Arterberry, Deputy Dist. Attys., all of Los Angeles, for respondent.

Maurice Gordon, of Los Angeles, for appellant.

MOORE, Presiding Justice.

On March 14, 1944, defendants were indicted in seven counts for grand theft and in one count for criminal conspiracy to commit grand theft by false pretenses and false promises. Their trial commenced on May 15 and the verdict of guilty on all counts was returned on July 12, 1944. Appellant's motion in arrest of judgment and for a new trial having been denied he was sentenced on September 8, 1944, to the state prison at San Quentin for the term prescribed by law. The terms of imprisonment for the counts from 2 to 8 inclusive were to run concurrently and consecutively to the term of imprisonment for count 1.

The appeal is from the judgments of conviction and from the order denying a new trial. It is grounded upon the claims of insufficiency of the indictment; insufficiency of the evidence to prove a conspiracy or to prove grand theft; prejudicial misconduct of the district attorney; error in admitting evidence of transactions other than those mentioned in the indictment; error in giving and refusing instructions.

I. The Indictment is Sufficient.

Appellant contends that the indictment fails to charge a public offense in two respects: (a) That it does not conform with the provisions of sections 950, 951, 952 of the Penal Code, and (b) that if such sections have been complied with they are unconstitutional in that appellant has been denied due process of law guaranteed by the 14th Amendment of the Federal Constitution and California Constitution, Article I, section 13.

The first count of the indictment charges a conspiracy of the defendants in that they "confederated and agreed together and with each other, and with divers other persons to the grand jury unknown, that they would cheat and defraud by criminal means, and obtain money and property by false pretenses and false promises, with fraudulent intent not to perform such promises, and to commit grand theft." Following such charge the indictment sets forth 28 overt acts whereby it is alleged that one or the other or both of the defendants took specified sums of money from the several persons named in the declarations of the overt acts.

Counts 2 to 8 inclusive are in conventional form. Count 2 is typical. By its charging clause it alleges that "on or about March 26, 1941, at and in the County of Los Angeles, State of California, said defendants, James M. Gordon and Harry White did willfully, unlawfully and feloniously take forty-five hundred and sixty dollars ($4,560) in money, lawful money of the United States, of the personal property of one Ida A. Wastlund." Each count specifies the name of the victim and the sum stolen.

[1-5] The count charging the conspiracy is not wanting in any of the essentials of a valid accusation. Under our simplified forms of criminal pleading it is not necessary to detail the act which each of the conspirators is to perform in the execution of the enterprise. People v. Corica, 55 Cal.App.2d 130, 135, 130 P.2d 164. In view of the requirement that the accused must be furnished with a copy of the indictment, Pen.Code, § 988, and with the testimony given before the grand jury, the omission from the indictment of the names of the intended victims of the conspiracy is not fatal. The pleading is sufficient if it sets forth in intelligible language a notice of the offense to be charged. The accused is not entitled to the description of the "particular circumstances thereof" which he may get from his copy of the testimony given before the grand jury or the committing magistrate and furnished to him. People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506; Penal Code, Secs. 870, 925.

[6-11] The gist of the crime of conspiracy is the unlawful agreement to commit a crime and an overt act done in furtherance of the agreement. People v. Black, 45 Cal.App.2d 87, 96, 113 P.2d 746. No indictment is insufficient by reason of any defect or imperfection of its form so long as no substantial right of the accused is prejudiced upon the merits of the case. Penal Code, section 960. Section 952, Penal Code, as amended in 1927, provides that it shall be sufficient if its language gives notice to the accused of the offense charged against him. People v. Gilbert, 26 Cal.App.2d 1, 7, 78 P.2d 770. The validity of an indictment cannot be questioned when drawn in ordinary and concise language accusing the defendant of a specific public offense, omitting details, so long as he is furnished with a copy of the accusatory testimony. People v. Jones, 61 Cal.App.2d 608, 143 P.2d 726. The form of the indictment is not important so long as it presents in sufficient substance the facts constituting the crime charged, and it makes no difference whether the indictment be regarded "substantially and actually as a charge of substantive crime or as a charge of conspiracy." People v. Keyes, 103 Cal.App. 624, 634, 284 P. 1096, 1100. Neither is the validity of a count charging a conspiracy affected by the fact that the conspirators may have succeeded in committing the crimes which were the object of conspiracy. People v. Black, 45 Cal.App.2d 87, 96, 113 P.2d 746; People v. Chait, 69 Cal.App.2d 503, 159 P.2d 445. In no event shall a judgment be reversed because of an error in the form of the indictment "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Sec. 4½, Art. VI, Constitution; Penal Code, sec. 960; People v. Curtis, 36 Cal.App.2d 306, 327, 98 P.2d 228; People v. Beesly, 119 Cal.App. 82, 87, 6 P.2d 114, 970; People v. Pierce, 14 Cal.2d 639, 96 P.2d 784.

[12-14] The contention that an indictment drawn pursuant to sections 950 et seq. of the Penal Code as interpreted by the courts of this state is a denial of due process is not supported by the authorities. Due process of law means no more than "law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights." It is complied with so long as provision is made for reasonable notice and opportunity to be heard. People v. Troche, 206 Cal. 35, 42, 273 P. 767, 770; People v. Dunn, 40 Cal.App.2d 6, 17, 104 P.2d 119.

II. The Evidence Is Sufficient to Sustain the Judgments.

[15] Counts 2 and 3 accuse the defendants of having feloniously taken from Mrs. Wastlund the sum of $4560 on March 26, 1941, and $4,650, on April 10, 1941. Counts 4, 5, 6, 7 accuse the defendants of having feloniously taken from Mrs. Chamberlain the sum of $2,559 on May 16, 1941; $1,633 on June 9, 1941; $2,354 on June 20, 1941, and $1,000.50 on June 26, 1941. Count 8 accuses defendants of having feloniously taken from Mrs. Pattengill the sum of $2,633, June 3, 1941. During the course of the trial the evidence with reference to theft from Mrs. Wastlund and the two thefts from Mrs. Chamberlain was limited in its application to the defendant White. That limitation however appears to have been intended to apply only before proof of the conspiracy had been received. Inasmuch as the evidence amply supports the finding

of the conspiracy we see no escape for appellant on the ground of insufficient proof from any of the judgments if the evidence received as to the frauds supports the conviction of White.

[16] The variety of grand theft charged is that in which a person by fraudulent representation or pretense defrauds another of his money or property. Penal Code, sec. 484. The scheme utilized by these defendants whereby to approach their victims was the sale of desert lands in the San Joaquin Valley by representing that they were underlain with petroleum. By testimony of the several purchasers of the desert acres it was proved that the moneys were obtained by making declarations of the value and oil content of the lands, of their proximity to oil production and by promises that the parcels purchased from defendants would be sold or leased to major oil companies within a short time at great profit. The statements of fact were shown to be untrue, and the jury believed that the promises were made without intention of performing them. The testimony introduced to prove the statements and promises falls into two classes, namely, (1) that of the purchasers of the lands and (2) that of defendant White, an accomplice. The testimony of each of the vendees as to the false statements and promises corroborated the testimony of White which the jury accepted.

The seven thefts alleged in counts 2 to 8 inclusive resulted from the fraudulent sales to three women, namely, Mesdames Wastlund, Chamberlain and Pattengill. However, in support of the conspiracy charge 28 overt acts are alleged which include not only the sales to those three women but also the calls made upon and sales to Mesdames Winston and Conger in furtherance of the conspiracy.

According to the testimony of White, defendants commenced their labors together at the time of White's first sale to Mrs. Conger in December, 1940. Prior to White's call on that lady he agreed with Gordon that they would "split" the profits made by the sales to Mrs. Conger and that Gordon would pay White five per cent on the amount of each sale to apply upon White's income tax. Thereupon Gordon told White of the financial condition of each of the prospective purchasers. They continued thereafter to work on this basis in all transactions specified in the indictment. At their first meeting in the presence of each of their vendees defendants posed as strangers to each other; pretended that the land offered was owned by some estate, by some widow in distress, or by some friend who was forced to make sale immediately. Promptly following each sale defendants purchased the parcel from the subdivider for about 20 per cent of its sale price. At the time of making each of the calls they framed their dramatics, line of conversation and method of presentation in such manner as to support each other. As to those 28 acts the testimony of the vendees established that seven calls were made by appellant alone without effecting a sale; that seven calls were made by White alone without sale; that one call was made by both defendants without results; that three calls of appellant alone resulted in sales; that in three calls by defendants together they accomplished sales of the desert land. Of the 28 overt acts six were sales by White; three were sales by Gordon, three were sales in which both were present and participants. Five of the 28 acts were visits by defendants together without accomplishing a sale.

Sales to Mrs. Wastlund.

Mrs. Ida Wastlund, 79 years of age, resided in Long Beach. Prior to her alleged transactions with defendants she conveyed her two Altadena lots worth $2,000 to Gordon in return for 2½ acres of desert land in Kings County.* Between February 19 and May 9, 1941, defendants made 13 calls upon Mrs. Wastlund at her home. They made three separate sales to her, one by both defendants and the other two by White alone. In attempting to sell her 7½ acres on February 3, 1941, Gordon stated that it was better for her to have 10 acres than only 2½; that it was prospective oil land; that 10 acres made a better drilling site and that there was talk of leasing the land at that time. For this parcel she paid him $2,280. When White called on February 19 he sold her 10 acres in Kings County for $2,700 after telling her that she should acquire more land because it was "prospective drilling for oil." He concealed from her the fact that he could on the same day purchase the 10 acres from Murray Blank, the subdivider, at $37.50 an acre. On March 26 White again called on Mrs. Wastlund and sold her 20 acres in Kings County for $4,560 after telling her that it was potential oil land and that it was necessary for her to hold more acreage than she already had. Neither did he then tell her that he could purchase the same 20 acres from Murray Blank for the sum of $800. On April 10 White against visited Mrs. Wastlund and sold her another 20-acre parcel for $4,650 and again did not advise her that he could purchase the same land on that day for $800. In all of her transactions with the defendants singly or together she believed in and relied upon their statements that the land sold her was close to oil production and that she would profit by immediate purchase.

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* The legal descriptions will not be given in the body of the opinion. For reference they are included in this note by omitting the township and range which are always South and East respectively.

The parcels sold to Mrs. Wastlund were in sections 32—18—19; 16—20—19; 16—21—19; 28—18—19; 7—20—19; 4—19—19.

The parcels sold to the Winstons were in sections 18—21—19; 7—20—19.

The parcels sold to Mrs. Chamberlain were in sections 36—24—20; 16—20—19; 22—19—16; 26—19—16.

The parcels sold to Mrs. Pattengill were in section 26—19—16.

Sales to the Winstons.

Mrs. Winston testified that Gordon first called at their home in October 1940, and offered to sell them land rich in oil, close to an oil field. He stated that he was in touch with major oil companies and had an offer to lease it within less than 90 days for $40,000. Relying upon appellant's statements Mr. Winston, 83 years of age, purchased 7½ acres in Kings County for $1,500. When Gordon called in November he sold them 15 acres of desert land in Kings County for $4,500 and promised that on his next visit he would bring a check.

Gordon reported to White concerning his sales to the Winstons of 22½ acres for a little over $7,000 and urged White to make a sale of the same amount. When Gordon and White met at the Winston home on January 4, 1941, they pretended to be strangers. White told them of "the Esther Harrington estate" and that he had a splendid opportunity to buy the estate's land. He promised to sell it to a major oil company and on his honor declared that arrangements were already made for the sale and that this property would be leased for a large amount. White sold the Winstons 22½ acres for $4311, which amount he stated was due by parties who had defaulted on a contract to purchase the parcel. White purchased this 22½ acres from the subdivider, Murray Blank, for $900 in the name of his own secretary, Esther Harrington.

Sales to Mrs. Chamberlain.

Counts 4, 5, 6 and 7 charged thefts from Mrs. Chamberlain, a retired school teacher residing in Long Beach. She had met appellant late in 1940 when he called to inquire concerning a small parcel (1¼ acres) which she owned in the desert. She purchased five acres from him on March 14, 1941, for which she paid $1,305.40 and also conveyed her 1¼ acres. Gordon posed then as the representative of the Associated Acceptance Corporation. Again on March 27, 1941, Gordon sold her another 10 acres in Kings County for $3,000. Neither of the foregoing transactions appears among the overt acts alleged nor constitutes a count in the indictment. In making both sales Gordon represented to Mrs. Chamberlain that the acreage sold her was potential oil land and was a hedge against inflation.

Thereafter White visited Mrs. Chamberlain on May 16. Immediately after White's appearance Gordon entered as White told of some woman who had lost her husband, was in great distress and wished to sell 25 acres; that it was a potential oil field; that production would not be long delayed; and that when leased she would get a bonus of several hundred dollars per acre. Gordon offered to take 10 acres if Mrs. Chamberlain would take 15. She accepted and paid $2,559 for this parcel. Neither told her that they had already purchased the same 15 acres from Murray Blank for $600.

On June 9, 1941, White again called on Mrs. Chamberlain, and after he had repeated his former representations she purchased 10 acres in Kings County for $1,633. Her grantor was White who purchased the 15 acres for $550 from the Chase Mortgage and Investment Company, the corporation controlled and operated by Murray Blank. On June 20, 1941, Gordon alone sold her another 10 acres in Fresno County for $2,354. He did not disclose to her however that he could and did then purchase the same 10 acres from Murray Blank for $550. Within the week Gordon called again and sold her still another five acres for which he took her remaining "chips and whetstones": two lots in Wilmington, a $1,000 bond of the Morris Essex Railroad Company worth about $200, other securities and $135.50.

In addition to the foregoing sales which are alleged in the indictment, Gordon sold Mrs. Chamberlain twenty acres in Kern County on November 3, 1941. On November 21, 1941, he sold her another five acres in Fresno County for which he accepted an Oklahoma royalty interest and $980. On September 14, 1942, Gordon sold her another 15 acres in Fresno County for $2,260 although Gordon purchased the same acres for $675, which fact he did not disclose to Mrs. Chamberlain.

Sales to Mrs. Pattengill.

Count 8 accused defendants of obtaining from Mrs. Pattengill $2,633 on June 3, 1941. Inasmuch, however, as her other transactions with the defendants throw light upon that incident as well as upon the charge of conspiracy we first hastily review her experiences with them prior to the facts mentioned in Count 8 which is identical with overt act 24.

Mrs. Pattengill was 81 years of age. She had resided in Hollywood about 23 years. She first met defendant White in 1938 and in 1939 he sold her parcels of desert land in the San Joaquin valley. After he had sold her several tracts White told her that she could have a better drilling section if she would purchase a number of parcels from his other clients. In reliance upon his statements that a lease to a drilling company could be sooner made if she bought other lands she purchased 14 acres in Fresno County in two parcels in October 1939, White's secretary being the grantor in both deeds. When appellant first called upon her on May 1, 1941, to add glamour to his personality and to make a show of responsibility he presented a card giving his address as "Gordon Distributors Company." He stated that it was a family firm; that it dealt in city real estate but that he had been specializing in oil lands in Fresno County; that he belonged to the oil scouts organization and had striven for six months for admission; that he had a document which proved he was an oil scout; that the men whose photographs he exhibited (captains in the oil industry) were also members and that this should satisfy Mrs. Pattengill of his knowledge of oil land. Having gained her confidence by his self praise and repeated visits, he told her that it would be to her advantage to exchange her lands for some of his because some of her last purchases were remote from the main body of her holdings. Thereupon she purchased 15 acres in Fresno County, paid Gordon $3,250 in money and conveyed to him ten acres she had purchased from White. He did not disclose to her, however, that he could, and did on the same day, purchase the 15 acres from Murray Blank for $750 but told her that it belonged to a client residing in northern California.

Returning now to the transaction of June 4, 1941, both defendants were present. Appellant told Mrs. Pattengill that it would be much better to have more land because they were asking already for large drilling tracts and he did not think that she "could ever obtain results from the smaller ones"; that it would be very much to her advantage to buy 13 acres from owners of small parcels, 1½ and 2 acres; that the land would be leased for a ⅛ royalty and a bonus of $500 to $750 an acre and asked her to sign a contract appointing him as her agent to make the lease; that he represented five major oil companies. In reliance upon his statements she paid appellant $2,633 for the 13 acres in Fresno County and received two deeds from appellant. On the date of his deeds to Mrs. Pattengill he in turn received a deed from Murray Blank conveying to him the same 13 acres for which he paid $50 per acre. The latter fact, however, he did not disclose to his vendee.

During the course of her negotiations with defendants White told her many times that the whole proposition was to lease the property for a bonus and a royalty. Mrs. Pattengill was corroborated by her cousin who had lived with her for more than 20 years.

Other Swindles.

Other transactions by appellant for which neither defendant was accused were received as evidence of his criminal intention in committing the thefts alleged as well as of the conspiracy. Prior to his sale to Mrs. Dawson he had called several times. Having learned of the ownership of borax properties by her and Miss Adamson he subsequently returned and stated to them that he could sell no less than five acres as that much was required for a drilling site but would accept their two and a half acres of borax and thereby get their money out; that he would handle the oil lands for them, collect the royalties and make the leases for a commission of 10 per cent. On April 9, 1941, the two ladies purchased five acres in Kings County for which they paid him $1,675. He stated that the land was owned by the Chase Mortgage Company which held a mortgage on the lands and that the owners desired to sell enough to clear the mortgage; that the five acres offered them was the only parcel in the area not under lease to a major oil company; that he would own eight acres adjoining that offered to them. He did not disclose to them that on the same day he would purchase four of the same acres for $150.

May 1, 1941, after many visits to her home appellant sold Mrs. Dawson 5¾ acres in Kern County for $1,800. He told her that it was oil land; that he would lease or sell it for her; that because he was an oil scout he could get first-hand information from the oil companies; that she would double her money right away. He did not tell her this was the same parcel that appellant had sold to Mrs. Conger in 1935 and taken back from her on an exchange in December 1939. She neither sold or leased the land nor received any income from it.

The sale to J. O. Edenbaugh in November 1937 is of the same pattern as those charged in the indictment. He was a retired Santa Monica city employee, formerly driver of an ash and can truck. Gordon called upon him many times before inducing a sale. He stated that he must sell lands in the Trico area in Kern County prior to the expiration of his option; that it was in an oil district; that the Standard Oil Company was drilling a well just north of the five-acre tract; that if Edenbaugh would purchase this five acres he would guarantee his money back plus 20 per cent in 90 days. Relying upon such statements and promises Edenbaugh made the purchase for $1,000. Gordon then gave him a contract that he would lease the five acres for a 15 per cent commission. Edenbaugh never received any return on his investment, and the land was worthless.

Mr. and Mrs. Leonardo De Lorenzo were visited by appellant many times in 1937. They purchased 10 acres in Fresno County from him in January 1938 for $3,000. In the June following he sold them 40 acres in Kern County for $8,000. He told Mr. and Mrs. De Lorenzo that the 40 acres in Kern County was worth $8,000 and that its value would be doubled before the year had expired; that it was "fine" according to a geologist friend; that he himself had gained inside knowledge because he was manager of the estate and had contact with the escrow. Six months later, relying upon Gordon's statement that it was potential oil land about to be drilled, the De Lorenzos purchased another twenty acres in Fresno County for which they conveyed to appellant a 77-acre ranch with all improvements in Bristol County, New York, worth $5,000, and paid him $600 in cash. During the same year White also sold the De Lorenzos ten acres of desert land in Fresno County, and in the following month acquired from them ten of the acres they had purchased from Gordon in the preceding July. After learning from them of their deals with Gordon, White promised to ascertain from a friend in Kern County the worth of their purchase from appellant. White later reported to them that his friend's appraisal was $400 an acre and they would be foolish to exchange it. Thereafter Gordon called at their home with maps of Kern County and told them the area was very rich in oil.

J. F. Reimer was 77 years of age in February, 1942, when appellant told him that he might sell his Oklahoma royalties and buy good land in Fresno County adjoining the lands of the major oil companies; that he himself owned 30 acres and had 80 acres for sale; that he had five acres that had been seismographed, was oil-bearing and was surrounded by holdings of major oil companies; that five acres in a section to the south of it had sold for $125,000; that if Reimer would purchase the land appellant would look after his interest and take care of it because he knew it was underlain with oil. Reimer paid Gordon $750 for the five acres, and six months later purchased another five acres at $150 an acre after Gordon told him that a major oil company desired it but preferred not to buy from an estate of which this parcel was a part. That he could and did pay Murray Blank $45 per acre for these parcels he did not divulge to Reimer.

Late in 1940 Gordon told Josephine Hunter that his company made investments in non-productive securities such as hers. On February 18, 1941, she exchanged some stocks for 2½ acres in Kings County. He did not disclose that on the same day he purchased the parcel for $100 from Murray Blank. On April 12, 1941, she exchanged other stocks and paid $580 for 7½ acres in Kings County. To induce this purchase Gordon showed her some statistical data and newspapers giving reports of the explorations of various oil companies in that region. Two days later Gordon purchased the land from Murray Blank for $40 an acre. On May 14 he sold her 15 acres in Fresno County for $5,500. That on the same day he could purchase it from Murray Blank for $750 he did not advise her. April 14, 1943, Gordon sold Mrs. Hunter another 20 acres in Kern County for $4,795 and her 10 acres in Kings County which he had sold her in 1941. He told her this exchange was advantageous and necessary for reasons he had discovered in his own transactions; that the Kern County acres were strategically located and adjoined a large producing area. He exhibited to her news reports that producing wells were on the adjacent lands and had brought in a big supply of oil. Mrs. Hunter never sold or leased any of the land purchased from Gordon or received any returns from it.

The transactions with Mrs. Caroline Conger relate to overt acts 4, 5, 6, 7, 8, 9 and 10 of Count 1. Gordon had gained her confidence and her promise to act only upon his advice. He acquainted White with her name and her ability to invest. They so timed their calls as to meet at her home. Gordon told her that the United Northwest Oil Company had already deposited the price of the land in the bank and she should accept White's offer. Relying upon such statements she paid them $5,400 for forty acres in Tulare County. Besides making four other calls upon Mrs. Conger Mr. White sold her twenty acres in Tulare County on December 9, 1940, for $2,700 and on January 4, 1941, he sold her another twenty acres in Tulare County for $3,000. Each parcel sold to Mrs. Conger was conveyed by the same Miss Harrington or by Miss Rideau, maid in the home of White, and each parcel had been purchased or was about to be purchased from Murray Blank at about $35 per acre, which facts were not disclosed to Mrs. Conger. The 20 acres sold to her on January 4, 1941, included fifteen acres which defendants had taken from her as part consideration for the 40 acres which she purchased December 9, 1940, but of which she had no knowledge at the time.

Representations Proved False.

The testimony of Harold V. Dodd, deputy state oil and gas supervisor, established that there was no oil or gas in commercial quantities in any of the sections which included the acres sold by defendants to the parties named in the indictment and that there was no oil in commercial quantities in any lands in Tulare County.

Messers G. R. Couper of the land and lease division of the Texas Company and Mr. Walle Merritt of the land department of Shell Oil Company both gave testimony to the effect that their companies had at times acquired lands within a radius of five miles of the several parcels sold by the defendants for which they had paid only nominal sums for three-year leases; that in no instance was a well drilled upon any of the lands they had leased except in the case of Section 16, Township 20 South, Range 19 East, in Kings County. A "dry hole" was drilled on that section in 1940 to a depth of 10,747 feet. Otherwise their records disclosed no attempt at developing any one of the sections which included the several parcels sold by defendants in the transactions involved. According to these officials neither of the defendants ever transacted any business with their companies. Practically every lease held by those companies in the vicinity of a five-mile radius of the lands sold by defendants were quit-claimed in 1940, 1941, and 1943. The letters and reports quoted by appellant indicating that the area including the lands sold by defendants "warrants a thorough test for oil and gas" and "warrants the attention of anyone interested in potential oil and gas land" do not conflict with the testimony of Mr. Dodd.

The testimony of Mr. Ray D. Westcott, deputy real estate commissioner, proved that the Chase Mortgage and Investment Company had subdivided the lands sold by defendants and that its president was Murray Blank; that the subdivider of each of the sections from which the parcels were sold declared that "each purchaser will be informed that parcels in this project are being sold as a speculative investment only; that in event that oil or gas in paying quantities is not discovered on this property, the purchaser will probably receive no returns on his investment; will obtain nothing except a lease or a parcel of land." The deputy proved also that a copy of the commissioner's report must be delivered to a purchaser of any parcel in the subdivision before his payment of any part of the purchase price is accepted. In no instance does it appear that a copy of the subdivider's promise or of the commissioner's report was ever given by either defendant to any one of their victims. Thus it appears that while defendants were by writing fully advised of the speculative character of the lands they were selling to inexperienced and aged men and women, their suppression of such writings from their vendees was itself evidence of their deceitful aims.

Such Acts Condemned as Thefts.

[17] Appellant's testimony that he told his customers that an investment in the lands he was selling was speculative was not believed by the jury. From all of the proof submitted they preferred to believe and were warranted in believing that appellant did not divulge the truth under any of the circumstances detailed. The credibility of witnesses, the weight to be given to their testimony and the reasonable inferences to be drawn from all the facts were for the jury, and in the absence of prejudicial error their verdict will not be set aside. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Borrego, 211 Cal. 759, 765, 297 P. 17; People v. Pruitt, 55 Cal.App.2d 272, 275, 130 P.2d 767. Conflicts in evidence are of no concern to the reviewing court. The jury having accepted the testimony of the witnesses for the people, including defendant White, the testimony of appellant cannot induce us to alter the implied findings of the jury. People v. Crownover, 34 Cal.App.2d 7, 9, 92 P.2d 929.

In weighing the evidence of the false representations and false promises made by appellant, their materiality and the reliance of the vendees upon them, we have not ignored his arguments to the effect that the promises and representations were mere "predictions and opinions" and are not actionable fraud. The reply thereto is twofold: (1) The statements of fact were believed by the jury to be false and the promises given were made without intention of performance. Representations that lands are potential oil lands; that major oil companies will lease them and pay bonuses; that the investment will be returned in 90 days with profit; that the investment will be doubled; that the land is adjacent to or near productive oil land—these are material and constitute actionable fraud. (2) The disguise of defendants in dealing with their victims added to their perfidy. They asserted a superior knowledge of the lands and rare opportunities to acquire them not available to others. They pretended that Miss Harrington was a bereft widow or a decedent and that they were thereby enabled to buy lands which the oil producers coveted but deigned not to lease for fear of title complications. Under the circumstances and in view of the chain of events, after defendants' first agreement the vendees were easily induced to believe they were the beneficiaries of two generous and far-seeing benefactors and therefore naturally were influenced by the first representation in making subsequent purchases. People v. Shaffer, 38 Cal. App.2d 421, 428, 101 P.2d 560; People v. Hennessey, 201 Cal. 568, 582, 258 P. 49.

The Vendees Ignorant of the Petroleum Industry.

None of the investors was familiar with the oil industry; none had any knowledge of the nature of an oil reservoir—of its dome-like structure, of the manner of its creation and of the numerous strata of sand, rock, clay and ash that must be penetrated before the oil-bearing structure is reached. They had no geological knowledge; knew nothing of the folding or lifting of the earth's crust, of contours, faults and saddles; of the tilted reservoir or of the endless supply of water pressing against, and extending outward from, the lowest contour of the captive petroleum, thus rendering "non-productive" the surrounding area. Because of their utter ignorance of these and other technological facts the vendees were readily susceptible to the suggestions of defendants who made use of the popular notion that if a producing oil well is found on section 1 then oil probably underlies the adjacent sections 2, 11 and 12. With this psychological advantage defendants called at the homes of these inexperienced people, pretended to be strangers to each other, pretended to be selling the lands of an estate or of a woman in distress; whereas, in truth, they secretly intended to buy the land from the subdivider after first having obtained the purchase price from her whom they had generously offered to advise, while never disclosing the price to be paid to the subdivider and never favoring her with the certificate exhibited to themselves by the subdivider to the effect that an investment in such lands was a speculation only. Not only did they suppress material facts, which is a fraud (Civil Code, sec. 1572), but their very schemes and manner of approach were designed to entrap the unwary and thus were reprehensible and deceptive. Brooks v. United States, 8 Cir., 146 F. 223, 227; Looker v. United States, 2 Cir., 240 F. 932, 934.

[18-20] The "assurances" and "guarantees" of immediate profitable sales or leases for the vendees were of the nature of promises. If a promise is unconditional and is made without intention of performance it is actionable fraud. A promise is the expression of the present intent which is a fact (Blakeslee v. Wallace, 6 Cir., 45 F.2d 347, 350; Knickerbocker Merchandising Co. v. United States, 2 Cir., 13 F.2d 544, 545); and if the promisor has no intention of performing he deceives those who rely upon his promises. The substantial fraud depends upon the divergence between the act promised and the promisor's belief that he could fulfil his promise. If he knows he intends not to perform, his promise is a fraud. Knickerbocker Merchandising Co. v. United States, supra. Whether a promise was dishonest is a question for the jury's determination upon all of the evidence. People v. Ames, 61 Cal. App.2d 522, 531, 143 P.2d 92.

[21, 22] If the jury determined that defendants knew or had good reason to believe that the acres they were selling were outside of the productive limits of an oil field or that they had no belief that the land sold was underlain with oil in commercial quantities, or that they were in a far better position to judge than the "unsophisticated public," then they were warranted in finding that defendants had committed theft by false pretense. Van Riper v. United States, 2 Cir., 13 F.2d 961, 964. But fraud founded upon utterance is not confined to mere statements of fact and dishonest promises. Asserting one's belief or opinion bad faith is equally deceptive (Keeler v. Fred T. Ley & Co., 1 Cir., 49 F.2d 872, 874); and when the criminal purpose of the accused is demonstrated by numerous acts of taking the money of his victims by means of false promises the jury is not required to be too sensitive to fine distinctions in his favor. People v. Paluma, 18 Cal.App. 131, 135, 122 P. 431.

[23-25] Numerous authorities are cited in support of appellant's contention that the inducing statements made by him were mere predictions or opinions. Tahoe Pines Co. v. Newman, 59 Cal.App. 186, 210 P. 445; Zeh v. Alameda Community Hotel Corp., 122 Cal.App. 366, 10 P.2d 190; Everts v. Matteson, 21 Cal.2d 437, 451, 132 P.2d 476; Wegerer v. Jordan, 10 Cal.App. 362, 364, 101 P. 1066. Also, he cites the paucity of words used by some of the vendees in their testimony to show that definite promises were not made by defendants. But neither the authorities cited nor the testimony quoted impeach the judgments. Both defendants told Mrs. Conger that the purchase price of the section including the parcel offered her was already in escrow and she would double her money in two months. White pretended to befriend some of the vendees as against Gordon; in other instances Gordon was the confidential adviser of his clients about to be sold by White. Where two clever salesmen, by pretending (1) to be wise concerning the subject of their vending, (2) to give friendly advice, and (3) to afford their customers extraordinary opportunities, gain the confidence of confiding people by dangling before them golden opportunities to gain wealth, proof of explicit statements are not as essential as in transactions between men dealing at arm's length. United States v. Rowe, 2 Cir., 56 F.2d 747, 749. The fact that defendants combined false promises of future acts with statements of existing facts with no intention of performance did not overcome the effect of the false pretense concerning the present fact. People v. Ames, supra. But a false promise made by one who knows that he will not perform states his present intent, which is itself a fact. Knickerbocker, etc., v. United States, supra.

[26-31] The opinions of defendants as to the values of the desert lands were not meaningless. They bore upon existing facts which were inaccessible to the vendees. Values are facts. The importance and materiality of representations of value increase in proportion to the credulity and reliance of those who are asked to rely upon them. United States v. Rowe et al., supra. These defendants were especially culpable in their opinions of value (1) because of the zealous prophecies of new discoveries, of sales and of leases to major oil companies, (2) because of their pretenses that they were able to sell the lands by reason of the embarrassments of the owners, and (3) because of the vendee's reliance thereon. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958. Fraud oftentimes consists in asserting pretended beliefs and opinions for the purpose of deceiving. Keeler v. Fred T. Ley & Co., 1 Cir., 49 F.2d 872, 874. It was for the jury

to determine whether under the circumstances the vendees were warranted in relying upon the opinions as to value. Willson v. Municipal Bond Co., 7 Cal.2d 144, 151, 59 P.2d 974; Neff v. Engler, 205 Cal. 484, 271 P. 744. A dishonest opinion expressed to one entitled to rely upon it is actionable deceit. Hobart v. Hobart Estate Co., supra; Neff v. Engler, 205 Cal. 484, 271 P. 744. It is false pretense to take the property of another by force of an opinion asserted in bad faith and with a design to mislead. Mitchell v. Tuttle, 102 Cal.App. 16, 19, 282 P. 534; Keeler v. Fred T. Ley & Co., supra. If a seller of land possesses or assumes to possess superior knowledge of the property and asserts it to his vendee who has not had equal opportunity to gain such knowledge, his asserted opinion may be equivalent to an affirmation of fact and therefore actionable fraud. Eade v. Reich, 120 Cal.App. 32, 35, 7 P.2d 1043; Russell v. Roscoe, 106 Cal.App. 293, 298, 289 P. 185; Roloff v. Hundeby, 105 Cal.App. 645, 648, 288 P. 702. This leads us to observe that the express testimony of a victim of false pretense that he was induced to part with his money by the fraudulent statements of the accused is not essential. It is sufficient if the inference of his reliance could have been drawn from all the evidence. People v. Schmidt, 79 Cal.App. 413, 418, 249 P. 832, 250 P. 1104; People v. Hong Quin Moon, 92 Cal. 41, 27 P. 1096.

The Conspiracy Was Proved.

[32] From the proof recounted and the authorities cited no reasonable doubt remains of appellant's guilt of the seven acts of grand theft. Although the testimony of the vendees as to counts 2, 3, 4, and 5 was at first limited to White only, it is reasonable to infer that the trial court considered that limitation removed after the testimony of White who revealed the agreements and close collaboration between himself and appellant in their successful attempts to obtain money by false pretense. Inasmuch as the existence of the conspiracy made both guilty of any act done in furtherance thereof (People v. Temple, 15 Cal.App.2d 336, 339, 59 P.2d 417), any doubt remaining as to appellant's participation in the crimes charged in the last mentioned counts was dissipated by the conclusion of the jury that the conspiracy had been established.

[33] So interrelated and harmonious were the operations of defendants as disclosed by the documents and the testimony of the vendees that, based solely upon them, honest deduction could not but reasonably have inferred their conscious collaboration with a definite purpose. In fact, so marked with perfidy was their behavior that no strain of conscience was requisite to an inference of the existence of a conscious criminal accord to conduct a campaign of wilful plunder. Their bold efforts to beguile the innocent rendered the latter impotent as against the artifices of trained minds and aggressive personalities. The conspirators were so resolved to break all sales resistance that no peace was allowed an investor until all of his savings had been taken away. Indeed, were they so constant of purpose that a sinister and malign influence fringes the border of every scene.

Appellant contends that the inferences to be drawn from the fact that he sold lands in the same theater and to the same purchasers are not sufficient to support a conviction for conspiracy. But the jury were not required to rest upon inference from the narratives of the vendees, the deeds and contracts of sale to derive a finding of the conspiracy. While circumstantial evidence may, and usually does, suffice to prove a conspiracy, the verdicts here were not required to rely for support upon indirect proof.

Defendant White testified fully and freely of his agreement with appellant to divide the profits realized from Mrs. Conger's purchase if Gordon should recommend the sale. He related the details of the events of their united efforts in making sales to each of the vendees; of their pretending at first to be strangers; of their division of the profits gained in each instance; of his receipt from Gordon of an additional five per cent of the sales' prices to provide for the excess of his income tax; of Gordon's supplying him with names of prospective investors. They drew their arguments and suggestions from a common reservoir. They made substantially the same representations as to the ownership, as to the proximity of the acres to oil production, as to the certainty of its productivity and of its prospective sale or lease for a huge sum.

[34-37] A criminal conspiracy may be proved by the testimony of a conspirator as well as by the conduct of the defendants and the circumstances of their dealings. People v. Malone, 20 Cal.App. 2d 1, 6, 66

P.2d 216; People v. Zimmerman, 3 Cal. App. 84, 84 P. 446. Conspiracy is a distinct offense of which the parties may be guilty even though they have been convicted of the substantive crime. People v. Martin, 114 Cal.App. 392, 396, 300 P. 130. The purpose of evidence in a conspiracy case is to establish an illicit concord of the participants (People v. Stevens, 78 Cal. App. 395, 408, 248 P. 696), and the conspiracy is established when it is shown that the defendants entertained a mutual design to commit the offense designated as the aim of the conspirators, followed by an overt act in pursuance of such design. The secret agreement of defendants having been proved by White and the numerous overt acts in furtherance of their conspiracy having been attested by the victims of their unlawful scheme, the verdict has substantial support. People v. George, 74 Cal.App. 440, 452, 241 P. 97.

[38, 39] While the consummation of the conspiracy is not necessary to a conviction therefor (People v. Gilbert, 26 Cal. App.2d 1, 21, 78 P.2d 770), the facts impliedly found furnish proof of criminal acts in achieving the criminal purposes. The evidence received being competent the verdict cannot be reversed unless it be shown that upon no hypothesis was the evidence sufficient to support the judgment. People v. Yant, 26 Cal.App.2d 725, 737, 80 P.2d 506. While to sustain a conviction for conspiracy it is not essential that the overt act be criminal (People v. Corica, 55 Cal.App.2d 130, 130 P.2d 164), yet 13 of the 28 overt acts alleged were shown to have been seasoned by false statements and promises and by suppressing material facts from the vendees which if known would have defeated the sales.

[40-44] Appellant urges that "in the absence of proof of the existence of a conspiracy" all the acts and statements of defendants occurring more than three years prior to the return of the indictment (March 14, 1944) would not be proof of a conspiracy within that period. Such is not the law. It is no valid objection to evidence which tends to show the successive steps in the formation of a conspiracy of those accused merely that the facts disclosed had their genesis at a time long anterior to the agreement. It is admissible if the evidence tends to prove the criminal accord. People v. Stevens, supra. However, proof of the commission of 14 of the overt acts within the three-year period blasts appellant's contention. Proof of one overt act is sufficient to support a conviction for conspiracy. Penal Code, Sec. 1104. The estwhile existence of a criminal conspiracy may be proved by one of the conspirators. People v. Earl, 10 Cal.App.2d 163, 165, 51 P.2d 147. Once the conspiracy is established all evidence of the substantive crimes becomes admissible against all participants. People v. Temple, supra. It thereupon devolved upon the jury to determine the issue as to whether a conspiracy existed and whether the overt acts occurred. People v. Talbott, 65 Cal. App.2d 654, 663, 151 P.2d 317.

[45-48] Conviction of appellant for the thefts charged does not relieve him of guilt in entering into the conspiracy. Penal Code, sec. 182; People v. Martin, 114 Cal.App. 392, 396, 300 P. 130; People v. Clement, 97 Cal.App. 238, 275 P. 511; People v. Yant, 26 Cal.App.2d 725, 731, 80 P.2d 506. It is true that the evidence does not show that all of the fraudulent acts were within three years from the return date of the indictment, but such showing is not essential to the competency of the evidence. A conspiracy may be proved by evidence of its gradual formation, of acts which occurred long anterior to the criminal compact. People v. Black, 45 Cal.App.2d 87, 113 P.2d 746. Therefore the sales to Conger, Wastlund and the Winstons more than three years prior to the indictment were evidence of the conspiracy.

White Was a Competent Witness.

[49, 50] Appellant contends that this court should disregard White's testimony because it was given under promise to be lenient if he testified truthfully. We are in accord with the doctrine that the testimony of an accomplice who has confessed his guilt of numerous crimes must be regarded with suspicion, especially where he has been encouraged to expect immunity or only slight punishment for the crime under investigation. People v. Walther, 27 Cal.App.2d 583, 590, 81 P.2d 452; People v. Coffey, 161 Cal. 433, 489, 119 P. 901, 39 L.R.A.,N.S., 704. But that principle does not require an inhibition against the admission and consideration of the testimony of such accomplice. His testimony is received with all of its vices as in the case of any witness. If he is believed his testimony makes proof; if he is wholly discredited it does not affect the accused. If his criminal record is dark

enough to raise a reasonable doubt the jury acquits; if in spite of it he is believed, a verdict of conviction follows. But a reasonable doubt created in the minds of the reviewing court is not a factor. People v. Bargala, 81 Cal.App. 381, 386, 253 P. 938. If testimony is not inherently incredible it will support the verdict. People v. Pruitt, 55 Cal.App.2d 272, 130 P.2d 767. However, the jury in this case had much evidence in the testimony of the vendees to support the detailed narrative of White.

Inasmuch as upon no hypothesis whatever is the evidence insufficient to support the verdict and the decision of the trial court, the judgments cannot be reversed for want of proof. Constitution, Art. VI, section 4½; People v. Newland, supra.

III. No Prejudicial Misconduct of the District Attorney.

[51, 52] The offer by the district attorney of evidence of the cost of the lands sold and his comment to the jury thereon are assigned as prejudicial misconduct. It was contended at the trial that such evidence would prejudice the jury and that there were no misrepresentations concerning cost. In a prosecution for false pretense the suppression of a fact material to the transaction is proper subject of proof. While proving that defendants sold Mrs. Winston desert land at $300 an acre its cost to them on the same day of less than $50 an acre was competent (1) to show the bad faith in advising the investment and in representing that it was potential oil land and that they had an offer to lease it within three months for $40,000; (2) also it was competent to prove that while selling desert land as oil land defendants stealthily suppressed from the vendee a material fact, namely, the price to be paid the subdivider. Such fact would have caused the vendee to suspect, if not to be convinced, that the land was not worth the price at which defendants offered it. Such evidence was especially pertinent as proof of the conspiracy to cheat and swindle the victims named. The suppression of a material fact by a person who states other facts calculated to mislead is actionable fraud. Civil Code, secs. 1572, 1710; Wells v. Zenz, 83 Cal.App. 137, 140, 256 P. 484; People v. Simmons, 12 Cal.App.2d 329, 332, 55 P.2d 297; United States v. Rowe et al., 2 Cir., 56 F.2d 747, 749.

[53] No prejudice resulted to appellant from the argument of the prosecutor in which he told the jury of the prices of $35 and $40 an acre paid by defendants for the lands they had sold at $150 and more per acre. Such facts being in evidence were proper subject for discussion by counsel, and consideration by the jury. People v. Sieber, 201 Cal. 341, 355, 257 P. 64; People v. Molina, 126 Cal. 505, 508, 59 P. 34.

[54-57] Appellant argues that prejudice resulted to him when the deputy district attorney told the jury in the opening statement the actual cost of the lands to defendants on the same day of their sales to the several vendees. To yield to such argument would be contrary to the traditional practice in this state. It is not only proper but beneficial for the prosecutor at the outset to outline the evidence he purposes to introduce in support of an accusation. It is not evidence and has no binding force. And if it had such force it is presumed to have been dispelled by the instruction to consider as evidence only that which had been received as evidence. People v. Stoll, 143 Cal. 689, 77 P. 818; People v. Pantages, 212 Cal. 237, 244, 297 P. 890. Even though the prosecutor's outline of evidence in his opening statement should not be followed by actual proof, yet no prejudice results in the absence of a showing of bad faith. People v. Wong Hing, 176 Cal. 699, 169 P. 357; People v. Donaldson, 36 Cal.App. 63, 171 P. 442. The record here fails to disclose any instance of the failure to present the testimony of living witnesses in support of the opening statement. However, any such failure would have been cured by the jury's obedience to the instruction to be guided by the evidence received. People v. David, 12 Cal.2d 639, 86 P.2d 811.

IV. No Error in Admitting Evidence of Similar Transactions.

[58, 59] Complaint is made of the trial court's receiving evidence of transactions with others similar to those had with the vendees named in the indictment. Specifying the sales to Edenbaugh in 1937, to Mrs. De Lorenzo in 1938, to Mrs. Dawson and Mrs. Hunter in 1941 and 1943 and to Mr. Reimer in 1942, appellant argues that these transactions "had no bearing upon * * * either the conspiracy count or any of the grand theft counts"; that they were

"to insure a prejudice against appellant." In support of this contention many authorities are cited. People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7; People v. Gibson, 107 Cal.App. 76, 289 P. 937; People v. Gaertner, 43 Cal.App.2d 388, 395, 110 P.2d 1002; People v. Glass, 158 Cal. 650, 655, 112 P. 281; People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28. These cases are either contrary to appellant's contention or they do not support it because they are distinguishable. The guiding rule in a situation like the one before us is that evidence of similar transactions is admissible to show guilty knowledge or intent so long as they "contain the material elements of the main case." People v. Robinson, 107 Cal.App. 211, 224, 290 P. 470, 476; People v. Bird, 124 Cal. 32, 56 P. 639. It is also competent to prove a definite prior design which included the doing of the act for which the accused is on trial. Under this rule evidence was admissible to show that defendants had made substantially the same representations to other persons. People v. Robinson, supra. Such or similar representations to other victims of their cunning are properly received also to show guilty knowledge of the accused in making the false pretenses to the vendees named in the accusation, to establish a plan and scheme to defraud (People v. Whiteside, 58 Cal.App. 33, 38, 208 P. 132), and to prove defendants' knowledge of their falsity or a criminal intent. 16 C.J. § 1162; 22 C.J.S., Criminal Law, § 691. See People v. Wymer, 53 Cal.App. 204, 206, 199 P. 815.

[60] So constant is the pattern of appellant's behavior in all of his sales of desert lands, demanding exorbitant profits on his own investment from old or inexperienced people; dealing in worthless lands in the general area of an oil field; suggesting a dramatic situation whereby the lands became available for purchase; pretending to have knowledge that the acres offered would be sought by the major oil companies at extravagant prices while at the very time he knew that much of the same or adjoining property had been held by those operators under inexpensive leases and quit-claimed prior to his campaign to sell them to the unwary—so uniform was his conduct on every theater of his operations that no reasonable doubt remains of the felonious purpose that activated his deeds. But if there were serious doubt as to the correctness of the court's rulings in allowing proof of transactions with the vendees not named in the indictment, still they would not constitute prejudicial error under Section 4½, Article VI of the Constitution for the reason that from a review of the evidence the guilt of appellant is clearly established.

[61] The effort of appellant to muddy the stream by injecting the false issue of his creed was abortive below and is ineffective here. Not a word was said by the prosecuting attorney to imply that appellant ever attended a church, a synagogue or a Moslem temple. The only mention in the record of appellant's attachment to any group of worshipers was the response to his own cross examination of Mrs. Chamberlain which he followed with an offer of a letter addressed to himself and written by that lady at appellant's own request. If the jury were impressed as we are they must have concluded that every phrase of that document was composed by appellant in his zeal to forestall a prosecution by a method as devious as those used in selling worthless acres on the margin of the Diablo Range.

No Error in Giving or Refusing Instructions.

[62, 63] Appellant assigns as error the rejection of his offered instructions 17, 32, 33 and 47 to the effect (1) that the jury must adopt that interpretation of two susceptible constructions of the evidence that will admit of defendant's innocence, and (2) that two classes of evidence are recognized and of what each consists. The answer is that the principles embodied in the refused instructions were contained in the court's instructions 21 and 22. Such repetition would have been undue emphasis. After the trial judge has once given an applicable principle of law he is not obliged to repeat it notwithstanding it may be dressed in forceful verbiage and garnished with exhilarating phraseology. People v. Bickerstaff, 46 Cal.App. 764, 775, 190 P. 656; People v. Wolfgang, 192 Cal. 754, 763, 221 P. 907. It is contended that the doctrine of People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469, and People v. Rayol, 65 Cal.App. 2d 462, 150 P.2d 812, should control because "the evidence of a conspiracy is wholly of a circumstantial nature." So contending, appellant overlooks the fact that one of the conspirators testified as to the prog-

ressive steps of the conspiracy from its incipiency to the attainment of its final objective.

[64] Appellant also contends that error was committed by omitting from the instructions on conspiracy that the jury "must find the commission of an overt act within three years from the date of return of the indictment." The answer to such contention is that no request was made for an instruction to the effect that the overt act must have been committed within three years prior to the filing of the indictment. It is a rule of early origin and of long continued practice, with the exception of certain situations not here involved, that if counsel for the accused deems necessary an instruction upon any issue or upon any feature of an issue or of the controversy it is his duty to request the trial court to give such instruction as he may desire. People v. Matthews, 194 Cal. 273, 283, 228 P. 424; People v. Rogers, 163 Cal. 476, 484, 126 P. 143; People v. Winthrop, 118 Cal. 85, 91, 50 P. 390; People v. Ahern, 93 Cal. 518, 29 P. 49; People v. Ellison, 26 Cal.App.2d 496, 79 P.2d 732; People v. Martin, 44 Cal.App. 45, 46, 185 P. 1003.

[65] It is true that the language of section 1127, Penal Code, prior to 1935 provided that "in charging the jury the court must state to them all matters of law necessary for their information." That language was construed under some situations to require the court's charge without reference to requests of counsel. But by the amendment of that section the court "*may* instruct," etc., and "either party *may* present * * * any written charge on the law * * * and request that it be given." Section 1093 goes no further than that "the judge *may* then charge the jury, and must * * * if requested by either party," on pertinent points of law. In the absence of any constitutional requirement (Const. Art. VI, sec. 19) the statutes govern. The analogue of appellant's contention was urged in People v. Simeone, 26 Cal.2d 795, 161 P.2d 369, in which the court held that the defendant having failed to request an instruction could not thereafter complain. It follows that upon such assignment appellant is without support.

[66] Instruction 59 having been offered by appellant was modified by inserting the italicized words which made it read in part as follows: "The court therefore instructs you that the price at which these parcels of land were sold by either of the defendants cannot and must not *of itself and apart from other circumstances in evidence be considered by you as evidence* of fraud even though you may personally feel that the selling price was disproportionate or excessively high." He now contends that error was thereby committed in that the modification nullified the instruction. We are blind to any such effect. It would not have been proper to instruct that defendants' sale price "cannot and must not be considered" as evidence of fraud. Standing alone the price of land cannot be deemed evidence of fraud, whereas in connection with other facts it may constitute the virus of such proof.

[67] Two instructions, 37 and 38, offered by appellant, bearing upon (1) sales of land at excessive prices and (2) the right of one to sell land he does not own if he subsequently acquires title, were read to the jury. He now criticizes these instructions as "inconsistent with the statement of the trial judge that the jury will consider the cost price," proof of which was admitted. This contention is unavailing in the light of the court's admonitions that from the rulings made during the course of the trial the jury was "not to infer" the opinions of the court "as to the guilt or innocence of the accused"; that "the jury are the sole and exclusive judges of the facts." However, if there might have been an inconsistency between the instructions and the court's rulings it was invented and imported by appellant, who may not complain of his own misconceptions of procedure. People v. Curtis, 36 Cal.App.2d 306, 321, 98 P.2d 228.

[68] Appellant assigns as prejudicial instruction 46 which announces that theft may be committed by larceny, embezzlement, or by false pretense or representations (Penal Code, sec. 484), and instruction 60 which says in effect that the crime of theft is committed if one is induced to part with his property by reason of material false pretenses as to a past or existing fact. The jury could not have been misled by being told that grand theft includes larceny and embezzlement as well as false pretense. People v. Woolsey, 13 Cal.App.2d 54, 58, 56 P.2d 557. The indictment alleged only false pretense, and all of the evidence offered established that the offense came within the category of that crime.

[69-71] Instruction 52 advised the jury that while the expression of opinion will not constitute a false representation yet if a false representation extends "beyond mere opinion concerning the quality, value, nature or other incident of an article or property offered for sale or of the solvency of one of the contracting parties to a contract * * * whereby the purchaser * * * is defrauded" it is a violation of law. This instruction is attacked on the ground that there was no testimony of false representations concerning the quality, value or nature of the land sold. From the facts impliedly found and above discussed no reasonable doubt remains that the defendants by their statements and suggestions induced their customers to believe that they were paying their money for acres so near production that they must overlie oil-bearing structure. While it is true that the solvency of defendants was not discussed in positive terms to their victims, yet their repeated offers to purchase or their statements of what lands they had purchased were implications that they were men of bounteous resources. But if such statements may not be deemed representations appellant could not have been prejudiced. The jury were clearly instructed to be governed by the evidence only. Assuming that they were of ordinary intelligence they must have derived their verdict with full realization of their obligations to the state. 4 Cal. Jur.1943 Revis., sec. 574, p. 958, 959.

In view of the foregoing it is needless to labor this discussion with comments upon the asserted errors (1) in denying appellant's motion peremptorily to instruct the jury to acquit or (2) in denying his motion for a new trial. People v. Clark, 61 Cal.App. 46, 47, 214 P. 248; People v. Kimball, 23 Cal.App.2d 32, 34, 72 P.2d 157.

The judgments of conviction and the order denying appellant's motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

27 Cal.2d 197

PAYROLL GUARANTEE ASS'N, Inc., et al., v. BOARD OF EDUCATION OF SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

S. F. 17242.

Supreme Court of California.

Nov. 8, 1945.

Rehearing Denied Dec. 6, 1945.

1. Schools and school districts 🔑72

The statute making school buildings available as centers for community activities establishes condition that such activities must not disturb educational program that constitutes main purpose of public schools. St. 1943, p. 690, §§ 19431, 19433; and § 19432, as amended by St. 1945, c. 1213.

2. Schools and school districts 🔑72

Under statute making school buildings available as centers for community activities, board of education may not only make reasonable regulations with regard to use of school auditorium for authorized purposes, but may deny an application for its use if such use would further the overthrow of present government of United States by force or violence or other unlawful means or would interfere with use and occupancy of public schoolhouse and grounds as required for purpose of public schools. St. 1943, p. 690, §§ 19431, 19433; and § 19432, as amended by St. 1945, c. 1213.

3. Mandamus 🔑79, 168(4)

Board of education's denial of application for use of school auditorium for a mass meeting, open to public without charge to acquaint public with proposed state constitutional amendment, on ground that proposed meeting would greatly interfere with conduct of night classes because proposed speaker would arouse so much organized opposition that classes would be disturbed if not disrupted, was supported by substantial evidence and Supreme Court could not, in mandamus proceeding, declare that it was the board's ministerial duty to grant the application. St. 1943, p. 690, §§ 19431, 19433; and § 19432, as amended by St. 1945, c. 1213.

4. Schools and school districts 🔑72

Statute regarding willful disturbance of public school meeting does not inhibit the expression of opposition to political meetings held in school auditoriums. St. 1943, p. 692, § 19501.

5. Schools and school districts 🔑72

The fact that proposed public meeting in auditorium of school building might interfere with school work would justify Board of Education in denying application for use of auditorium on a school night. St. 1943, p. 690, §§ 19431, 19433; and § 19432, as amended by St. 1945, c. 1213; St. 1943, p. 692, § 19501.

6. Schools and school districts 🔑72

In passing on an application for extraneous use of a school auditorium, board of education must consider the probable effect of proposed use on regular school program and must deny one that would lead to an interference with that program. St. 1943, p. 690, §§ 19431, 19433; and § 19432, as amended by St. 1945, c. 1213.

7. Mandamus 🔑79

When board of education denied application for use of auditorium in school building on a night when regular classes were scheduled, board acted within its authority under statute providing that any meeting shall not interfere with use of public schoolhouse as is required for purpose of public schools, and therefore writ of mandate would be denied. St. 1943, p. 690, §§ 19431, 19433; and § 19432, as amended by St. 1945, c. 1213.

CARTER, J., dissenting.

In Bank.

Mandamus proceeding by Payroll Guarantee Association, Inc., and others against the Board of Education of the San Francisco Unified School District and others, to compel the granting of an application to use a school auditorium for a mass meeting.

Writ denied.

Wayne M. Collins, of San Francisco, and J. Lamar Butler and Lawrence W. Allen, both of Los Angeles, for petitioners.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and Irving G. Breyer, all of San Francisco, for respondents.

S. V. O. Prichard, Asst. Co. Counsel, of Los Angeles, as amicus curiae on behalf of respondents.

TRAYNOR, Justice.

By this proceeding in mandamus petitioners seek to compel respondents to grant their application for the use of the auditorium of the Evening High School of Commerce at San Francisco on Friday evening, November 9, 1945.

Sections 19431–19433 of the Education Code, St. 1943, p. 690 (as partly amended in 1945, c. 1213), provide as follows:

"19431. There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities."

"19432. Any use, by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered.

"Any person who is affiliated with any organization, which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof, by force or violence or other unlawful means, or any organization of persons which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof, by force or violence or other unlawful means, is hereby declared to be and is characterized, a subversive element.

"Notwithstanding any of the other terms of this chapter, no such governing board shall grant the use of any school property to any person or organization who or which is a subversive element as herein defined.

"For the purpose of determination by such governing board whether or not such person or such organization of persons applying for the use of such school property, is a subversive element as herein defined, such governing board may require the making and delivery to such governing board, by such person or any members of such organization, of affidavits in form prescribed by such governing board, stating facts showing whether or not such person or organization is a subversive element as herein defined. * * *"

"19433. The use of any public schoolhouse and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes and shall in nowise interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State."

[1,2] Thus the statute, in making school buildings available as centers for community activities, establishes the condition that such activities must not disturb the educational program that constitutes the main and continuing purpose of the public schools. The respondent board may not only make reasonable regulations with regard to the use of the school auditorium for authorized purposes but may deny an application for its use if (1) such use would further, directly or indirectly, the overthrow of the present government of the United States or any State, Territory or possession thereof, by force or violence or other unlawful means, or (2) would interfere with the use and occupancy of the public schoolhouse and grounds as required for the purposes of the public schools of the State. See Goodman v. Board of Education, 48 Cal.App.2d 731, 120 P.2d 665.

[3] Petitioners have applied for the use of the auditorium for a mass meeting open to the public without charge, to acquaint the public with a proposed state constitutional amendment that petitioners intend to place on the ballot at the next general election to be known as "California Full Employment and Pension System." They intend to present Gerald L. K. Smith as speaker. Petitioners' application was filed on the prescribed form and bears the required signature of the school principal, certifying that the proposed use would not conflict with school programs or other scheduled meetings. The board has filed in this proceeding an affidavit of the principal "that the approval was limited to the availability of the auditorium for the evening

applied for by said organization. That subsequent to the approval of said request, affiant has been informed that Mr. Gerald L. K. Smith will be a speaker on the program scheduled for such use; that affiant has been informed that in each and every instance where Gerald L. K. Smith has spoken in a public building in the State of California, there have been extended picket lines at such building, resulting in a noisy and boisterous demonstration; that affiant is informed and believes, and on the basis of such information and belief alleges that if this application is granted, there will be extended picket lines comprising several thousand persons who will surround the building, causing noisy and boisterous demonstrations * * * that affiant is informed and believes, and on the basis of such information and belief, alleges that if this application is granted, numerous pupils enrolled at said school will refuse to go through the picket lines in order to attend classes; that the demonstrations, with attendant noises caused by such an extended picket line, will interfere with the use and occupancy of the said school and will interfere with the regular conduct of school work." The board has also filed an affidavit of the Superintendent of Schools "that the demonstrations with attendant noises caused by such an extended picket line will interfere with the use and occupancy of the school building and will interfere with the regular conduct of the school work." Representatives of various organizations appeared before the board, and other organizations sent in written statements, protesting the use of the auditorium and announcing their intention to picket the meeting. The minutes of the board show "that the general reasons advanced for the opposition * * was that Gerald L. K. Smith is an undesirable character, whose activities and speeches are attempting to divide the American people on the question of race and religion. That his activities are in no way different than those advocated by leaders of the Fascist Government which has existed in Europe, and that because of this fact public property should not be used to assist his activities." It was also urged by the opponents that the proposed meeting would interfere with school activities. The board members were advised by the board's attorney that the application must be granted unless the proposed meeting would interfere with the regular school work.

Respondent board has emphasized in this proceeding that its refusal of petitioners' application rests exclusively on the ground that in its opinion the proposed meeting would interfere with the school activities scheduled at that time. It is conceded that on the night of the proposed meeting there will be evening classes at the same school, although no classes are scheduled on Saturdays and Sunday. Moreover, it appears that there are auditoriums available in other schools where no classes are scheduled on the night of petitioners' proposed meeting. The board has determined that although the auditorium will not be required for the scheduled classes, the proposed meeting would greatly interfere with the conduct of the classes because the proposed speaker would arouse, as he has in Los Angeles and other cities, so much organized opposition that classes would be disturbed if not disrupted. The board had substantial evidence before it to support its determination that such an outcome was likely. Hence this court cannot declare that it was the board's ministerial duty to grant petitioners' application.

Petitioners do not deny that the board is justified in believing that the proposed meeting would be picketed, and that interference with the school work might ensue. They contend, however, that such interference would not be of their own doing and therefore cannot justify the board's action in denying them the use of the auditorium on a school night. They invoke section 19501 of the Education Code, which provides: "Any person who wilfully disturbs any public school * * * meeting is guilty of a misdemeanor * * *." They contend that it would be for the police to prevent any disturbance of the proposed meeting or of the school work, and that petitioners should not be penalized for any possible inability of the Police Department to prevent such disturbances.

[4, 5] Section 19501, however, is concerned only with wilful disturbance of public school meetings. It does not inhibit the expression of opposition to political meetings held in school auditoriums. It could not do so without infringing upon the constitutional right of free speech, which can be exercised by peaceful picketing. Speakers who express their opinions freely must run the risk of attracting opposition; they cannot expect their opponents to be silenced while they continue to speak free-

ly. If a speaker in a school building or the opposition that he aroused attracted so much attention as to disturb school activities, it would not be for the police to curb those who incidentally caused the disturbance so long as their activities were lawful, but for the board to prevent the occurrence of such a disturbance. Neither a speaker nor his opponents are thereby stilled; they may express themselves fully and freely in school buildings as elsewhere whenever their activities do not bring in their wake a disturbance of the regular school program. See Cox v. State of New Hampshire, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396.

[6, 7] The board's primary concern is with the maintenance of that program. It cannot dissipate its energies by seeking to guide and control or even to evaluate the strategy of opposing factions at every passing meeting that may be held in a school building. The activities of two opposed groups might operate in conjunction to interfere with school work. A speaker has a large part in fixing the character of his meeting; he cannot disclaim some share of the responsibility for whatever reactions his speech provokes. Again the disturbance might result, not from any activity of either the speaker or his opposition, but merely from an overflow audience. It is for the board to determine, not who would motivate a disturbance, but how serious is the risk of disturbance. The primary task of the schools is education. The statute establishes that the educational activities of schools shall at all times take precedence over other permissive but secondary uses of school buildings. In passing on an application for an extraneous use of a school auditorium the board must consider the probable effect of the proposed use on the regular school program and must deny one that would lead to an interference with that program. When the board denied petitioners' use of the auditorium in a school on a night when regular classes were scheduled it acted well within the authority conferred upon it by section 19433 of the Education Code providing that any meeting shall "in nowise interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State."

The alternative writ is discharged and the application for the peremptory writ of mandate is denied.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The issue presented in this case is whether or not the governing body of a school district may arbitrarily refuse the use of a school building under its supervision for a public assembly. I agree with the premise of the majority opinion that the primary function and purpose of school buildings is education and training of students, and that the governing board should not permit the use of the buildings for any purpose which is inimical to that function. A pivotal issue in this case is, therefore, whether there was such a showing made before the board to justify its conclusion that that function would be impaired if petitioner was granted permission to use the building. It must be conceded that the board cannot act arbitrarily or capriciously. But before discussing that question there are certain vital factors to be considered.

First, it is conceded by the majority opinion that there is no issue of the element of subversiveness in this case. The board did not purport to base its denial of permission on that ground. Hence, we must assume that we have an organization which itself is, and the causes it espouses are, wholly lawful in every respect. Second, the state law unequivocally places school buildings in the same category, as far as public assemblies are concerned, as public parks and streets. Section 19431 of the Education Code reads:

"*There is a civic center at each and every public school building and grounds* within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and *associations formed for recreational, educational, political, economic,* artistic, or moral activities of the public school districts *may engage* in supervised recreational activities, and *where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside.* Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities." (Emphasis added.) See, also, Goodman v. Board of Education, 48 Cal.App.2d 731, 120 P.2d 665. It is obvious from the statute and the Goodman case that a public policy has been clearly and unequivocally declared by the Legislature. *That policy is that school buildings shall be available for public assemblies and for the exercise of those cherished rights, freedom of speech and assembly.* Those concomitant rights are guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and the Constitution of California. Cal.Const., art. I, §§ 9 and 10. *Hence, it must follow that the Legislature of California by its foregoing declaration of policy has provided a place where those constitutional rights may be exercised.* For those reasons I have stated that the school building is in the same category as public streets and parks. The Supreme Court of the United States has forcefully declared the right to exercise those rights in the latter places. The use of such places is inseparably interwoven with the rights themselves. In Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423, the court said:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, *time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.* The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." (Emphasis added.) In the instant case the declaration by the Legislature, rather than ancient custom, as in the case of parks and streets, makes school buildings the place for the exercise of the rights involved.

This brings us to the only limitation (pertinent to this case) on the use of the school buildings for the exercise of those rights—the only basis upon which the board may refuse permission, namely, the use must not, in the language of the statute, in anywise "interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State." Education Code, § 19433. And "No use shall be inconsistent with the use of the buildings or grounds for school purposes, or interfere with the regular conduct of school work." Education Code, § 19402. It is true the board has discretion in determining whether such interference will occur but it cannot exercise that discretion arbitrarily or capriciously or upon speculation or for reasons which will substantially impair the declared policy that school buildings may be used for the exercise of free speech and assembly. As said in Goodman v. Board of Education, supra, 48 Cal. at page 734, 120 P.2d at page 667:

> "It appears from the above (referring to the use of schools for public assemblies but making school use paramount) that *some* discretionary, but *not arbitrary,* power is reposed in the board * * *." (Italics added.)

In this case there are two factors which, it is asserted, justified the board's conclusion that there would be an interference with the school functions: (1) The psychological factor, that is, that there is a threat that the place will be picketed and the adult pupils will not attend the evening classes. (2) The disturbance factor; that there is a threat that there will be such noise and commotion that classes cannot be conducted. In this connection it must be remembered that it is undisputed that the room in the building, the use of which petitioner seeks, is available, no school functions being scheduled therein. In regard to both of those elements it should be observed that they are nothing more that speculation and conjecture which certainly do not constitute a proper basis for the board's action. All we have is the mere opinion that those things are going to happen. That is not sufficient as a basis for refusing permission. The United States Supreme Court said in Hague v. Committee for Industrial Organization, supra, 307 U.S. at page 516, 59 S.Ct. at page 964, 83 L.Ed. 1423, in speaking of the refusal to permit assemblies in parks and streets:

> "It (the ordinance dealing with permits) does not make comfort or convenience in the use of streets or parks the standard of

official action. It enables the Director of Safety to refuse a permit *on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.'* It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, *for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."* And in Cox v. New Hampshire, 312 U.S. 569, 577, 61 S.Ct. 762, 766, 85 L.Ed. 1049, 133 A.L.R. 1396:

"In Hague v. Committee for Industrial Organization, supra * * *, the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent 'riots, disturbances or disorderly assemblage.' The ordinance thus created, as the record disclosed, an instrument of arbitrary suppression of opinions on public questions. The court said that 'uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.'" Likewise, in the instant case the refusal based upon mere opinion is arbitrary and that is all the board had upon which to base its action. Also, similarly the assumption by the board and the majority opinion that there will be noise and boisterous conduct, must be based upon the untenable premise that all law enforcement facilities and the school authorities will be wholly impotent or will refuse to maintain order and protect the pupils in attending classes, an assumption of nothing less than anarchy. To that proposition the complete answer is made in Hague v. Committee for Industrial Organization, supra, 307 U.S. at page 516, 59 S.Ct. at page 964, 83 L.Ed. 1423, the "uncontrolled official suppression * * * cannot be made a substitute for the duty to maintain order * * *." Both of the factors touching interference with school functions are predicated on what some third persons may or may not do. The board in refusing permission *is not exercising its judgment.* It is bowing to the threats or conjectured conduct of third persons. In the one case it is picketing and in the other the possible refusal of the pupils to attend classes. If it is permitted to base its action on such grounds there is nothing left of the cherished rights of freedom of speech and assembly and of the declared right to use school buildings for that purpose. If the republican party desires the use of a school building to hold a meeting the board may refuse permission upon the assumption or threat by the parents of students of democratic persuasion that they will not attend classes. If any meeting of any character by any group is proposed and it is opposed by only one person or many persons attending the school a denial of permission might follow. That amounts, not to a fair exercise of discretion by the board on the issue of interference with school functions, but to a dictatorship by one person or many, completely negativing the constitutional guaranties and the right to use school buildings to express them. The question of interference with school functions cannot thus be made to turn on the whim and caprice of the mental attitude of the pupils toward the proposed meeting. In such event *it is not the proposed assembly* which *interferes with the school program, it is the pupils who are interfering because of their refusal to attend classes,* but the board in denying the permit is penalizing the group desiring to assemble rather than the pupils. The same reasoning applies where there is a threat or assumption of noise, commotion, rioting or violence which will disturb the classes. And in addition there is the factor that such condition, if it arises, should be and presumably will be controlled by the proper authorities. Suppose someone threatened to burn the school buildings if the meeting were held. Would anyone say that such a threat was such an interference as to authorize a denial of permission? Even if there is reason to believe that there will be noise which will disturb classes, the school officials are competent to cope with that situation. They may maintain order and prevent any undue commotion or disturbance.

The reasoning upon which the majority opinion is based makes it possible for any school board to deny the use of school buildings to anyone who may apply when the proposed use is for a purpose which may be even slightly controversial, as it will not be difficult to find those who will object and threaten. This is all that is required to deny permission for such use under the rule of the majority opinion. This places in the hands of school boards, especially in those communities where there is only one school building available for such uses, the power to deny permission for the use of such building to anyone whom a majority of the board dislike. Discrimination and favoritism are bound to result, and the obvious purpose and object which the Legislature had in mind in enacting the so-called Civic Center Act will be frustrated.

The history of civilization is replete with instances in which those in power have sought to suppress expression of the thoughts and ideas of those advocating philosophies with which they did not agree. Human nature has not changed, and notwithstanding constitutional and statutory provisions and court decisions declaring the rights of freedom of speech and assembly to constitute the very foundation of our democratic way of life, there are still those who because of ignorance, prejudice, self-interest or blind bigotry would deny these rights to those who advocate a philosophy out of harmony with their own views. To the end that the basic concept of our civil liberties may be preserved with fairness and equality to all, the courts should be alert to strike down any attempted infringement of these fundamental rights regardless of the guise under which it is cloaked.

Rehearing denied; CARTER, J., dissenting.

27 Cal.2d 319

HOWARD v. HOWARD.

S. F. 17067.

Supreme Court of California, in Bank.

Nov. 27, 1945.

Rehearing Denied Dec. 27, 1945.

1. Judgment ⇨511

Fraud is "extrinsic" when it deprives the unsuccessful party of an opportunity to present his case to court, and, if unsuccessful party has been kept in ignorance of action or has been prevented from fully participating therein, the judgment is open to attack at any time.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

2. Judgment ⇨511

Where party has been given proper notice of action and has not been prevented from full participation therein and has had opportunity to protect himself from any fraud, fraud perpetrated is "intrinsic" even though unsuccessful party does not avail himself of opportunity to appear before court, and he cannot attack judgment once time has elapsed for appeal or other direct attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

3. Divorce ⇨331

Where property settlement agreement was received in evidence in divorce proceeding in sister state as voluntary agreement of parties and agreement went into evidence without opposition by defendant, alleged fraud of plaintiff in procuring agreement by representing herself as a faithful wife went to merits of proceeding, and divorce decree, which adopted agreement, was immune from attack in plaintiff's action to establish divorce decree and to recover sums due thereunder.

Appeal from Superior Court, of City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Anita Z. Howard against Lindsay C. Howard to establish a foreign divorce judgment and to recover sums due thereunder, wherein the defendant filed a cross-complaint. A demurrer to the cross-complaint was sustained without leave to amend. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, App., 161 P.2d 681.

Walter McGovern, of San Francisco, and Neil S. McCarthy, of Los Angeles, for appellant.

Torregano & Stark and Francis W. Murphy, all of San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff and defendant were married in 1925. In 1938 they executed a property settlement agreement binding defendant to pay plaintiff $1,250 a month until her remarriage. A few weeks later plaintiff went to Nevada and sued for divorce on the ground that defendant had wilfully deserted her. Defendant appeared in the action, filed an answer, and at the trial was represented by counsel. He did not contest the charge of desertion, and plaintiff was granted a divorce on that ground. The divorce decree adopted the property settlement agreement. Thereafter defendant married another woman with whom he now lives. Until January 1, 1942, defendant paid the sums due under the Nevada decree. Defendant alleges that at that time he discovered that plaintiff had procured the property settlement agreement by fraud in representing herself as a faithful wife and mother, whereas during coverture and before the execution of the agreement she had repeatedly committed acts of adultery. Plaintiff then brought this action to establish the Nevada decree as a judgment in this state and to recover sums due under the property settlement agreement incorporated in that decree. Defendant filed an answer and cross-complaint attacking the money provisions, but not the divorce provisions, of the Nevada decree, on the grounds that they had lapsed because of a subsequent Mexican common-law marriage of plaintiff, and that the property settlement agreement had been procured by the fraud of plaintiff. The trial court sustained a demurrer to the answer and cross-complaint without leave to amend and struck out all material parts of the pleading relating to the defense of fraud. The cause went to trial on the affirmative allegations of plaintiff's amended supplemental complaint, including the allegation that she had not remarried. The trial court found that allegation to be true and also found that plaintiff was a Nevada resident at the time of filing the divorce action, that defendant had deserted her more than a year previously, that the Nevada court had jurisdiction of the parties, that defendant appeared of record in and defended the divorce suit, and that the property settlement was part of the divorce decree. Upon these findings judgment was entered in favor of plaintiff. Defendant appeals.

[1,2] Defendant concedes that the divorce provisions of the Nevada decree are not open to attack, but he contends that the money provisions thereof are not binding, on the ground that they were obtained by extrinsic fraud. "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98. See 23 Cal.Law Rev. 80; 9 Cal.Law Rev. 156. If an unsuccessful party to an action has been kept in ignorance thereof, Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976, or has been prevented from fully participating therein, Caldwell v. Taylor, supra, there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; Langdon v. Blackburn, 109 Cal. 19, 41 P. 814. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am. St.Rep. 117; see Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 48 Am.St.Rep. 110." Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 107.

[3] The property settlement agreement here in question was offered and received in evidence in the Nevada proceeding as a voluntary agreement of the parties with respect to their property rights and plaintiff's right to support and maintenance. The issue as to its fairness was thus tendered in that proceeding. Defendant was represented at the trial, and the property settlement agreement went into evidence without any opposition by him. The alleged fraud went to the merits of an important part of the Nevada proceeding and should have been guarded against by defendant at that time. Pico v. Cohn, 91 Cal. 129, 134, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; Tracy v. Muir, 151 Cal. 363, 372, 90 P. 832, 121 Am.St. Rep. 117; see cases cited, 15 Cal.Jur. 14-24. Having adopted the property settlement agreement and made it a part of the final decree of divorce, the Nevada court adjudicated its fairness and approved its terms, and that judgment is therefore im-

mune from attack in the present case. Carr v. Bank of America, 11 Cal.2d 366, 374, 79 P.2d 1096, 116 A.L.R. 1282; Hendricks v. Hendricks, 216 Cal. 321, 324, 14 P.2d 83; Hammell v. Britton, 19 Cal.2d 72, 82, 119 P.2d 333; Olivera v. Grace, 19 Cal.2d 570, 574, 122 P.2d 564, 140 A.L.R. 1328; Horton v. Horton, 18 Cal.2d 579, 584, 116 P.2d 605; Petry v. Petry, 47 Cal.App.2d 594, 595, 118 P.2d 498; Godfrey v. Godfrey, 30 Cal.App.2d 370, 379, 86 P.2d 357; McLaughlin v. Security First Nat. Bank, 20 Cal.App.2d 602, 606, 67 P.2d 726.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

Rehearing denied; EDMONDS, J., dissenting.

27 Cal.2d 216

PEOPLE v. WILLIAMS.

Cr. 4639.

Supreme Court of California.

Nov. 16, 1945.

1. Homicide 🔑**250**

Evidence sustained conviction for murder.

2. Convicts 🔑**5**

Evidence sustained conviction for assault by a life prisoner in violation of statute providing death penalty for assault by a life prisoner. Pen.Code § 4500.

3. Assault and battery 🔑**92**

Evidence sustained conviction for assault with caustic chemical in violation of statute. Pen.Code, § 244.

4. Convicts 🔑**5**

Where defendant was undergoing a sentence of from one year to life at time of committing assault and Adult Authority had not fixed period of imprisonment, the defendant was undergoing a "life sentence" within statute providing death penalty for assault by a life prisoner. Pen. Code, § 4500.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Sentence".

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Sam Williams was convicted of murder, of assault by a life prisoner, and of assault with caustic chemical, and he appeals.

Affirmed.

Natalie J. Holly, of San Rafael, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

This is an automatic appeal from a judgment imposing the death penalty and two other penalties.

Defendant is a negro inmate of the California State Prison at San Quentin, California. He is serving, and was serving at the time the alleged offenses were committed, an indeterminate sentence of from one year to life for second-degree robbery. He was charged by indictment with three offenses, to wit: (1) Murder; (2) assault by a life prisoner in violation of section 4500 of the Penal Code; (3) assault with caustic chemical in violation of section 244 of the Penal Code. Edwards, also a negro inmate of San Quentin, came to his death as a result of the effect of a combination of lye and water upon his face and neck. The lye water is alleged to have been thrown upon Edwards by defendant. Defendant waived a jury. The court, sitting without a jury, found him guilty of the three offenses as charged. The degree of murder was fixed at first degree. Defendant was sentenced to life imprisonment on the murder charge; to the death penalty for assault by a life prisoner; and to the penalty prescribed by law for assault with caustic chemical.

The second count of the indictment and the sentence of death rest upon section 4500 of the Penal Code. That section provides as follows: "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, is punishable with death."

The prosecution placed upon the witness stand six inmates of the prison who were eyewitnesses. These witnesses testified substantially as follows: On the afternoon of September 29, 1944, a group of from 15 to 20 inmates, including Edwards, the deceased, were congregated outside the clothing department of the prison awaiting their respective turns to enter and obtain clothing. Edwards was standing close to the door and was engaged in conversation with the other men. Some of the prisoners testified that as they approached the clothing department they noticed defendant standing by an entrance gate. After the men congregated outside the door, defendant worked his way through the crowd and approached Edwards from the latter's side and rear. Defendant carried with him a small jar partly filled with liquid. Upon reaching the place where Edwards was standing, the defendant whirled Edwards around and threw the liquid in the general direction of his face. A large portion of the liquid fell upon Edwards but some of it splashed upon the others causing burns. One of the prisoners shouted "acid," and the men quickly scattered. Edwards fell to the ground in pain and was picked up later and taken to the prison hospital. Defendant ran out through the gate, dropping the jar as he went. It still contained a small amount of liquid and was retrieved by a prisoner. A litmus paper test of the contents of the jar was later made by an inmate working in the prison hospital as a technician. He testified that the test indicated the presence of a strong alkaline solution.

A prison guard testified that on the afternoon of September 29, 1944, defendant rushed into the captain of the yard's office and stated that he had just thrown some lye upon Edwards; that Edwards had threatened him with a knife on previous occasions; and that his own face was burned and he wished to go to the hospital.

Thomas C. Cheetham, executive secretary to the Warden of San Quentin Prison, testified that he and the attorney who later prosecuted the case interviewed defendant on the day after the episode in which Edwards was injured. According to this witness, defendant, at that time, stated that he had shared with Edwards some funds, which defendant had received from relatives; that he had asked Edwards to repay him but that Edwards had kept avoiding him, and a quarrel had ensued; that he worked his way through the crowd and threw the lye; that he meant to do it and was glad he had done it; that Edwards had threatened him with a knife and told him to keep away; that he had obtained the lye at the furniture shop where he worked and that he had put it with some water in a jar, had placed a cover on the jar and had put it in a brown paper sack. Cheetham testified that defendant made his statements voluntarily and that no coercive measures were used. He stated that defendant requested an attorney toward the close of the conversation. It appears that after the conversation had progressed 30 or 40 minutes a reporter arrived, but defendant refused to talk further.

At the trial defendant denied stating that he threw lye or intended to do so or that he worked his way through a crowd to where Edwards was standing. He claimed that when he made the statement to Cheetham and the prosecuting attorney, the men stood on either side of him and kept after him to talk. He further testified that he obtained the lye in the furniture department; that he secured the lye for the purpose of taking it to his cell to wash his commode; that he mixed the lye with water and placed it in a jar; that it was necessary for him to pass by the clothing department in order to get to his cell; that he did not intend to go into the clothing department; that he met Edwards as he was going by the clothing department; that Edwards asked him what he was carrying and when defendant replied "lye," Edwards grabbed at the jar and the two tussled; and that defendant then raised his arm to throw the contents out of the jar but Edwards grabbed it and the liquid fell upon Edwards and also upon defendant.

Defendant was represented by counsel in the trial court but no brief on appeal has been filed by or on behalf of defendant. In a letter from defendant's trial court counsel, it was stated that no brief would be filed "as I am unable to raise any point which might be advantageous to my client or enlightening to the court."

[1-4] The evidence, summarized above, is clearly sufficient to support the conviction on all three counts and a review of the entire record fails to disclose any error which would warrant a reversal. Defendant was undergoing a sentence of from one year to life at the time of committing the alleged offenses. As the Adult Authority had not fixed the period of imprison-

ment, it is settled, that at the time in question, defendant was undergoing a life sentence within the meaning of section 4500 of the Penal Code. In re Quinn, 25 Cal.2d 799, 154 P.2d 875; People v. McNabb, 3 Cal.2d 441, 444, 45 P.2d 334; In re Lee, 177 Cal. 690, 171 P. 958. In People v. McNabb, supra, a similar question was presented and it was held that as there was no maximum fixed by law in term of years, such a sentence is in effect a definite life term unless and until a lesser term of imprisonment is fixed in due course by proper authority.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

* * *

27 Cal.2d 131

SEARS et al. v. RULE et al.

L. A. 18818.

Supreme Court of Cailfornia.

Nov. 1, 1945.

Rehearing Denied Nov. 29, 1945.

1. Appeal and error ⇨1099(7)

The sufficiency of the evidence to sustain trial court's finding must be considered in the light of decision on prior appeal which constitutes the law of the case.

2. Wills ⇨487(1)

Evidence sustained finding that, although trust, which testatrix sought to create by devising property to brother for distribution in accordance with wishes previously discussed, failed because neither subject, purpose nor beneficiaries were mentioned, testatrix did not intend to leave to the brother absolutely any of the property.

3. Trusts ⇨96

Where voluntary trust which testatrix sought to create failed, but it appeared that testatrix did not intend to bequeath the subject matter thereof to trustee absolutely, a constructive trust arose when the property was distributed to trustee.

4. Trusts ⇨96

Where testator devises his property in reliance upon an agreement with devisee that the latter will hold it in trust for, or to convey it to, a third person, the devisee holds the property upon a constructive trust for the third person.

5. Trusts ⇨359(2)
Wills ⇨421

Where a voluntary trust failed, but it appeared that testatrix did not intend to bequeath the subject-matter thereof to the trustee absolutely, issue whether a constructive trust was created was not within jurisdiction of the probate court, but the constructive trust could be enforced in a separate proceeding in equity without attack on the probate proceedings. Probate Code, §§ 228, 229.

6. Appeal and error ⇨852

A judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory.

7. Evidence ⇨426, 461(4)
Husband and wife ⇨266

Evidence is admissible to show that a husband and wife, who took property apparently as joint tenants, actually intended it to be community property, and property may be converted into community property by oral agreement.

8. Husband and wife ⇨264

Evidence sustained finding that certain property of husband and wife was community property, despite the use of the life tenancy form in some of their holdings, so as to entitle heirs of husband, who predeceased wife to one-half of the property under statute. Probate Code, §§ 228, 229.

9. Descent and distribution ⇨82
Estoppel ⇨39

A quitclaim deed executed by deceased husband's heirs to deceased's widow, by which heirs released all claim to husband's estate then existing or any claims thereafter acquired, was not a relinquishment of any interest such heirs might acquire in the estate of the widow. Probate Code, §§ 228, 229.

10. Descent and distribution ⇨82

Quitclaim deeds executed by deceased husband's heirs to deceased's widow, by which heirs relinquished any claims then existing or which they might thereafter acquire in deceased husband's estate, did not make the widow a purchaser of the property formerly held by the husband, as respects question whether husband's heirs were entitled to share in the community property upon widow's death. Probate Code, §§ 228, 229.

11. Limitation of actions ⚷13

Where defendant, after committing a wrongful act, has fraudulently concealed the facts from plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, defendant will be estopped from taking advantage of the statute of limitations. Code Civ.Proc. § 338, subd. 4.

12. Limitation of actions ⚷95(2)

In determining whether plaintiff discovered, or should have discovered, the facts giving rise to his cause of action, the same rules govern that are applicable in cases falling within provision of statute relating to fraud as the gravamen of the original action. Code Civ.Proc. § 338, subd. 4.

13. Limitation of actions ⚷104(2)

Where defendant who was the personal representative of the estate and the trustee under a trust that failed, made false representations to one of the heirs tending to lull her into a sense of security, defendant was guilty of fraudulent concealment and could not rely on statute of limitations as a defense to heir's action to acquire interest in the estate. Probate Code, §§ 228, 229; Code Civ.Proc. § 338, subd. 4.

14. Trusts ⚷374

In action to establish a trust in realty devised to defendant who was also personal representative of the estate, where action concerned all property received by defendant under will and its scope was sufficiently broad to include property that should have been accounted for in the estate as well as that which was specifically mentioned in decree of distribution, court had power to compel an accounting with respect to property appropriated by defendant and not mentioned in the decree. Probate Code, §§ 228, 229.

15. Equity ⚷39(1)

A court of equity having once acquired jurisdiction will adjust all the differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief was requested.

16. Trial ⚷400(1)

In action to establish a trust in realty conveyed to defendant under a trust which failed, and for an accounting, trial court adopted the proper procedure in receiving evidence showing in detail all the items of property coming to defendant from testatrix and what defendant thereafter did with it and, after entering judgment and on motion for new trial, amending the findings to show all charges and credits allowed to defendant for expenditures made. Probate Code, §§ 228, 229.

◆

Appeal from Superior Court, Los Angeles County; Paul Vallée, Judge pro tem.

Action by Hattie Sears and others against Charles T. Rule and others to impress a trust upon property left to defendant under the will of Sarah E. Weber, and for an accounting, wherein Minnie B. Cotton filed a cross-complaint. From a judgment for plaintiff and cross-complainant, and from an order denying a new trial, the defendant Charles T. Rule appeals.

Judgment affirmed, and appeal from order denying new trial dismissed.

Prior opinion, 151 P.2d 293.

Kenneth E. Grant, of Los Angeles, George T. Warren, of Encino, Henry H. Draeger, of Beverly Hills, and A. A. Goldstone, of Los Angeles, for appellant.

Edwin J. Miller, Ralph W. Miller, and Edwin L. Smith, all of Los Angeles, for respondents.

O'Melveny & Myers and Pierce Works, all of Los Angeles, and Howard E. Forster, of Terminal Island, for respondent.

GIBSON, Chief Justice.

Charles F. Weber died in 1934, leaving all his property to his wife, Sarah E. Weber. Mrs. Weber died in January, 1936. Plaintiffs and cross-defendants (hereinafter called plaintiffs) are the remaining heirs of Charles Weber. They brought this action to impress a trust upon property distributed from the estate of Mrs. Weber to defendant Charles T. Rule, her brother, as sole beneficiary under her will. The complaint alleged that the decree of distribution in the estate of Mrs. Weber had been procured through the extrinsic fraud of Charles Rule, that in fact the decedent died intestate, and that plaintiffs were entitled to the property as her statutory heirs under Probate Code, § 229. Other persons including James H. Rule (who died after this action was filed) and John E. Rule, the two brothers of defendant Charles Rule, were named as defendants solely because of their having directly or indirectly received some of the property from Charles Rule.

A demurrer was sustained to the first amended complaint, and the ensuing judgment of dismissal was reversed upon a prior appeal. Sears v. Rule, 45 Cal.App.2d 374, 114 P.2d 57. Thereafter, but before trial, a cross-complaint was filed by Mrs. Minnie Cotton, a niece of Mrs. Weber, seeking relief similar to that demanded by plaintiffs. After a trial without a jury a judgment was rendered in favor of plaintiffs and cross-complainant Mrs. Cotton. Defendant Charles Rule appealed from the judgment.

The trial court found that Mr. and Mrs. Weber were married in 1904, came to California in 1920, and thereafter agreed that all their property, regardless of nominal title, should constitute community property, and that at the death of Mr. Weber all their property (with one exception, a parcel of real property transferred to Mrs. Weber as a gift) was community property. After Mr. Weber's death his heirs, including plaintiffs, executed instruments purporting to release and quitclaim to Mrs. Weber any interests they had or might acquire in Mr. Weber's estate. (A demurrer to a separate defense based upon these instruments was sustained.) The court also found that after Mrs. Weber's death all the property in her estate, with the exception above noted, was likewise community property of herself and her deceased husband.

Mrs. Weber's will provided, in article 4: "I give, devise and bequeath to my brother, Charles T. Rule, of Los Angeles, California, all my household furniture, furnishings, silverware, jewelry, trinkets, clothing and personal effects; also my automobile." Article five reads: "All the rest, residue and remainder of my estate, of whatever kind and character, and wheresoever situated at the time of my decease, I give devise and bequeath as follows, to-wit: (a) To my bother, Charles T. Rule, of Los Angeles, California, the whole thereof; and in the event he should fail to survive distribution to him, then to my heirs in accordance with the laws of succession of the State of California. (b) The reason of making my brother, Charles T. Rule, aforesaid, the sole beneficiary of my estate, is that I am confident, and place my trust in him to the extent, that he will distribute my estate in accordance with my wishes he and I have often discussed."

Article 6 provided that if "any devisee, legatee or beneficiary hereunder" should contest the will, such person should receive $1 and no more; and article 7 named defendant executor and "Guardian of the estate of any minor or incompetent person to whom distribution is made hereunder * * *" Defendant was the only "beneficiary" mentioned by name.

Defendant qualified as executor and proceeded to administer the estate. During the course of administration he appropriated certain property of the estate without listing it in the inventory or otherwise accounting for it to the probate court. He also paid certain sums and transferred certain property to John E. Rule, James H. Rule, and Mrs. Cotton. Portions of the cash payments thus made were listed in defendant's final accounting as "directed to be provided for in last Will of deceased by Executor." In his petition for distribution defendant represented to the probate court that he was entitled to the entire estate of Sarah Weber, as sole beneficiary under her will, and on March 15, 1937, the probate court made its decree distributing the whole of the estate to him absolutely. However, he has never been discharged as executor.

The trial court found that Sarah Weber did not intend to leave any of her property, except the household furniture and other items mentioned in article 4 of the will, to defendant absolutely, but that she intended to leave the residue to him "in trust only, for the beneficiaries previously agreed upon and understood between herself and Charles T. Rule." The court concluded that the attempted trust failed because the will "did not name the object or purpose * * * or identify the beneficiaries thereof" and that the probate court should have distributed the property according to the laws of intestate succession, but that it made the decree it did as a result of defendant's fraud.

The court concluded that a trust should be impressed upon all the property of the estate of Sarah Weber remaining in defendant's possession, and upon all property acquired with the proceeds of any such property distributed to or appropriated by defendant. It decreed that John E. Rule was the owner of two specified parcels of real property, that as to the remaining property plaintiffs were owners of undivided interests amounting to one-half thereof and cross-complainant the owner of an undivided one-eighth thereof, that defendant and his wife should execute and deliver to plaintiffs and cross-complainant deeds and transfers of the undivided interests, and that title thereto was quieted in plaintiffs and cross-complainant. The judgment included money awards to plaintiffs and cross-complainant based upon findings with respect to the property and money distributed to defendant by the probate court, moneys received by him but not accounted for to the probate court, moneys from dividends, interest, rents, and other income, and the reasonable value of premises occupied by defendant and his son and daughter, with interest thereon. The sums allowed by the original judgment totalled $137,525.54, but on motion for new trial the awards were reduced to the aggregate sum of $93,206.26. The trial court impressed a lien upon defendant's remaining three-eighths interest in the property to secure the money judgment. Defendant took this appeal.

I. Sufficiency of Evidence to Establish a Trust for the Benefit of the Heirs of Mrs. Weber.

[1] The chief contention of defendant is that the trial court erred in its interpretation of the will. Most of the matters relating to this issue, however, were considered by the District Court of Appeal on the prior appeal in Sears v. Rule, 45 Cal.App.2d 374, 114 P.2d 57, and, as plaintiffs urge, the sufficiency of the evidence must be considered in the light of that decision which constitutes the law of the case. Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17; see Allen v. California Mutual B. & L. Ass'n, 22 Cal.2d 474, 481, 482, 139 P.2d 321.

The prior appeal was taken from a judgment given after the sustaining of a demurrer to the complaint and the refusal of the trial court to permit the filing of a second amended complaint which, with minor exceptions, was the pleading subsequently used at the present trial. The chief question before the appellate court was whether or not the proposed pleading "states facts sufficient to create a resulting trust in the residue of property not disposed of by will, for the benefit of the heirs according to the rules of succession * * *." 45 Cal.App.2d at page 378, 114 P.2d at page 60. The proposed complaint then, as it does now, set forth the provisions of the will of Sarah Weber and alleged, among other things, that the testatrix intended to give defendant the residue in trust only, that he had agreed with her to distribute the property in accordance with their previous understanding, and that a "secret trust" was thereby created. Neither plaintiffs nor cross-complainant have ever attempted to enforce the alleged agreement itself. They do not claim that they are third-party beneficiaries thereof nor do they seek to prove its terms. They merely urge the existence of the agreement or understanding as a part of their proof in establishing that there was an intestacy, and that defendant should be compelled to hold the property as an involuntary trustee for themselves as heirs.

The District Court of Appeal, after pointing out that the will did not create a valid trust because it did not mention the subject, purpose or beneficiary, went on to say (45 Cal.App.2d at page 379, 114 P.2d at page 60): "After a careful examination of the provisions of the will, viewed in the light of the facts alleged in the complaint, we are of the opinion the probate court erred in determining that the residue of the estate, other than the household goods and personal effects, were devised absolutely to Charles T. Rule. On the contrary, we are persuaded the testatrix did not intend to make her brother sole beneficiary of her entire estate. It seems clear that she had a previous understanding with him that she would give him the property in trust to be distributed to individuals or for the benefit of charitable causes according to an agreement between them." See, also similar expressions at pages 382 and 383 of 45 Cal.App.2d at page 62 of 114 P.2d.

This construction was based in part upon the "surrounding circumstances" as to which considerable supporting evidence was offered at the trial. Other portions of the opinion, however, indicate that both the intention of the testatrix and the existence of an agreement between herself and defendant could be inferred from the language of the will alone. For example, at page 382 of 45 Cal.App.2d, at page 62 of 114 P.2d, the court points out that the will gave defendant, absolutely, all household goods and personal effects, but that it treated the residue in a separate paragraph, whereas if it had heen intended to make defendant sole beneficiary, the additional paragraph, together with its qualifying language, would have been unnecessary. Further, the court said at page 382 of 45 Cal.App.2d, at page 62 of 114 P.2d: "In subdivision (b) of paragraph five of the will she uses language which is absolutely conflicting with the theory that she intended to make her brother Charles sole beneficiary of her estate. In effect, she says I trust my brother Charles and am confident he 'will distribute my estate' according to our agreement and my wishes in that regard, as previously expressed in many discussions. That declaration is not a mere expression of a wish or desire. * * * It is significant that the will specifically declares the testatrix has confidence to believe her brother 'will distribute' her property * * * to the parties or causes previously agreed upon in former conferences. That is inconsistent with the theory that he was entitled to distribution of the entire estate as the sole beneficiary thereof. The theory that the testatrix did not intend to convey her entire estate to her brother Charles, and upon the contrary that she intended to convey the residue mentioned in the fifth paragraph to him in trust to be distributed in accordance with their previous agreement, seems to be conclusive from the sixth clause of the will. * * * Paragraph seven of the will contains a clause equally inconsistent with the theory that Charles T. Rule was to become sole beneficiary of the entire estate, * * *. It is apparent the last-mentioned clause contemplates distribution of a part of the estate to minors or an incompetent person. No language could more clearly indicate that Charles was not to become the sole beneficiary or distributee of the entire estate."

[2] There is other evidence in the record which, independently of the law of the case, tends to support the judgment. Although defendant declared on the stand that Mrs. Weber told him the property was all to be his, that he could do with it as he saw fit, and that he was not bound to transfer it to anyone else unless he wished to do so, his testimony was not consistent, and some of it was more in accord with the position urged by plaintiffs and cross-complainant. It appears that defendant wrote letters to his brother indicating that he had insisted upon his sister making a will, and he admitted discussing with her what was to be included in her will. The legal effect of the will was explained to Mrs. Weber in defendant's presence, he was familiar with its terms before it was executed, and he knew exactly what it meant. He testified that the will was drawn for the purpose of carrying out her wishes and that he had discussed with her, "as stated here in the will," what those wishes were. When asked if Mrs. Weber told him how he should "divide" the property, he replied, "Yes," and made the same reply to the question whether his brothers "were to share in this estate or some part of it." And in a deposition taken in connection with another action he stated that after the will was signed an attorney explained "about the trust. * * * About everything going to [defendant] in trust." At the trial in the present action his only explanation was that this was a misconstruction of his meaning and that the words had been put in his mouth.

From the foregoing it appears that the record is sufficient to support the findings that Mrs. Weber did not intend to leave to defendant absolutely any of her property except the household furniture and other items mentioned in article four of the will, and that defendant knew that she intended to leave him the residue of the estate "in trust only, for the beneficiaries previously agreed upon and understood between herself and Charles T. Rule."

[3-5] Under these facts a constructive trust arose when the property was distributed to defendant by the probate court. The general proposition is well settled that where a testator devises his property in reliance upon an agreement or understanding with the devisee that the latter will hold it in trust for, or convey it to, a third person, the devisee holds the property upon a constructive trust for the third person. Weinstein v. Moers, 207 Cal. 534, 279 P. 444; Curdy v. Berton, 79 Cal. 420, 21 P. 858, 5 L.R.A. 189, 12 Am.St.Rep. 157; De Laurencel v. De Boom, 48 Cal. 581; Prior v. Andrews, 83 Cal.App. 782, 257 P. 560; see Brazil v. Silva, 181 Cal. 490, 496, 497, 185 P. 174; In re Estate of Lyon, 163 Cal. 803, 805, 127 P. 75; In re Estate of Everts, 163 Cal. 449, 454, 125 P. 1058, 1059; cf. Aho v. Kusnert, 12 Cal.2d 687, 87 P.2d 358.

The trust is imposed in order to avoid unjust enrichment of the devisee. See Rest., Trusts, § 55, and comments thereto; Rest., Restitution, § 186, and comments thereto. The issues raised in such a situation are not within the jurisdiction of the probate court, and the will and the decree of distribution remain effective to give legal title to the devisee or legatee named, but the constructive trust is enforced in a separate proceeding in equity without attack on the probate proceedings. Weinstein v. Moers, 207 Cal. 534, 541, 542, 279 P. 444; In re Sharp's Estate, 17 Cal.App. 634, 120 P. 1079; Prior v. Andrews, 83 Cal.App. 782, 257 P. 560; see In re Estate of Rath, 10 Cal.2d 399, 405, 406, 75 P.2d 509, 115 A.L.R. 836 [stating that although there is an extrinsic agreement, distribution may be ordered only in accordance with the will]; In re Estate of Everts, 163 Cal. 449, 454, 125 P. 1058, 1059; cf. Brazil v. Silva, 181 Cal. 490, 185 P. 174.

The present case is different from those cited above in that here plaintiffs do not claim to be the beneficiaries of the agreement or understanding between defendant and the testatrix, and the trial court made no finding on the exact terms, purposes, and beneficiaries of the agreement. For this reason it is impossible to enforce a trust in favor of the undisclosed persons who were the intended beneficiaries of the agreement, and we are not at this time concerned with the rights of such persons should their identity become known. Since it was found, however, that an agreement did exist, and that the testatrix, to defendant's knowledge, did not intend that defendant should keep the property, defendant would be unjustly enriched if he were permitted to retain it and, therefore a constructive trust arises for the benefit of the heirs of Mrs. Weber. The problem is similar to that presented where such an agreement or "secret trust" may not be carried into effect because its purpose is contrary to law, in which event, if no other disposition is made by the will, the devisee or legatee will be declared to hold the property in trust for the benefit of the heirs of the testator. See Garner v. Purcell, 173 Cal. 495, 49, 160 P.2d 682; O'Donnell v. Murphy, 17 Cal.App. 625, 629, 120 P. 1076; Rest., Trusts, Comment i to § 55.

[6] In view of this conclusion we need not consider the sufficiency of the evidence to support the trial court's findings to the effect that the probate court should have distributed the property to the heirs and that the decree of distribution was procured through the extrinsic fraud of defendant and was consequently void. The judgment, as we have seen, may be sustained without setting aside the decree of distribution. It is, of course, immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory. Cf. MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449.

II. Validity of Plaintiffs' Claim as Statutory Heirs of Mrs. Weber.

The next question relates to the claim of plaintiffs that they are entitled to one-half of the property as statutory heirs of Mrs. Weber by virtue of sections 228 and 229 of the Probate Code as these sections read at the time of Mrs. Weber's death in 1936. Section 228 then provided that if, as here, neither the decedent nor the predeceased spouse left children or descendants of children surviving, then one-half of the community property of decedent and the previously deceased spouse should go to certain heirs of the predeceased spouse and the other half to certain heirs of the decedent. Section 229 provided that if decedent left no issue, and the estate was separate property of the previously deceased spouse "and came to the decedent from such spouse by gift, descent, devise or bequest," all of such property goes to certain heirs of the predeceased spouse. Plaintiffs are the heirs of Mrs. Weber's predeceased husband. The trial court found that all the property of Mrs. Weber except the lot on which the home was located was community property of herself and Mr. Weber and that plaintiffs were entitled to one-half thereof. The court found, further, that title to the home, which had been purchased with funds of both Mr. and Mrs. Weber, had been acquired in the name of Mr. Weber but was subsequently transferred to Mrs. Weber and that this transfer constituted a gift of Mr. Weber's one-half interest. The court concluded that plaintiffs were entitled to a one-half interest in the home.

Defendant concedes that in the event of intestacy plaintiffs would be entitled to a one-half interest in the home. He contends, however, that the evidence is insufficient to support the finding that the remaining property was community property of Mr. and Mrs. Weber. He urges that it was conclusively shown that it was held by them as joint tenants and that, assuming intestacy, it vested in Mrs. Weber, the survivor, on her husband's death, and on her death passed to her blood heirs alone. His argument is that sections 228 and 229 of the Probate Code did not then apply to joint tenancies.

[7] The record shows that certain items of property, including stocks, bonds, other securities, real property, and bank accounts were held in the name of Mr. Weber alone. Other real property and two bank accounts stood in the name of Mr. and Mrs. Weber as joint tenants. The court found that this property was held in joint tenancy merely for the purpose of convenience and to save expense of probate and that Mr. and Mrs. Weber had agreed that, regardless of title, all their property should constitute community property. It is of course well established that evidence is admissible to show that a husband and wife who took property apparently as joint tenants actually intended it to be community property and that property may be converted into community property by oral agreement. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 758, 146 P.2d 905.

[8] The evidence offered by plaintiffs in this connection consists, first, of declarations of Mr. Weber in the presence of Mrs. Weber and not denied by her. Mr. Weber, during his lifetime, stated in the presence of Mrs. Weber that "he had his property in joint tenancy to avoid probate costs." He also said "you save probating costs, and it is the best and the cheapest in the end; and * * * that is the way I have all mine." Mrs. Weber did not reply. Mr. Weber told a witness that he had carried a bank account in joint tenancy to simplify the handling of their estates. Mr. Weber transacted all the business for both of them. Several witnesses testified that Mr. Weber always spoke of the various properties as his; that he said he had made purchases and sales; that he never spoke of any property or money that his wife had; and that Mrs. Weber, who heard these statements, never contradicted them.

Mrs. Weber also made numerous declarations regarding the various properties. She said she had never attended to any of the business. With reference to certain oil wells, subsequently sold, she said: "Web had a sweet income from that." She observed that although the money in the bank was in a joint account, it was "Web's money," that "It isn't my money, it is all Web's," and that she couldn't do anything with it. She made similar statements with respect to certain stocks, street bonds, and real property. Defendants urge that these statements of Mrs. Weber were made immediately following Mr. Weber's death when she was in a distraught condition, but the effect of such circumstances on the weight of the evidence was a question for the trier of fact.

Additional declarations were made in the course of the probate proceedings. The petition for letters of administration in the estate of Mr. Weber, in which Mrs. Weber, John Rule, and defendant joined, stated that decedent left an estate "consisting of community personal property," and the petition referred to checks payable to decedent, stocks, bonds, and other personal property. In the probate order settling the final account and distributing the property in the estate of Mr. Weber it was found that all the property in the estate, including all the securities and certain other personal property of Mr. and Mrs. Weber, and four parcels of real property, was community property. It is true that this did not include eight parcels of real property and the two bank accounts held under the names of both Mr. and Mrs. Weber as joint tenants and separately listed in the inheritance tax appraiser's report. But at the inheritance tax hearing after the death of Mr. Weber, Mrs. Weber testified that there was no "joint personal property that stood in joint tenancy" that she knew of, other than the two bank accounts mentioned heretofore. She also testified that she still had the money that she had at the time she married Mr. Weber. The transcript of the tax hearing also shows the following: "By Mr. Peck [attorney for the inheritance tax department]: Apparently she had some and he had some. That has been commingled probably in same way. How would it be to just call it community property? By X: That is what we are trying to do." (The letter "X" was used when the reporter did not know who made the statement). Plaintiffs assert that the context shows that Mrs. Weber gave the answer here, but in any event it is clear that she made no objection to this procedure.

It is apparent from the foregoing that the trial court was warranted in concluding that all of the property of Mr. and Mrs. Weber involved herein was community property, despite the use of the joint tenancy form in some of their holdings.

III. Effect of the Instruments Transferring to Mrs. Weber All of Plaintiffs' Interest in the Estate of Mr. Weber.

[9] Defendant next contends that Mrs. Weber, after the death of her husband, for a valuable consideration, acquired from plaintiffs by quitclaim all their interest in the estate of Mr. Weber, that by the transfer plaintiffs released any interest they had or thereafter acquired in Mr. Weber's estate, and that the property thereby became Mrs. Weber's own property. The trial court sustained a demurrer to this defense and refused to permit the filing of a proposed amended answer setting forth two instruments, similar in terms, signed by Mrs. Weber and by plaintiffs and entitled "Agreement of Settlement with Heirs of Estate." The instruments both recited that grounds for contest of the will of Mr. Weber existed and that the agreements were executed "for the purpose of forever settling and determining the dispute concerning said will, and to prevent the contest thereof, and to forever settle and determine any and all interest of any character or nature whatsoever that [plaintiffs] may now or hereafter have in the estate of Charles F. Weber, deceased." It was provided that plaintiffs "hereby * * * forever rescind, remise, release, relinquish and quitclaim any and all claims, interests, rights, bequests and/or devises that [plaintiffs] may now, or hereafter, have, or acquire, in and to the estate of Charles F. Weber, deceased." It was also agreed that plaintiffs would file no "other or further petition or action against said estate or in any other way hinder or embarrass [Mrs. Weber] in the administration of said estate." The agreements were to bind the heirs of the parties thereto. The record shows, further, that by the settlement plaintiffs received a total consideration of $25,500. During the trial defendant offered these instruments in evidence, but they were rejected upon plaintiffs' objection that they related to the estate of Mrs. Weber's predeceased husband and not to the estate of Mrs. Weber.

It is defendant's contention that the instruments constituted a complete release by plaintiffs of any possible interest that they then had or thereafter acquired in the estate of Mrs. Weber and that plaintiffs are now barred from maintaining this action since their claim is based upon the fact that the property involved was a part of the estate of Mr. Weber within the meaning of sections 228 and 229 of the Probate Code. He also argues that since Mrs. Weber acquired plaintiffs' interest by purchase, the continuity of title essential under sections 228 and 229 was broken and she thereafter hed the property freed of any possible right of succession by plaintiffs upon her death.

We find nothing in these instruments that would constitute a bar to this action. Their purpose was to settle a dispute over the estate of Mr. Weber and to prevent a will contest therein, and they disclose a typical case whereby the contestants relinquish their claims in the particular estate in return for a sum of money. The instruments refer repeatedly to plaintiffs' interest in the estate of Mr. Weber but make no mention whatsoever of plaintiffs' rights in the property of Mrs. Weber after her death. It would be unreasonable to hold that by these instruments plaintiffs purported to surrender not only their claims to the estate of Mr. Weber, but in addition, and by implication alone, their rights to succession in the estate of another person who was still alive at the time.

[10] Nor did the instruments make Mrs. Weber a purchaser of the property formerly held by her husband. Rather, they constituted a settlement or compromise of a rival claim against the estate of Mr. Weber which permitted the property to go to Mrs. Weber in the same manner it would have gone if neither the threatened contest nor the settlement had ever existed.

In support of his position defendant cites In re Estate of Wilson, 40 Cal.App.2d 229, 104 P.2d 716. Plaintiffs contend that this case is not applicable and that it is "bad law and contrary to natural justice." In our opinion the decision is not inconsistent with the conclusion we have reached. It was there held that the only purpose of a "quitclaim deed and assignment" given by the heir of a deceased spouse to the surviving spouse was to surrender any rights which the heir might have upon the death of the surviving spouse under subdivision 8 of section 1386 of the Civil Code (the predecessor of Prob.Code, § 228). Whether or not the District Court of Appeal correctly determined the purpose of that document, its conclusion with respect thereto clearly constituted the underlying basis of the decision. In the present case, however, the instruments expressly stated that a different purpose was intended, namely, to accomplish the settlement of a threatened will contest. The possibility of settling a will contest or other dispute over the property of the deceased spouse was not considered in the Wilson case. Accordingly, we need not determine whether it was correctly decided upon the facts before the court.

IV. Contention That Cross-Complainant Is Barred by the Statute of Limitations.

The cross-complaint of Mrs. Cotton was filed in March, 1942, approximately six years after the death of Mrs. Weber, and defendant contends that the claim of cross-complainant is barred by the statute of limitations. Mrs. Cotton, however, urges that the delay in filing her cross-complaint resulted from her ignorance of her rights because of certain false representations made to her by defendant and because of his failure, as executor, to inform her of the true facts, and she asserts that defendant is estopped thereby from relying upon the statute of limitations. It appears that defendant, in his petition for probate of the will of Mrs. Weber, intentionally omitted the name of Mrs. Cotton and did not notify her of the proceedings although he was aware of her status as an heir and knew where she lived. Mrs. Cotton, however, learned of the death of Mrs. Weber and shortly thereafter came to Los Angeles from Nebraska and stayed at defendant's home as his guest for ten or twelve days. Defendant told her that she was not an heir of the decedent. He gave her no information about the contents of the will nor did he show her a copy. He did not disclose to her the nature and extent of the estate, but falsely represented that it was of little value. Defendant also represented that under the will he had complete power to determine the distribution of the estate; that none of Mrs. Weber's relatives was entitled to anything except as he chose to carry out his sister's wishes; that Mrs. Weber's estate was his to do with as he pleased but that he would give her either a ranch or $5,000 in cash; and that he was giving each of the other heirs $5,000. As the result of these conversations defendant and Mrs. Cotton executed a settlement agreement for the express purpose of avoiding litigation concerning the will, and under the terms of the settlement she received $5,000. Defendant also gave her a diamond ring. Immediately thereafter she went home.

In December, 1938, she was named as a defendant in plaintiffs' action and was served with a copy of the complaint and summons in Nebraska, following which she came to California and saw plaintiffs' attorney. She testified that she thought she had been summoned as a witness and asked for her fees and mileage, but the attorney told her that the action had been dismissed by the lower court and that an appeal was pending. She took no steps to enforce her rights until after she learned of the reversal of the first judgment in August, 1941. In December, 1941, or January, 1942, she received a letter from Mrs. John Rule which indicated that her husband had received certain buildings from the estate instead of the $5,000 settlement which defendant had represented was the amount given to each heir, and expressed fear that he might lose the property as a result of the litigation. Mrs. Cotton then became concerned over her own interest, engaged counsel to represent her, and filed her cross-complaint in March, 1942.

It should be added that cross-complainant was over 65 years of age at the time of the controversy, had only a ninth-grade education, had no business experience or knowledge of legal proceedings, and the court found that she did not understand any of the legal documents served on her or shown to her.

Thus it appears that the defendant first sought to exclude Mrs. Cotton entirely from the estate by failing to notify her of the probate proceedings; that he then, by his false representations and concealment of material facts, induced her to accept a settlement of any claim she might have against the estate for a small sum; that she was falsely informed that this was the share accepted by other heirs; and that she was further led to believe not only that she had no enforceable legal right to any other or greater share but also that the estate was so depleted that it would not yield any substantial sum to anyone disputing the settlement. That cross-complainant was both ignorant and gullible is a necessary inference from her own testimony, but there is nothing inherently unbelievable in her story and, therefore, the judgment of the trial court in her favor forecloses further inquiry into its credibility.

[11, 12] It is apparent from the foregoing evidence that defendant should not be permitted to rely upon the statute of limitations. Where an action is based "on the ground of fraud" and therefore within the three-year statute of limitations, the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud. Code Civ.Proc., § 338, subd. 4. When the right of action is not based upon fraud, the exception provided in subdivision 4 of section 338 is not available to the plaintiff. Nevertheless, if the defendant, after committing the wrongful act, has fraudulently concealed the facts from the plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, the defendant will be estopped from taking advantage of his own wrong by asserting the statute of limitations. Pashley v. Pacific Elec. Co., 25 Cal. 2d 226, 231, 153 P.2d 325. In such a case, in determining when the plaintiff discovered, or should have discovered, the facts giving rise to his cause of action, the same rules govern that are applicable in cases falling within subdivision 4 of section 338 of the Code of Civil Procedure. Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 215, 30 P.2d 39.

[13] The record shows that defendant's conduct amounted to fraudulent concealment of the facts within the meaning of the Pashley and Kimball cases; that Mrs. Cotton did not discover the true facts until sometime in 1942; and that the delay in asserting her rights was caused by the fraud of defendant. He not only made false representations to cross-complainant, tending to lull her into a sense of security, but it also appears that he was a fiduciary and, accordingly, had a duty to disclose the true facts to her. He was the personal representative of the decedent under the will and, further, he was a trustee holding title to the property devised and bequeathed to him under the will for the benefit of the heirs, including cross-complainant. His failure to speak the truth, therefore, amounted to a fraudulent concealment.

V. Propriety of the Money Judgments against Defendant.

[14] Defendant finally attacks the money judgments awarded against him upon the grounds that the court included therein certain sums based upon issues not raised by the pleadings and that the court did not follow a procedure appropriate to taking an accounting. With respect to the first point, defendant contends that although the complaint and cross-complaint requested an accounting only of the property embraced in the final decree of distribution in the estate of Mrs. Weber, the findings charge defendant with misappropriation of large sums of money belonging to Mrs. Weber that were not accounted for in her estate. He urges that these findings had no reference to the property listed in the decree of distribution in the estate or to rents, issues, and profits thereof; that evidence on these matters was introduced over his objection; and that the trial court acted in excess of its jurisdiction insofar as it based the money judgments thereon.

There is no merit in this contention. The action concerns all the property received by defendant under the residuary clause of Mrs. Weber's will, and its scope is sufficiently broad to include property that should have been accounted for in her estate as well as that which was specifically mentioned in the decree of distribution. It does not appear that defendant was misled by the fact that plaintiffs asked only for an accounting of the property passing to him under the decree of distribution, and, further, he could have, but apparently did not, ask for a continuance of the trial in order to meet any unanticipated problems.

[15] The action of the trial court, moreover, is in accord with the general rule that a court of equity, having once acquired jurisdiction, will adjust all the differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief was requested. See Smith v. Blodget, 187 Cal. 235, 242, 201 P. 584; Vierra v. Fontes, 135 Cal. 126, 129, 66 P. 241; Murphy v. Sheftel, 121 Cal.App. 533, 541, 9 P.2d 568. It has been held that under this rule the court could properly order an accounting although the complaint did not ask for such relief. Swan v. Talbot, 152 Cal. 142, 94 P. 238, 17 L.R.A.,N.S., 1066; see 1 Am.Jur. 306.

[16] Defendant's objections to the procedure of the trial court are equally without foundation. He urges that no accounting at all was taken but that the trial court erroneously left the entire matter to findings prepared by counsel, thus not permitting charges and credits to be considered and exceptions taken to specific items. In

Whann v. Doell, 192 Cal. 680, 684, 221 P. 899, 901, cited by defendant, the court said that an action for an account would not be properly disposed of by a mere statement of the balance due, without a reference, without an account, or without exceptions being taken to specific items, because in such event the aggrieved party could not successfully present his grievances to an appellate court. The court added, however: "On the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. * * Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree or a bill of exceptions, showing the controversy, and the disposition thereof. * * *"

In the present case the trial court received evidence showing in great detail all the items of property coming to defendant from Mrs. Weber and what defendant thereafter did with it. The court then ordered counsel on both sides to prepare findings that they thought appropriate, stating that the court would make its findings from those submitted by counsel. The findings thereafter adopted by the court listed, item by item, the properties received by defendant. After the judgment was rendered and upon motion for new trial the findings were amended and the money judgments were reduced from a total of $137,525.53 to a total of $93,206.26. The amended findings related not only to the charges against defendant but also included credits allowed him for various expenditures made by him for benefit of the property. This procedure was not prejudicial to defendant. All the items involved appear in the record and are subject to examination upon appeal as required by the Whann case. Defendant had ample opportunity to propose favorable findings and to object to those prepared by plaintiffs. He had the further opportunity, which he apparently availed himself of, to suggest corrections in the findings on motion for new trial.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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71 Cal.App.2d 729

PEOPLE v. ELY.

Cr. 2377.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1945.

Rehearing Denied Dec. 8, 1945.

Hearing Denied Dec. 20, 1945.

1. Automobiles ⚿316

The 1941 amendment of Vehicle Code that definition of involuntary manslaughter as contained in Penal Code should not apply to homicide caused by driving of any vehicle, does not repeal such definition but merely created an exception to its application, and hence when amendment was repealed, definition again applied without restriction since the two statutes are in pari materia. Vehicle Code, § 500, St. 1941, p. 1414; Pen.Code, § 192 and § 193, as amended by St. 1943, p. 1959.

2. Automobiles ⚿316

After repeal by the Legislature in 1943 of the section of the Vehicle Code relating to negligent homicide, a prosecution lies under the section of the Penal Code relating to manslaughter where the homicide is caused by the driving of a vehicle. Vehicle Code, § 500, St. 1941, p. 1414; Pen. Code, § 192 and § 193, as amended by St. 1943, p. 1959.

◆

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

Stanley Ely was charged by information with manslaughter and from an order setting aside the information, the People appeal.

Reversed and remanded.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Alvin E. Weinberger, Asst. Dist. Atty., both of San Francisco, for appellant.

Bernheim, Popper & Sugarman, of Richmond, for respondent.

OGDEN, Justice pro tem.

This appeal presents the question whether, after the repeal by the Legislature in 1943, p. 1959, of section 500 of the Vehicle Code (negligent homicide), a prosecution lies under section 192 of the Penal Code (manslaughter) where the homicide is caused by the driving of a vehicle.

[1, 2] The respondent was charged by information with the crime of manslaughter, the charge being based upon the death of one John Jenkins as the result of a collision, on February 17, 1945, between an automoblie operated by the former and one in which the deceased was a passenger. The trial court, upon motion of respondent, set aside the information, and from this order the People appeal.

It is the contention of respondent that the enactment by the Legislature in 1941 of the amended section 500 of the Vehicle Code, pertaining to the offense of negligent homicide, effected a repeal of Penal Code section 192, in so far as its provisions defining the offense of manslaughter were applicable to homicide caused by the driving of a vehicle, and that there has been no revivor thereof.

Section 500 of the Vehicle Code, as amended in 1941, read as follows: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle with reckless disregard of, or wilful indifference to, the safety of others, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison for not more than three years. Hereafter, the provisions of the Penal Code, defining involuntary manslaughter, shall not apply to homicide caused by the driving of any vehicle." (Stats. 1941, Chap. 279, p. 1414.)

In 1943 the Legislature expressly repealed this entire section of the Vehicle Code and by the same act (Stats. 1943, Chap. 421, p. 1959) section 193 of the Penal Code was amended. Chapter 421 reads as follows: "Section 1. Section 500 of the Vehicle Code is repealed. Sec. 2. Section 193 of the Penal Code is amended to read: 193. Manslaughter is punishable by imprisonment in the State Prison for not exceeding 10 years, except that a violation of subdivision 2 of Section 192 of this code resulting from the operation of a vehicle is punishable by imprisonment in the county jail for not more than one year or in the State Prison for not more than five years." The Legislature did not, however, at that session re-enact Penal Code section 192 or otherwise redefine the offense of manslaughter.

If respondent's contention is correct, the result would be that after the effective date of the foregoing legislation in 1943 a homicide caused by the negligent driving of a vehicle was not a criminal offense, at least not until the effective date of an amendment to section 192 of the Penal Code in 1945 (a date subsequent to the time here involved), which expressly redefined manslaughter as applicable to homicides caused by the driving of a vehicle. That such a result was not intended and is contrary to the expressed intent of the Legislature is evidenced by its simultaneous adoption of the amendment to Penal Code section 193, above quoted, which provided a specific and different penalty for the crime of manslaughter resulting from the operation of a vehicle. The expressed intent of the Legislature of 1943 could not alone, it is true, serve to revive a statute or part thereof repealed, if in fact there was a repeal, by a former Legislature. Respondent relies upon the rule that no statute, or part of a statute, is revived by the repeal of the repealing statute without express words reviving such repealed statute or part of such statute. Government Code, sec. 9607, St. 1943, p. 1008. However, there is no need for us here to concern ourselves with the question as to what is necessary to revive a repealed statute. We are of the opinion that there was no repeal of Penal Code section 192 within the meaning of the rule stated.

Section 500 of the Vehicle Code, as originally adopted in 1935, St. 1935, p. 173, defined an offense distinct and different from that of involuntary manslaughter. The original test of culpability as to the Vehicle Code offense of negligent homicide was whether ordinary care was exercised. The test applicable to the Penal Code offense of manslaughter was whether due caution and circumspection were exercised. People v. Pociask, 14 Cal.2d 679, 96 P.2d 788; People v. Beckhard, 14 Cal.2d 690, 96 P.2d 794; People v. Amick, 20 Cal.2d 247, 125 P.2d 25. A prosecution under either section was permissible, and it has been intimated that a prosecution and acquittal under one would not place the accused in jeopardy as to the other. People v. Amick, supra; People v. Crow, 48 Cal.App.2d 666, 120 P.2d 686. The two statutes were neither repugnant to nor inconsistent with each other; they were in pari materia. The change of the Vehicle Code section test of culpability from that of failure to exercise ordinary care to one of reckless disregard of, or willful indifference to, the safety of others, as effected by the amendment of 1941, did not create any change in such relationship. But for the concluding clause of the amendment, the provisions of both sections, in a proper case, would have remained applicable to an unlawful homicide caused by the operation of a vehicle.

The Legislature, by providing that the definition of involuntary manslaughter should no longer apply to such cases, did not repeal, either expressly or by implication, that definition. It merely created an exception to its application, leaving the definition remaining in the same form and language. The definition of the crime of manslaughter in section 192 of the Penal Code remained unchanged and unmodified. The applicability of that definition, not the definition itself, was modified. Except for the restraining effect of the amendment, the Penal Code section would have remained, as before, applicable to vehicle cases. When, by the repeal of section 500 of the Vehicle Code in 1943, the barrier to the full application of the definition of manslaughter was removed, that definition again applied without restriction to every situation embraced within its expressed meaning.

The case of County of Ventura v. Barry, 202 Cal. 550, at page 554, 262 P. 1081, at page 1083, presented a situation somewhat parallel to the situation here, and is determinative of this appeal. In holding that there was no repeal there, the court said: "The rule of law applicable to this situation is well stated as follows: 'The statutory rule against the revival of a statute by the repeal of a repealing act relates to absolute repeals, and not to cases where a statute is left in force and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remain in force, and the exception being taken away, the statute is afterwards to be applied without the exception. * * *' 25 R.C.L. 934." That case involved the right of the county assessor to retain a percentage of personal property taxes collected by him. Section 4290 of the Political Code, in part, provided: "* * * the assessor shall be entitled to receive and retain for his own use, unless in this title otherwise provided, six per cent of personal property tax collected by him * * *." By a subsequent amendment of 1923, p. 1210, to section 4252 of the same title of the Political Code, it was provided, in part, that "All commissions or fees now or hereafter allowed by law shall be paid into the county treasury * * *." Section 4252, in 1925, p. 71, was re-enacted with the abovequoted provision omitted. It was held that there had been no repeal of section 4290 and that the assessor was again entitled to retain a percentage of taxes collected.

Respondent attempts to distinguish County of Ventura v. Barry, supra, from the situation here presented, upon the basis that the applicable statute in that case expressly provided "unless in this title otherwise provided." He argues that the test of a repeal is whether the statutes are in pari materia or are repugnant to each other, and that the words "unless in this title otherwise provided" saved the general statute in the cited case from conflict with the specific provision. Without disputing the soundness of this reasoning, it should be pointed out that in both the cited and instant situations the Legislature did nothing more than create an exception to the applicability of a statute which otherwise remained in force. In the cited case the original statute expressly contemplated exceptions to its application. In the instant case the subsequent statute alone created the exception. Both cases clearly come within the rule quoted from 25 Ruling Case Law 934 and approved by the Supreme Court in the case cited.

We have examined the case of People v. Hunt, 41 Cal. 435, relied upon by respondent, but find nothing therein inconsistent with what has been said here. It was there held that an act which provided for the election of county assessors repealed by implication a former act providing for the election of township assessors; and that a subsequent repeal of the repealing act did not revive the act providing for township assessors. The situation presented there was clearly one of outright repeal and was therefore within the rule of Government Code, section 9607.

In his brief, respondent states that his motion to set aside the information was based upon the additional ground that at the preliminary hearing no causal connection between the death of the deceased and any act of respondent was established. He does not, however, further elaborate upon or argue this point. The record discloses that his motion was made and submitted to the trial court solely upon his contention that there had been a repeal of section 192 of the Penal Code. However, upon examination of the reporter's transcript of the testimony received at the preliminary hearing, we are satisfied that such causal connection was sufficiently established thereby.

The order appealed from is reversed and the cause is remanded for appropriate proceedings upon the information.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER, J., dissenting.

71 Cal.App.2d 685

PEOPLE v. WEAVER.

Cr. 3930.

District Court of Appeal, Second District, Division 3, California.

Nov. 15, 1945.

1. Assault and battery 🔑92

Evidence supported conviction of assault with a deadly weapon, as against claim of self-defense. Pen.Code, § 245.

2. Assault and battery 🔑58

In prosecution for assault with a deadly weapon, the fact that defendant did not intend to stab victim, who was a bystander, but another person, was not a sufficient excuse, where defendant did not establish that she acted in self-defense against the other person. Pen.Code, § 245.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Billie Weaver was convicted of assault with a deadly weapon, and she appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

In a jury-waived trial defendant was convicted of assault with a deadly weapon upon one Eph Lincoln, and sentenced to serve 90 days in the county jail under the alternative provisions of section 245 of the Penal Code which permit punishment to be imposed for this offense either by fine or incarceration in jail or state prison. She appeals from the judgment, claiming that she acted in self-defense and that the evidence was insufficient to sustain the conviction. The record does not indicate that her claims are well grounded.

Eph Lincoln, the man who was assaulted, was engaged in no controversy with the defendant. At the time she stabbed him or slashed him with a knife she was directing her attention not to him, but to her "boy friend," Ernest Spears, known locally as "Trigger," who had just struck her over the head with a garbage bucket which he seized behind the bar of Sarrell's, the establishment where he was employed as bartender. He testified that in his excitement, being pursued by appellant, the blow with the bucket which landed on appellant's head was intended to strike her hand and knock from it the knife which she carried. As his aim was poor, so was appellant's, for the stab which she intended for Trigger landed instead in the chest of Lincoln who was seated quietly on a stool behind the bar and several feet away from Trigger.

While appellant and Trigger had been quarrelling previously, and had left Sarrell's Bar and Grill shortly before the stabbing took place, only to return almost immediately, Lincoln did not participate in the quarrel in any way. He testified that Trigger, when he returned to the saloon, was followed by appellant who "came running back in the place"; that Trigger "stopped at the cigar counter at the end of the bar and she stopped there. I am sitting behind the cigar counter, which is at the bar, too, on a stool, and all at once she comes behind the counter and lunged there with a knife and struck me." Question by Mr. Danoff: "Did you say anything to her? A. I said 'Madam, you cut the wrong man.'"

Shortly thereafter, Lincoln was taken to the hospital and given a blood transfusion and was not discharged from the hospital until eight days later.

Appellant did not testify at her trial, but a police officer stated that she told him, "that Mr. Spears had hit her in the face with a bucket, and she had took after him with the knife and evidently stabbed the wrong man back of the counter."

[1, 2] The record in this case indicates that the person engaged in self-defense at

the time of the stabbing was not this appellant, but the man whom she was pursuing with a knife in her hand. Therefore, the authority cited by her counsel (30 C.J. 88, 89) as sufficient to excuse her assault upon an innocent bystander, has no application, and since she was not acting in self-defense, the fact that she did not intend to stab Lincoln cannot clear her, under the reasoning of cases cited by respondent in 40 C.J.S., Homicide, § 17, p. 864.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

71 Cal.App.2d 788

STEPHENSON v. PHŒNIX WOOD & COAL CO. et al.

INDRELIE v. SAME.

JAMES v. SAME.

Civ. 3412.

District Court of Appeal, Fourth District, California.

Nov. 27, 1945.

Hearing Denied Jan. 24, 1946.

1. Appeal and error 🔑659(3)

A motion to augment record by inclusion of instructions not incorporated in record as originally filed will be granted in order that reviewing court may pass upon the effect of an alleged erroneous instruction. Rules on Appeal, rule 12.

2. Automobiles 🔑245(62, 64)

Whether admitted negligence of driver of truck and semi-trailer in parking vehicle at night partly on cement portion of pavement and without any lights was a proximate or concurring cause of collision with station wagon approaching from the rear was for jury under evidence authorizing inference that driver of station wagon would have seen truck and trailer in case lights had been burning at time of topping rise some 315 feet away instead of seeing only the reflector and trailer when something more than 75 feet from it.

3. Trial 🔑296(3)

In action by passengers in station wagon being operated as common carrier to recover for injuries as result of collision with parked truck and semi-trailer, an instruction defining liability of defendants as common carriers, though erroneous in so far as permitting verdict against both defendants under the common carrier rule was not prejudicial as to defendant not operating as common carrier in view of other instructions in same group limiting application of rule to the station wagon defendants.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Separate actions by Everett C. Stephenson, Jr., Hans Indrelie and Harry James against the Phoenix Wood & Coal Company and others to recover damages as result of collision between a station wagon in which plaintiffs were riding as passengers for hire and a semi-truck and trailer being operated by defendant named through its employee. Judgment for plaintiffs, and defendants separately appeal.

Affirmed.

William W. Shaw and Sarau, Thompson & Colegate, all of Riverside, for appellants.

Sims & Wallbert, of Los Angeles, for respondents.

MARKS, Justice.

This case involves separate appeals by two groups of defendants from a judgment in favor of plaintiffs who were injured in a collision between a station wagon, in which they were riding as passengers for hire, and a semi-truck and trailer, owned by R. M. Dunlap, R. G. Baker and M. F. Greaves, being operated with their consent by the Phoenix Wood and Coal Company through Jake Kelly, its employee.

The station wagon was owned by Clarence Harlow and Emily Harlow doing business under the name of the Mission Limousine Service. It was a common carrier and was being driven by Levi Chestnut, an employee of the owners. Both drivers were on the business of their employers and acting within the scope of their employment at the time of the accident.

As the two groups of defendants take entirely conflicting positions on this appeal, we will, where possible, refer to the driver of the station wagon and its owners as the defendants, and to the other defendants as the appellants.

The appellants admit the negligence of Kelly in two respects but urge that such negligence was neither a proximate nor a concurring cause of the accident. They also urge prejudicial error in one instruction given to the jury. On the other hand the defendants admit the negligence of Chestnut; that such negligence was a proximate and concurring cause of the accident. They argue that the admitted negligence of Kelly was also a proximate and concurring cause. They find no prejudicial error in the record and urge affirmance of the judgment. They state that their appeal was taken solely for the purpose of protecting their rights in the event of a reversal of the judgment against the appellants.

The instructions given to the jury are not incorporated in the record as originally filed. The appellants have moved to augment the record by their inclusion. This motion is resisted by plaintiffs on the ground of lack of diligence in preparing the record. The original instructions have been delivered to the clerk of this court and are now available to us.

[1] Rule XII of Rules on Appeal give us authority to order augmentation of the record on our own motion where such course seems advisable. It is the policy of this court, where possible, to have a sufficient record before it for the consideration of all material questions. Therefore the motion will be granted so we may pass upon the effect of the erroneous instruction.

The accident happened at about 3:30 o'clock on the morning of April 9, 1943, on Highway 99 about 21 miles west of the city of Indio in Riverside County. At the place of the collision the highway runs in a general easterly and westerly direction and has a cement pavement about 21 feet wide in its center, with hard surfaced shoulders on either side about 6 feet wide made of desert mix. About 315 feet west of the point of collision is the crest of a rise which descends gently for that distance. The roadway then ascends again to the crest of another rise.

Both vehicles were proceeding east. When the semi-truck and trailer had reached the foot of the decline the gasoline in the tank which was feeding the engine was exhausted. Kelly pulled over to the right, stopped his vehicle with the left rear wheel of the trailer 16 inches north of the south edge of the cement portion of the pavement and the balance of the semi-truck and trailer on the south desert mix shoulder. He testified that he had to alight from the cab to change to another tank of gasoline. He also testified that all the lights on the semi-truck and trailer were illuminated but this is contradicted by other evidence to the effect that all the lights were out so that his counsel concedes there is sufficient evidence to support the conclusion, if drawn by the jury, that there were no lights illuminated on the semi-truck and trailer at and just before the accident.

Counsel for the appellants, in his brief, summarizes the testimony of Chestnut as to the events immediately preceding the collision as follows: "I was going over a little raise in the highway and the first thing I seen was a little red reflector on the back end of a black tanker, and it seemed like no time elapsed at all until we had a crash. I looked for a way around it to the right and I can't recall the reason why I didn't go to the left. At the time I came over the crest of the hill I was traveling east. When I saw a reflector on the rear end of a tanker I applied my brakes. I couldn't tell how far I was behind the tanker when I first saw the reflector—it looked very close to me. It was a dark night. I did not observe any burning tail lights on the tanker at any time between the time when I first saw the reflector and the time of the collision. I would say I was traveling around 45 miles an hour when I first saw the reflector. My best recollection of the time that elapsed between the time I first saw the reflector and the collision is that it happened very quick. The first glimpse I got of the reflector, I seen the tanker. My headlights showed the reflection on the reflector and brought the tanker itself into view. When I first saw that reflector I just went over a little bump in the road. I have no idea how far I traveled after passing over the crest of that grade before the collision occurred. I believe I did not apply my brakes at any time before I observed the reflector, when I was going down that incline. * * * When I first saw the reflector I was way over to the right of the white center line. My right wheels were not on the paved portion of the highway when I saw the reflector, but they was on the shoulder—off the pavement. * * * I do not know how far ahead of me the tanker was when I first saw it and the reflector. I don't know whether I had been driving with my right wheels on the concrete surface of the highway. I don't believe I changed in any way the direction of my station wagon when I first saw the tanker, and I continued down the highway without changing the direction of my car. I applied my brakes after I saw the tanker. I can't estimate the time that elapsed between the time I saw the tanker and when I applied the brakes, nor the time it took for them to take effect, nor, the time between that and the collision."

There is evidence in the record that the wheels of the station wagon left tire burns on the pavement for 75 feet before the collision; that the south tire burn was 16 inches south of the south edge of the cement portion of the pavement; that these tire burns were in a straight line without change of direction. It is admitted that the right front of the station wagon ran into the left rear of the trailer.

Appellants argue that as Chestnut saw the semi-truck and trailer when at a sufficient distance from it to swerve to his left and avoid it, and as he did not, but continued on his course and crashed into it, the admitted negligence of Kelly in parking the vehicle with the left rear wheel on the cement portion of the pavement and without any lights could not have been a proximate or concurring cause of the collision as the accident would have happened if all the lights on the semi-truck and trailer had been illuminated and the vehicle had been parked entirely on the desert mix shoulder with the left rear wheel just off the cement pavement. It should be observed that it was assumed during the trial, and we will assume here, without a holding to that effect, that the desert mix shoulder was a part of the highway upon which vehicles could properly and lawfully park.

In support of their argument that the admitted negligence of Kelly was neither a proximate nor concurring cause of the accident appellants cite McMillan v. Thompson, 140 Cal.App. 437, 35 P.2d 419; Mounts v. Tzugares, 9 Cal.App.2d 327, 49 P.2d 883, and Doane v. Smith, 63 Cal.App.2d 691, 147 P.2d 650, none of which support their argument under the facts before us which are clearly distinguishable from those of the cited cases.

In McMillan v. Thompson, supra, defendant's truck was stalled on the highway. The car in which plaintiff's decedent was riding was passing the stalled truck to its left when a third vehicle traveling in the same direction crashed into the rear of the vehicle in which the decedent was riding throwing it into the stalled truck. The opinion recognizes the probable negligence of the driver of the stalled truck but held that the negligence of the third driver in crashing into the rear of the passing vehicle was not reasonably foreseeable and concluded that this negligence of the driver of the third vehicle was an independent intervening act of negligence which was the sole proximate cause of the accident.

In Mounts v. Tzugares, supra, a truck was parked on the paved portion of the highway leaving 14½ feet of clear pavement between it and the center line. In passing it a truck and trailer crossed to its wrong side of the center line and came into collision with plaintiff's car. The portion of the judgment against the owner and driver of the parked truck was reversed, the court holding that the negligence of the driver of the truck and trailer in crossing the center line onto its wrong side of the road was the proximate cause of the accident.

In Doane v. Smith, supra, an automobile came into collision with a trailer attached to a truck whch was parked with its left wheels on the traveled portion of the highway. The jury returned a verdict for the plaintiff and the trial judge on the hearing of the motion for new trial granted a motion for judgment notwithstanding the verdict, and judgment was entered for defendants. It was reversed on appeal with directions to enter judgment for plaintiff on the verdicts, the court saying [63 Cal.App.2d 691, 147 P.2d 653]: "We might discuss the evidence in the case in greater detail, but it would add nothing to the controlling features of the case as we have stated them. The case presented only factual questions upon the vital issues. It clearly appeared that the act of stopping the truck and trailer on the highway was, under the circumstances, a violation of law. The questions of proximate cause and contributory negligence were close questions which a court or jury could reasonably decide either way. Defendants present a forceful argument on the latter issue and it may be that if we were trying the facts we would agree with their contention. But the case upon this issue is not one of law. We are satisfied that the implied findings of the jury upon the material issues in the case were supported by the evidence."

[2] In the instant case the jury was justified in concluding that when the semi-truck and trailer was stopped its lights were not illuminated. Had the lights been burning as the law required, the reasonable inference might follow that Chestnut would have seen them when he topped the rise some 315 feet away instead of seeing only the reflector and trailer when something more than 75 feet from it and he might have had time to realize the danger and to have avoided the collision.

The other ground urged for reversal is found in instruction 15, given at the request of plaintiffs, which defined the liability of defendants as a common carrier. It contained the following:

"* * * and if you should find that from the accidental event, as a proximate result thereof, plaintiffs have suffered injuries, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant Samuel Levi Chestnut, who, at that time, was acting as the agent, and within the scope of his authority, for the defendants Mission Limousine Service, Clarence Harlow and Emily Harlow, doing business under the name and style of Mission Limousine Service. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs."

To the extent that this instruction permits a verdict against both defendants under the common carrier rules it is erroneous. This instruction is found in a group of four defining the liability of a common carrier. Instruction 14 limits the application of this rule to the station wagon group. Instruction 52 clearly states there were two groups of defendants, each claiming that the negligence of the other was the proximate cause of the accident, and if they found that the negligence of one group was the sole proximate cause of the accident plaintiffs could not recover against the other.

[3] It seems improbable that the jury was misled by the error in instruction 15 and we can find no sufficient prejudice in it to justify a reversal of the judgment.

The motion to augment the record by adding the various instructions proposed, given and refused, is granted and those instructions are made a part of the record on appeal with leave to withdraw them and return them to the county clerk of Riverside County when they have served their purpose here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

MONROE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 15055.

District Court of Appeal, Second District, Division 2, California.

Nov. 23, 1945.

Hearing Granted Jan. 21, 1946.

1. Husband and wife 🔑299(3)

Trial court had jurisdiction to modify a provision for support and maintenance, previously allowed in a decree for separate maintenance which has become final, even though the decree did not reserve the power of modification in trial court. Civ.Code, § 137.

2. Prohibition 🔑19

In an application for a writ of prohibition directed to a court relative to a judicial act, the judge of the court is not a proper party respondent.

◆

Application by Edwin Rue Monroe for a writ of prohibition to prohibit the Superior Court of the State of California in and for the County of Los Angeles and the Honorable John Beardsley, one of the judges of said court, from hearing an order to show cause, the purpose of which was to modify the provision for support money in a decree of separate maintenance which had become final.

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* Subsequent opinion 170 P.2d 473.

Application denied.

Louis Miller and Reynolds & Painter, all of Los Angeles, for petitioner.

Hahn & Ross, of Los Angeles, for respondents.

McCOMB, Justice.

This is an application for a writ of prohibition to prohibit the respondent court from hearing an order to show cause the purpose of which is to modify the provision for support money in a decree of separate maintenance which had become final.

These are the undisputed facts:

On March 23, 1945, respondent court entered a decree of separate maintenance in favor of Mary H. Monroe against petitioner herein. The decree provided in part as follows:

"It is Further Ordered, Adjudged and Decreed that defendant pay to plaintiff for her support and maintenance the sum of $250.00 per month for a period of 27 months commencing as of March 1, 1943, payable in semi-monthly installments of $125.00 each on the 1st and 15th of each and every month.

"It is Further Ordered, Adjudged and Decreed that defendant pay to plaintiff, for the support and maintenance of the minor child of the parties hereto the sum of Fifty ($50.00) Dollars per month for a period of twenty-seven months, commencing as of the 1st day of March, 1943, payable in semi-monthly installments of $25.00 each on the 1st and 15th days of each and every month; that upon the expiration of said period of twenty-seven months plaintiff shall be paid by defendant for the support and maintenance of said minor child the sum of $100 per month payable in semi-monthly installments of Fifty ($50.00) Dollars each on the 1st and 15th days of each and every month until said child reaches the age of majority, or is married or becomes self-supporting or until the further order of the court."

No appeal was taken from the decree and it became final. Petitioner has performed and complied with each and every provision of the decree of separate maintenance. On May 21, 1945, respondent court issued an order directed to petitioner requiring him to show cause on June 20, 1945, why the order of March 23, 1943, should not be modified so as to provide that additional payments should be made for the support and maintenance of plaintiff in the separate maintenance action. Petitioner made a motion to quash the proceeding pending before the trial court, which motion was denied. An alternative writ of mandate has been issued by this court to respondents to show cause why they should not be enjoined from proceeding to hear the application for an order modifying the order of March 23, 1943.

[1] This is the sole question presented for our determination:

Does the trial court have jurisdiction to make an order modifying a provision for support and maintenance previously allowed in a decree for separate maintenance, which decree has become final, where the decree does not reserve the power of modification in the trial court?

This question must be answered in the affirmative and is governed by this rule:

The trial court may in its discretion modify a final judgment granting separate maintenance to a wife. (Section 137, Civil Code.*)

Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Long v. Long, 17 Cal.2d 409, 110 P.2d 383; Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; O'Brien v. O'Brien, 130 Cal. 409, 62 P. 598; O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225; Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am.St.Rep. 70; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749; Gillespie v. Andrews, 78 Cal.App. 595, 248 P. 715; and Bacigalupi v. Bacigalupi, 72 Cal.App. 654, 238 P. 93, relied on by petitioner, are each divorce actions and a different rule is applicable from that which applies in a separate maintenance action. In a separate maintenance action the parties are not divorced and their property rights are not necessarily settled. They may become reunited or at some future time a divorce may be granted to one or the other of the parties. Until such event they remain husband and wife and the obligation rests upon the husband to support his wife and minor children. Hence the provisions in section 137 of the Civil Code authorizing the trial court in the exercise of a sound discretion at any time to modify an order or decree providing for the support of a wife which is contained in a decree for separate maintenance. (For an excellent discussion of the history and theory supporting the foregoing views, see Gloth v. Gloth [Virginia] 153 S.E. 879, 885 et seq.)

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* Section 137, Civil Code reads in part as follows:

"The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court."

[2] In view of the law established by the legislature in this state, cases such as Erkenbrach v. Erkenbrach, 96 N.Y. 456, and Koehl v. Koehl, 92 Misc. 579, 156 N.Y.S. 234, are inapplicable to the present action. (See 4 Cal.Jur., 10 year supp., [1944] p. 499, Courts, sec. 48.) In an application for a writ of prohibition directed to a court relative to a judicial act, the judge of the court is not a proper party respondent. (Brouwer v. Superior Court, 130 Cal.App. 163, 166, 19 P.2d 834.

For the foregoing reasons petitioner's application for a writ of prohibition is denied and the alternative writ heretofore issued is discharged.

MOORE, P. J., and FOX, Justice pro tem., concur.

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71 Cal.App.2d 759

REARDON v. DALY CITY et al.

Civ. 12945.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1945.

Hearing Denied Jan. 24, 1946.

1. Municipal corporations ⇨159(6)

Under ordinance of City of Daly City providing for civil service system, creation of board of review to hear all appeals or complaints with respect to the classified service was not mandatory, and even if board of review was appointed, its action would be subject to review by city council.

2. Municipal corporations ⇨159(6)

Where city council of Daly City was required to act as board of review under ordinance providing for civil service system because of failure to appoint board of review as authorized by ordinance, the substantive rules enumerated in ordinance as applicable to a board of review were equally applicable to any action of council sitting as a board of review in reference to proceeding to remove an officer for misconduct.

3. Municipal corporations ⇨182

Where right of city council of Daly City to dismiss city employee under the classified service on enumerated charges was not made to depend on council's adoption of rules for administration of civil service system consistent with provisions of ordinance providing for civil service system, such rules were not essential to validity of council's action in dismissing chief of police who was under the classified service.

4. Municipal corporations ⇨177

If an administrative body, such as a local board, has been clothed with quasi judicial functions, there must be a hearing of character of informal trial in accordance with provisions of the controlling law.

5. Constitutional law ⇨318

In proceedings before city council of Daly City for dismissal of chief of police who was in the classified service, due process of law would not require a public hearing or trial unless accused requested the hearing by filing an answer, in which event the ordinance automatically provided for a public hearing.

6. Municipal corporations ⇨218(8)

The right to a public trial or hearing in proceeding for dismissal of employee in classified service under ordinance of City of Daly City providing for civil service system was a privilege granted for benefit of accused and could be waived.

7. Officers ⇨66

A person accepts an office subject to conditions placed in the law creating the position, including any provision relative to removal.

8. Municipal corporations ⇨182

In proceeding before city council of Daly City for dismissal of chief of police who was in the classified service, the chief of police could waive hearing on resolution charging him with misconduct and removing him from office.

9. Officers ⚷103

Administrative remedies must be exhausted before judicial assistance of court is available to a party aggrieved by a statute or ordinance.

10. Mandamus ⚷3(1)
Municipal corporations ⚷185(13)

Chief of police of Daly City who was in the classified service under ordinance providing for civil service system was not entitled to hearing in superior court on a writ of mandate or certiorari to review city council's action dismissing him from office, where he had not previously exhausted his administrative remedies.

◆

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

Mandamus proceeding by James G. Reardon against City of Daly City, A. J. Gaggero, Mayor of the City of Daly City, and others, to compel respondents to restore petitioner to the office of Chief of Police and to pay him salary from the date of the purported removal until the date of judgment, less the amount earned by him in that time. From a judgment granting the writ of mandamus, the respondents appeal.

Reversed.

F. E. Hoffmann, of San Mateo, and J. W. Coleberd, of South San Francisco, for appellants.

Raymond J. O'Connor, of San Francisco, and Joseph J. Bullock, of Redwood City, for respondent.

WARD, Justice.

This is an appeal from a judgment of the superior court granting a writ of mandamus to compel appellants, the City of Daly City and the city council thereof, to restore petitioner James G. Reardon to the office of chief of police and to pay him salary from the date of the purported removal until the date of judgment, less the amount earned by him in that time.

On June 26, 1944, the city council adopted a resolution, No. 855, whereby the petitioner was removed from his office as chief of police, the removal to be effective as of the date of the adoption of the resolution. The resolution set forth misconduct in that the chief of police had deliberately told a falsehood to the Police Commission with reference to property which had been confiscated by officers of the department in compliance with United States government regulations requiring seizure of certain property held by aliens at the outbreak of World War II. In addition the resolution related that the chief was unable to present the council with an inventory of alien property seized or confiscated and that such conduct constituted incompetency, inefficiency and a failure to perform duties and to observe rules and regulations.

Petitioner Reardon was present at the meeting when the resolution was adopted and within three days was given a copy of the resolution. About six weeks later the chief filed a petition for a writ of mandate to compel his reinstatement. Among other conclusions of law the superior court found: "That by failure of the City Council of the City of Daly City, a Municipal Corporation, to appoint a Board of Review as provided for under the provisions of Ordinance No. 203, Section 6, and by reason of the failure of the City Council of said City of Daly City to adopt rules and regulations for the administration of the Civil Service System as provided for in Section 5 of said Ordinance No. 203 of the City of Daly City, the City Council of the City of Daly City was and is without power to discharge a civil service employee of said City."

Ordinance 203 designated the chief and members of the police department as holding classified service positions subject to the civil service system. (Section 2.) The ordinance also provided that the council should formulate and adopt rules for the administration of the civil service system consistent with the provisions of the ordinance. (Section 5.) Section 9 of the ordinance provides in part: "All persons holding positions in the Classified Service shall be subject to suspension without pay for a period of not exceeding thirty days, and also to demotion or removal from office or employment for misconduct, incompetency, inefficiency, or failure to perform duties, or to observe the rules and regulations of the department, office or board, but subject to the right of appeal of the aggrieved party to the board of review in the manner set forth in the rules and regulations. Any such employee shall be entitled to receive a written statement of the reasons for such action within three days and he shall have three days time thereafter to answer in writing thereto. In the event such employee files an answer, a copy of such written charge and of such answer shall be forthwith filed with the personnel clerk. Any employee who has been suspended, demoted or removed from office may, within ten days after filing his answer, or in the event written charges have not been made available to him within the time prescribed, then within ten days after the expiration of the period within which same should have been made available, file a written demand with the personnel clerk requesting that the board of review provided for in the rules and regulations shall review such suspension, demotion or removal, in which event the personnel clerk shall, without delay, file a copy of said reasons and the answer of the employee, together with such other information as may be provided for in the rules and regulations, with said board of review. Said board of review may make, or cause to be made, such investigation as it may deem necessary, and thereafter shall hold a public hearing, at which time it shall hear evidence for and against the party aggrieved. Hearings may be informally conducted and the rules of evidence need not apply. Written conclusions or findings of the board of review shall be rendered within ten days after the matter is submitted, and thereupon be certified to the City Council or official from whose order the appeal was taken. Such findings and conclusions of the board of review may contain such recommendations as said board shall deem warranted. The City Council or the appointing officer may thereupon affirm, revoke, or modify the action taken as in the judgment of such Council or officer shall be deemed warranted."

Section 6 provides: "The City Council shall hear all appeals or complaints acting in the capacity of a board of review or may, in the event the rules and regulations adopted so provide, appoint a board of review to hear all appeals or complaints, with respect to the Classified Service. In the event that such a board is created, upon the conclusion of any such hearing, said board of review shall certify its findings to the City Council and make such recommendations as it may deem warranted. * * * In the event such a board of review is created it shall consist of three members to be appointed by the City Council."

[1, 2] In analyzing the above noted provision of the ordinance in question, it is the evident intention that a board of review shall hear all appeals or complaints *"in the event that such board is created."* (Italics added.) The creation of such board is not mandatory. If a board of review is appointed, its action is not final. Its findings and conclusions shall be submitted to the council. The council may affirm, revoke or modify. If the board of review is not created, then "The City Council shall hear all appeals or complaints in the capacity of a board of review." If the council should act as a board of review then the substantive rules and regulations enumerated in the ordinance as applicable to a board of review are equally applicable to any action of the council sitting as a board of review in reference to proceedings to remove an officer for misconduct. For instance, it would be incumbent upon the council to present a written statement of the reasons for removal within three days and the accused would have three days thereafter to answer in writing. (Sec. 9.) The trial court presented two reasons why petitioner, Reardon, should be reinstated: (1) Failure to appoint a board of review; (2) failure to adopt rules and regulations for the administration of the civil service system. As heretofore demonstrated, the creation of a board of review was not mandatory but optional and the city council was authorized to act as a board of review. Ordinance 203 provides for the adoption of rules in accordance with the provisions therein. The ordinance provides the substantive rules to govern the hearing following a dismissal of a person in the Classified Service though the council could have adopted additional rules "consistent with the provisions of this ordinance." (Ordinance 203, sec. 5.) The only rules required, if any, would be mechanical rules of a general nature to put the mandatory public hearing into operation.

[3] The two grounds for dismissal specified in the resolution of June 26, 1944—"failure to perform his duties" and "misconduct of office"—were supported by the specific charges in the resolution that Reardon did not present an inventory of the alien property in his custody when requested, and that he told a falsehood and loaned a 38 caliber Smith & Wesson revolver, part of the confiscated property. These statements were sufficiently specific to apprise Reardon wherein the council thought he had failed in performing his duties and with what misconduct in office he was charged. The right to dismiss on

the enumerated charges (sec. 9) was not made to depend on the adoption of rules. If the council was required to prescribe a particular rule to dispose of the charges, then such rule would be essential to the validity of the action taken. People ex rel. Lyons v. McAleer, 33 Cal.App. 135, 164 P. 425. In Cook v. Civil Service Commission, 160 Cal. 589, 117 P. 663, the court was dealing with examinations and the requirement in the charter that rules be enacted. At page 596 of 160 Cal., at page 666 of 117 P. it was said: "The section of the charter requiring the adoption of general rules for examinations, etc., by the commissioners, expressed, not a mandatory, but a directory admonition. There is nothing in the language of the act which makes the adoption of such rules a jurisdictional prerequisite to the holding of examinations by the board. These rules were merely 'to carry out the purposes of this article'; i. e., those relating to civil service. The rules were to be a part of the scheme of testing the fitness of candidates for promotion, but the right to examine candidates was not made to depend upon the adoption of these general rules." This case is controlling here.

If petitioner, Reardon, had followed the rules set forth in ordinance 203 by answering the charging portion of the resolution an issue would have been raised which would have required a "public hearing." Any city council rule could not have been inconsistent with the substantive rules set forth in the ordinance. In the absence of an answer there was nothing further to be decided. It may be that the failure to create a board of review made the city council both the accuser and the board of review, but if that is what the municipality desired, and it so expressed itself in section 6 of the ordinance, the individual opinions of members of courts of review relative to such procedure is of no consequence against the will of a legislative body.

In examining the specific set of facts in this case and applying the rules of procedure outlined in the ordinance, it is evident that an accused is first entitled to receive a written statement within three days after charges of misconduct are filed. The record discloses that the resolution charging Reardon with misconduct was adopted on June 26, 1944, in the presence of Reardon without comment by him. On or about the 28th day of June Reardon received a copy of the resolution from a member of the council. The ordinance further provides that within three days of the receipt of written charges an answer to them must be filed. If a written statement is not received "within ten days after the expiration of the period within which same should have been made available," the accused could ask a review of the action dismissing him. Reardon neglected to file with any department, board or council a "demand" for a review of the action of dismissal as provided in section 9. If Reardon had requested the city council to review the action, such review could have been conducted by the council sitting as a board of review (sec. 6) or by a board of review created at that time. If rules of procedure for that hearing other than the rules appearing in the ordinance were found to be necessary, such rules could have been adopted by the council prior to the public hearing. The first action taken by the removed chief was to file a petition for a writ of mandate to be directed to the municipal corporation, the councilmen thereof, the mayor and the police commissioners of the City of Daly City. The transcript on appeal shows that evidence in relation to the failure to establish rules, other than those contained in ordinance 203 and the failure to appoint a board of review, was introduced and passed upon, but the merits of resolution No. 855 charging Reardon with misconduct, etc., in office were not adjudicated.

[4-8] Previous decisions in this and other jurisdictions usually are of no avail in determining the rights of removed officials to reinstatement, due to the particular and sometimes peculiar wording of the controlling statute, charter provisions or ordinance and the rules and regulations adopted to aid in enforcement of such laws. There are several recognized precedents, however, that have been established in this and in the majority of other jurisdictions as a guide to determine such rights. If the administrative body, such as a local board, has been clothed with quasi-judicial functions (Greif v. Dullea, 66 Cal.App.2d 986, 153 P.2d 58), there must be a hearing of the character of an informal trial in accordance with the provisions of the controlling law. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816; Swars v. Council of the City of Vallejo, 64 Cal.App.2d 858, 149 P.2d 397; Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383. In the present

proceeding, due process would not require a public hearing or trial unless the accused requested a hearing by filing an answer in which event the ordinance automatically provides for a "public hearing." (Section 9.) The right to a public trial or hearing is a right which is personal to the accused. It is a privilege granted for the benefit of an accused and therefore may be waived. "The trend of modern authority is in favor of the doctrine that a party in a criminal case may waive irregularities and even rights very much the same as in a civil case. Constitutional rights have been held waivable in common with mere irregularities. The instances are very numerous." 8 R.C.L. p. 69, § 23; see, also, 7 Cal.Jur. p. 931, § 77; 14 Am.Jur. p. 848, § 119, and p. 950, § 269. In California it has been held that "a party may waive a right created by the statute for his benefit." People v. Robinson, 46 Cal. 94; People v. Smink, 105 Cal.App. 784, 288 P. 873. The petitioner, Reardon, held no constitutional right to the position of chief of police of the City of Daly City and could waive the privilege of continuing to occupy the office. A person accepts an office subject to conditions placed in the law creating the position, including any provision relative to removal. Ordinance 203 has no provision requiring that upon the filing of charges a member of the police department must stand trial. On the contrary this ordinance makes it optional with the accused. It must be held that Reardon could waive a hearing on the resolution charging him with misconduct and removing him from office.

[9, 10] In addition to Reardon's failure to follow the provisions of the controlling ordinance, another legal principle, the subject of repeated assertions in many decisions in this state, prohibits affirmance of the superior court judgment restoring petitioner to office. Administrative remedies must be exhausted before the judicial assistance of the courts of the state is available. Metcalf v. County of Los Angeles, 24 Cal.2d 267, 148 P.2d 645; Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Stockton v. Department of Employment, 25 Cal.2d 264, 153 P.2d 741; United States v. Superior Court, 19 Cal.2d 189, 120 P.2d 26; Gantner & Mattern Co. v. California E. Comm., 17 Cal.2d 314, 109 P.2d 932; Steen v. Board of Civil Service Com'rs, supra; Hill v. Brisbane, 66 Cal.App.2d 15, 151 P.2d 578; Jackson v. Howser, 66 Cal.App.2d 870, 153 P.2d 423. Reardon did not exhaust his administrative remedies, in that he waived his right to a hearing before either the city council or a board of review of the City of Daly City. Through this failure to exhaust his administrative remedies he sacrificed his right to a hearing in the superior court of this state on a writ of mandate or certiorari.

The judgment is reversed.

PETERS, P. J., and OGDEN, Justice pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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71 Cal.App.2d 783

GARNETTE v. MANKEL et al.

MANKEL v. GARNETTE et al.

Civ. 7162.

District Court of Appeal, Third District, California.

Nov. 27, 1945.

Hearing Denied Jan. 24, 1946.

1. Fixtures ⚷27(1)

The statute providing that machinery used in working a mine is to be deemed affixed to mine does not operate independently as a transfer of title, and courts will give, to personalty annexed to or used in connection with mining premises, character parties have fixed under an agreement that the personalty shall be considered as realty or personalty. St.1939, p. 1108, § 2601.

2. Fixtures ⚷27(3)

Where sublessee of mining property leased a power shovel with an option to purchase, under contract providing that shovel should retain its character as personalty, on sublessee's default under sublease and lease of shovel, shovel placed on mining premises did not become part of realty but retained its character as personalty, and owner was entitled to repossess shovel. St.1939, p. 1108, § 2601.

3. Bailment ⚷21
Evidence ⚷65, 66

Where owner leased a power shovel to sublessee of mining property with percentage of mining royalties as part consideration, and sublessee failed to obtain a permit for issuance of royalty interests, owner, while presumed to know law as to permit, was not presumed to know sublessee's noncompliance with law, and he was not in pari delicto with sublessee, and on sublessee's default under sublease and lease of shovel, owner was not precluded from claiming shovel. St.1917, p. 673, as amended.

4. Evidence ⚷60

Until contrary appears, that a person is innocent of crime or wrong and that law has been obeyed will be presumed. Code Civ.Proc. § 1963.

5. Estoppel ⚷68(3)

Where percentage of mining royalties was part consideration for lease of a power shovel to sublessee of mining property, sublessor's assignee as sublessee's creditor could not in claiming shovel urge invalidity of lease because of sublessee's failure to obtain a permit for issuance of royalty interests, while relying on validity of lease. St.1917, p. 673, as amended; St.1939, p. 1108, § 2601.

6. Fixtures ⚷27(3)

Where owner leased a power shovel to sublessee of mining property, on sublessee's default under sublease and lease of shovel, a valid contractual relationship between sublessee and owner was necessary to entitle sublessor's assignee to claim an interest in shovel on ground shovel when placed on mining premises became part of realty. St.1939, p. 1108, § 2601.

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Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by J. L. Garnette against Carl Mankel and others for alleged conversion of a power shovel, wherein named defendant cross-complained against plaintiff and others. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Chas. L. Gilmore, of Sacramento, for appellant.

Fontaine Johnson, of Sacramento, for respondents.

PEEK, Justice.

This is an action by appellant, J. L. Garnette, against respondent Carl Mankel, for the wrongful conversion of a power shovel. From the judgment denying the relief sought he has appealed.

The record discloses that one Charles Hopper Brown was the lessee of certain mining property in Placer County, California. He executed a sublease to one D. D. Pettigrew, who entered upon the premises and conducted the business of mining chrome ore, under the name of War Metals Development, Ltd., a limited copartnership. Said sublease provided in part: "Should Second Party [Pettigrew] desire to cease and abandon operations hereunder, he may do so at any time upon giving thirty days notice in writing of his intention so to do and, if he shall have kept all the terms and conditions hereof and be not in default in any particular hereunder, he shall have the right to remove his machinery and equipment placed by him upon the premises, within Sixty days after the giving of such notice." Brown assigned his interests in the primary lease and the Pettigrew sublease to appellant Garnette. Thereafter Pettigrew dealt exclusively with appellant as his lessor. Respondent Mankel was the owner of certain mining machinery, including a heavy duty Northwest 3/4 yard shovel. On May 16, 1942, in consideration of a guaranteed monthly rental and a percentage of the royalties to be derived from the mining operations, he entered into an agreement with War Metals Development, Ltd., through Pettigrew, whereby he leased certain equipment, including said shovel, to the copartnership for a term of three years, with an option to purchase. The contract further provided that the equipment was to be used exclusively on said mining premises and that the same should retain its character as personal property; that it should be returned to lessor by the lessee at the end of the term or sooner termination of the lease; that if the lessee should default in any of the provisions of the agreement, or if the mining operations should close or prove unprofitable and the lessor elect to terminate the lease and give thirty days notice in writing, said lessor could go upon the premises and retake possession of the equipment. In February 1943, Pettigrew defaulted on his royalty payments to appellant. On or about May 13, 1943, appellant went into possession of the premises and took over the operation thereof. Meanwhile War Metals Development, Ltd. defaulted on the payments to respondent under the lease for the shovel, and on or about May 9, 1943, respondent, with Pettigrew's consent, repossessed himself of the shovel and removed it from the mining property.

Two issues are presented for determination: First, whether, as appellant contends, the shovel, when placed on the mining premises, became a part of the realty under Public Resources Code, section 2601, St.1939, p. 1108, and thereby passed to appellant upon the termination of the lease or, as contended by respondent, it retained its character as personalty by reason of the understanding of the parties to the transaction under which it was placed on said premises, to which transaction appellant was a total stranger; and secondly, whether or not respondent is precluded from asserting his ownership of the shovel by reason of the failure of the copartnership to obtain a permit under the provisions of the Corporate Securities Act for the issuance of the royalty interests involved in the lease of the shovel.

[1] Public Resources Code, section 2601 (formerly Civil Code, section 661), provides in effect that all machinery and tools used in working or developing a mine are to be deemed affixed to the mine. However, it is a well recognized exception to the rule specified in said section that the parties themselves may, in their dealings with personal property annexed to or used in connection with mining premises, agree that it shall be considered as realty or personalty, and that the courts will give to such property the character which the parties themselves have fixed upon it. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am.Rep. 107. In other words said code provision does not operate independently as a transfer of title. Byron Jackson Iron Works v. Hoge, 49 Cal.App. 700, 703, 704, 194 P. 45.

The factual situation herein presented is not wholly unlike the question before the Supreme Court in the early Hendy case (57 Cal. 3, 40 Am.Rep. 107). There Hendy had leased mining equipment to one Lampson, the lessee of Dinkerhoff. Upon the lessee's default, Dinkerhoff took possession of the premises as well as the equipment leased by Hendy. Dinkerhoff refused Hendy's demand for a return of the machinery and the action by Hendy followed. The court held that as between Hendy and the lessee the property remained personalty; that Dinkerhoff stood in the same shoes as his lessee and that the machinery remained as personalty, whether in the hands of Dinkerhoff or the lessee.

In the Byron Jackson case, 49 Cal.App. 700, 194 P. 45, this court, relying upon the Hendy case (57 Cal. 3, 40 Am.Rep. 107), likewise held that equipment placed on mining property under a conditional sales contract, providing that title to the machinery was to remain in the seller until the purchase price had been paid, did not attach to the premises but remained as personalty in the hands of the lessee, and that the seller's action for the return of the property or the value thereof was well founded.

Following the conclusion in the Byron Jackson case, this court, in Western, etc., v. Graetz, 42 Cal.App.2d 296, 300, 108 P.2d 711 (hearing in the Supreme Court denied), again reiterated the general rule, holding that leased mining equipment, title to which was to remain in the seller, did not attach to the realty, and further observed that as no interest in the leased machinery was shown to have been gained by the owners of the premises its character as personalty continued as to them.

[2] We find nothing in the present case to take it out of the rule enunciated in the cases previously cited.

Appellant's second assignment of error is based on the theory that respondent's right to the shovel is predicated on his written agreement with the War Metals Development, Ltd., and that such agreement being void by reason of the fact that the copartnership failed to procure from the Commissioner of Corporations a permit for the issuance of the securities provided for in the agreement, as required by the Corporate Securities Act, St.1917, p. 673, as amended, respondent can assert no rights by virtue of said agreement.

[3, 4] Respondent is not chargeable with the copartnership's dereliction, if such it were, in failing to secure the permit. While respondent is presumed to know the law, he may not be presumed to know the fact of the noncompliance therewith. He is not in pari delicto with the copartnership but is one of the very persons whom the law was designed to protect. As stated in Hemmeon v. Amalgamated Copper Mines Co., 95 Cal.App. 400, 401, 402, 273 P. 74, 75:

"True, respondent must be presumed to have known the law requiring the possession of a permit as a prerequisite to the issuance and sale of securities, but it does not follow that she should be presumed to have known the fact that appellant had violated the law. * * * Until the contrary appears, it will be presumed that a person is innocent of crime or wrong and that the law has been obeyed. Code Civ.Proc., § 1963."

See also Tatterson v. Kehrlein, 88 Cal. App. 34, 49, 50, 263 P. 285; Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777; Randall v. California L. B. Syndicate, 217 Cal. 594, 597, 20 P.2d 33; Parmely v. Boone, 35 Cal.App.2d 517, 520, 96 P. 2d 164.

[5, 6] Appellant's further contention that as a creditor of Pettigrew, his lessee, he is entitled to attack the validity of the rental agreement, is likewise without merit. He cannot urge the invalidity of the agreement while relying on its validity to show a contractual relationship between Pettigrew and respondent which alone would entitle him (appellant) to claim an interest in the shovel. Austin v. Hallmark Oil Co., supra.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

SWEELEY v. SWEELEY.*

Civ. 14920.

District Court of Appeal, Second District, Division 2, California.

Nov. 23, 1945.

Rehearing Denied Dec. 11, 1945.

Hearing Granted Jan. 21, 1946.

1. Divorce 🔑211

The trial court, in its discretion, may award wife alimony for her support pending divorce action. Civ.Code, § 137.

2. Divorce 🔑211

Where evidence discloses wife's possession of small amount of non-income producing property, award to her of alimony pending divorce action is not abuse of discretion. Civ.Code, § 137.

3. Divorce 🔑211

Where only property in wife's possession was non-income producing, cash constituting bulk of such property was held for education of spouses' minor child pursuant to their agreement, and husband's net monthly income averaged $1,058, trial court did not abuse its discretion in allowing wife $225 per month for support of herself and such child pending husband's divorce suit. Civ.Code, § 137.

4. Courts 🔑91(2)

An opinion of District Court of Appeal in case dismissed thereby before decision of Supreme Court, which granted hearing after decision of District Court of Appeal, has no value as authority or precedent.

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Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Merle E. Sweeley against Ruth M. Sweeley for a divorce. From an order directing plaintiff to pay defendant a specified sum monthly for the support of herself and the parties' minor child pending trial, plaintiff appeals.

Affirmed.

E. O. Leake and J. J. Leake, both of Los Angeles, for appellant.

Zagon, Aaron and Sandler, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order directing plaintiff to pay to defendant for the support of herself and the minor child of the parties $225 per month pending the trial of a divorce action instituted by plaintiff on the ground of extreme cruelty.

The essential facts are these:

At the time of the hearing of the order to show cause upon which the order appealed from is predicated the evidence disclosed that defendant had in her possession $5,800.48 in cash which was derived from sale of the home and furniture of the parties hereto. Such money the parties had agreed should be held to provide a fund for the education of their child. The evidence also disclosed that plaintiff's average monthly income was $1,508.71 and that his average monthly expenses were $450, leaving an average net monthly income to plaintiff of $1,058.71. The plaintiff conceded that the sum of $50 per month was a reasonable and necessary amount for the support of his child.

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* Subsequent opinion 170 P.2d 469.

The trial court in addition to the order appealed from made an order restraining defendant from disposing of the cash in her possession except for the cost of litigation until after the hearing of the case on its merits.

This is the sole question necessary for us to determine:

Did the trial court abuse its discretion in making an order awarding defendant $225 per month as alimony pendente lite?

[1] This question must be answered in the negative and is governed by these pertinent rules of law:

1) The trial court may in its discretion award a wife alimony for her support during the pendency of an action for divorce. (Section 137, Civil Code.)

[2] 2) It is not an abuse of discretion for the trial court to award a wife alimony pendente lite if the evidence discloses she has in her possession a small amount of non-income producing property. (Westphal v. Westphal, 122 Cal.App. 379, 383 et seq., 10 P.2d 119.)

[3] Applying the foregoing rules to the facts in the instant case it appears that the only property defendant had in her possession was non-income bearing, and pursuant to an agreement of the parties the cash which constituted the bulk of said property was held for the education of their minor child. Therefore, since the husband's net monthly income averaged $1,058, clearly there was not any abuse of discretion in the trial court allowing the defendant, pending the trial, $225 per month for her support and the support of the parties' minor child.

Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868, is not applicable to the facts of the present case for the reason that in such case the wife failed either by affidavit or by testimony to show the amount necessary for her support. In the instant case defendant by affidavit and oral testimony showed specific needs and the amount necessary for her provision.

Turner v. Turner, 80 Cal. 141, 22 P. 72, is likewise not in point here for in such case the wife possessed income producing property which income was in excess of that of her husband. White v. White, 86 Cal. 212, 24 P. 1030, Stewart v. Stewart, 156 Cal. 651, 105 P. 955, and Mudd v. Mudd, 98 Cal. 320, 33 P. 114, are factually distinguishable from the present case and therefore are not of assistance to us.

[4] Shopiro v. Shopiro, — Cal.App.2d —, 153 P.2d 62, relied upon by plaintiff and cited as authority for his position that the trial court abused its discretion, is not an authority for the reason that the Supreme Court granted a hearing after the decision of the District Court of Appeal and before decision of the Supreme Court the case was dismissed. Therefore the case has no value as an authority or precedent. (In re Estate of Kent, 6 Cal.2d 154, 156, 57 P.2d 901.)

For the foregoing reasons the order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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71 Cal.App.2d 687

VACCAREZZA et al. v. SANGUINETTI et al.

Civ. 12887.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1945.

Hearing Denied Jan. 17, 1946.

1. Sales 🔑**255, 274**

Under the statute there is an implied warranty of fitness of food for the purpose for which purchased, and liability for breach of warranty is absolute regardless of negligence, and the warranty applies to the sale of foodstuffs for human consumption and runs with the goods to the ultimate consumer and there is no need of privity between the ultimate consumer and the manufacturer. Civ.Code, § 1735.

2. Sales 🔑**441(1, 3)**

In action for injuries caused by trichinosis as result of eating salami and coppe, burden was on plaintiffs to show by preponderance of the evidence that such foods were purchased from defendant retailer and manufactured by defendant wholesalers, that such products were infected, and that as a result of eating them trichinosis resulted. Civ.Code, § 1735.

3. Appeal and error ⚿994(3), 1012(1)

The credibility of witnesses and the weight to be given to their testimony rests with the trial court.

4. Evidence ⚿588, 597

A trial court is not permitted to base its findings on surmise, conjecture or guess, but it has the power to pass on the weight of the evidence.

5. Appeal and error ⚿989

On the question of the sufficiency of the evidence, the power of the appellate court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury, and when two or more inferences can be reasonably deduced from the facts, the appellate court is without the power to substitute its deductions for those of the trial court.

6. Appeal and error ⚿1010(1)

The inability of appellate court to substitute its findings on the facts for that of trial court is not changed by the fact that some of the findings are based on circumstantial evidence.

7. Evidence ⚿587

In order to establish a theory by circumstantial evidence, it is not necessary that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom.

8. Evidence ⚿587

A plaintiff relying on circumstantial evidence simply has to establish the reasonableness of his inference by a preponderance of the evidence.

9. Sales ⚿441(1)

In action for injuries resulting from trichinosis allegedly caused by salami and coppe purchased from defendant retailers and wholesalers, evidence sustained finding that such foods were purchased from the defendant retailer and that they were manufactured by defendant wholesaler. Civ. Code, § 1735.

10. Sales ⚿441(3)

In action for injuries sustained from trichinosis allegedly caused by infected salami and coppe, evidence sustained finding that such foods were infested with the larvae of trichinella, and that plaintiff wife and her two children contracted trichinosis from eating such foods. Civ.Code, § 1735.

11. Appeal and error ⚿996, 1010(1)

Findings of trial court supported by substantial evidence and by reasonable inferences therefrom could not be disturbed on appeal.

12. Evidence ⚿508

Expert testimony may be used to prove a fact.

13. Evidence ⚿54

Where attending physician testified that plaintiffs had trichinosis and the court found as a fact that they did, court's finding was a finding that physician's testimony was true and was not an inference that the trial court drew from symptoms recited by physician. Code Civ.Proc. § 1958.

14. Evidence ⚿54

The mere fact that a fact found is based upon circumstantial evidence and is used as a partial basis for another found fact, does not of itself violate the reasoning processes permitted by law. Code Civ. Proc. § 1958.

15. Evidence ⚿54

An inference cannot be based on an inference that is too remote or conjectural, but in a civil case where the first inference is a reasonably probable one, it may be used as a basis for a succeeding inference. Code Civ.Proc. § 1958.

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Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Luigi Vaccarezza and Yolanda Vaccarezza for injuries to their two minor children and to the wife allegedly caused by eating infected salami and coppe sold to plaintiffs by Peter Sanguinetti and Raphael J. Sanguinetti, individually and as copartners doing business under the firm name and style of G. B. Celli Company, and manufactured by Enrico Parducci, Giovanni Matteucci, Pietro Domenici, Louis Devincenzi, Francesco Ceccarelli and John Devincenzi, individually and as copartners doing business under the firm name and style of San Fransisco Sausage Factory, wherein the defendant sellers filed a cross-complaint against the defendant manufacturers. From a judgment for plaintiffs and cross-complainants against defendant manufacturers, the defendant sellers and the defendant manufacturers separately appeal.

Judgment affirmed.

Anderlini & Molinari and John B. Molinari, all of San Francisco, for appellants Parducci et al.

J. A. Pardini and Elda Granelli, all of San Francisco, for appellants Peter and Raphael J. Sanguinetti.

Hilary H. Crawford and H. W. Glensor, both of San Francisco, and J. LeRoy Johnson and Renaldo J. Jeffry, both of Stockton, for respondents.

PETERS, Presiding Justice.

The two Sanguinetti defendants, under the name G. B. Celli Company, a copartnership, are retailers of foodstuff, including salami and coppe, in San Francisco. Defendant Parducci, together with five other persons named as defendants, under the name San Francisco Sausage Factory, a copartnership, are wholesalers and manufacturers of sausage, including salami and coppe, in San Francisco. The action was instituted by plaintiffs, husband and wife, to recover damages for injuries to their two minor children and to the wife alleged to have been caused by becoming ill with trichinosis from eating infected salami and coppe sold to them by the G. B. Celli Company and manufactured by the San Francisco Sausage Factory. The trial court found in favor of plaintiffs and entered judgment against both sets of defendants, and, on the cross-complaint of the retailer, entered judgment for them against the manufacturer for any amount the plaintiffs might collect from the retailer. From this judgment both sets of defendants separately appeal, their main contention being that the basic findings are unsupported by any substantial evidence.

[1] The action is not based upon the negligence of defendants but upon breach of the implied warranty of fitness for the purpose for which purchased. Section 1735 of the Civil Code. The section imposes an absolute liability regardless of negligence. Gindraux v. Maurice Mercantile Co., 4 Cal.2d 206, 47 P.2d 708; Jensen v. Berris, 31 Cal.App.2d 537, 88 P.2d 220. The warranty applies to the sale of foodstuffs for human consumption, and runs with the goods to the ultimate consumer, there being no requirement of privity between the ultimate consumer and the manufacturer. Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799; Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833.

The following facts are admitted or not challenged: The wholesaler manufactures large quantities of salami, a product made from uncooked pork, beef, spices and salt. It labels this product "Columbo Brand," and no other wholesaler uses that trade name. In October, 1938, the critical time here involved, it also manufactured coppe, a product made from uncooked pork, spices and salt. This product had no trade brand or mark. Both products are intended to be eaten raw. One of its customers is the G. B. Celli Company, the defendant retailer. The G. B. Celli Company purchased from defendant manufacturer forty-five pounds of Columbo Brand salami on October 17, 1938, and the next day purchased four or five pounds of coppe.

It is also admitted that a salesman of defendant retailer, Tirio by name, solicited a grocery order on behalf of his employer from plaintiffs about the middle of October, 1938. Included within the order were four sticks of salami and two sticks of coppe. The plaintiffs specified that they desired first-class merchandise. The salesman, in filling out the order blank, specified that the salami should be "Columbo Brand," and designated the coppe as "San Francisco coppe." It is admitted that the retailer shipped, and plaintiffs received, the grocery order including four sticks of salami and two sticks of coppe sometime toward the end of October, 1938. It is not denied that two and one-half sticks of this salami and one-half stick of this coppe were consumed by plaintiffs, their children and by two hired men between October 31st and the middle of November. Admittedly, the two children became ill about the middle of November, 1938, and required medical and hospital care. The plaintiff wife became ill towards the end of November and required medical and hospital care.

The trial court found that the salami and coppe eaten by Mrs. Vaccarezza and her two children were purchased from defendant retailer and were manufactured by defendant wholesaler; that that salami and coppe were infected with the larvae of trichinella; that Mrs. Vaccarezza and her two children contracted trichinosis; that the illness resulted from eating the infested salami and coppe purchased from defendant retailer and manufactured by defendant wholesaler. Defendants contend that all of these basic findings are unsupported by any substantial evidence.

[2-5] Both sets of defendants seem to be laboring under a mistaken idea of the rules of law applicable to this appeal. It was incumbent upon plaintiffs to show by a preponderance of the evidence that the salami and coppe were purchased from defendant retailer and manufactured by defendant wholesaler; that such products were infected; that as a result of eating such infected meat trichinosis resulted. Generally speaking, the credibility of the witnesses, and the weight to be given their testimony, rests with the trial court. While the trial court is not permitted to base its findings on surmise, conjecture or guess, it has the power to pass on the weight of the evidence. On the question of the sufficiency of the evidence "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184; see, also, Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462.

[6, 7] This rule is not changed by the fact that some of the findings are based upon circumstantial evidence. Defendants seem to urge that before findings may be properly based on circumstantial evidence it is incumbent upon the plaintiffs to exclude the possibility of every other reasonable inference from the proved facts. That is not the law. Although there is language in Estate of Wallace, 64 Cal.App. 107, at page 113, 220 P. 682, that supports defendants' contention, it should be noted that in denying a hearing in that case the Supreme Court at p. 116 expressly withheld approval of that language and cited several cases establishing the correct rule. The true rule is stated as follows in Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, at page 617, 98 P.2d 239, 246, as follows: "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom, because it is now settled law that 'circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury.' Chalmers v. Hawkins, 78 Cal.App. 733, 739, 248 P. 727, 730; opinion of Supreme Court denying a hearing in Estate of Wallace, 64 Cal.App. 107, 116, 220 P. 682, 685; Tietke v. Forrest, 64 Cal.App. 364, 221 P. 681; Mah See v. North American Acc. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Ley v. Bishopp, 88 Cal.App. 313, 263 P. 369; Barham v. Widing, 210 Cal. 206, 214, 215, 291 P. 173. In the last-cited case, where the judgment was based upon an inference drawn from circumstantial evidence, although the inference was opposed to the direct testimony of the defendant and another witness, the Supreme Court upheld the judgment, declaring at page 215 of 210 Cal., at page 177 of 291 P.: 'The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive testimony of the defendant and his nurse to the contrary.' In Mah See v. North American Acc. Co., supra * * *, the court declared the rule to be that 'even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of the two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury * * * the verdict of the jury * * * cannot be set aside by this court on the ground that it is not sustained by the evidence'."

[8] Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933, and similar cases cited by defendants, do not establish a different rule. Those cases simply hold that inferences may not be predicated upon mere conjecture, a correct rule of evidence, and that inferences based upon facts disproved by common knowledge are unsupported by the evidence. The plaintiff relying on circumstantial evidence does not have to preclude the possibility of all other possible inferences. He simply has to establish the reasonableness of his inference by a preponderance of the evidence.

[9] If these rules be applied to the record here presented it is obvious that all material facts found by the trial court find ample support in the record. The first ba-

sic finding attacked is the one that the salami and coppe involved were purchased from the defendant retailer and manufactured by the defendant wholesaler. This finding is attacked by the wholesaler who contends that there is no evidence that the salami and coppe in question were manufactured by it. Admittedly the plaintiffs purchased four sticks of salami and two sticks of coppe from the defendant retailer in October, 1938. This was the only pork product purchased by them for several months prior to that time. The order blank admittedly specified "Columbo Brand salami," and "San Francisco coppe." Columbo Brand salami was manufactured by defendant wholesaler. Peter Sanguinetti, one of the members of the G. B. Celli Company, testified that in October, 1938, his firm carried in stock only the salami manufactured by defendant wholesaler; that although other brands of salami were purchased for customers, this was only done on specific order; and that his firm always furnished the brand called for by the purchaser's order. While this witness was ill in October, 1938, and not then present at his store, he knew the practices of his firm and was entitled to describe them. John Berberi, the shipping clerk for defendant retailer in October, 1938, and the man who filled and shipped the order to plaintiffs, testified that he recalled filling this order with Columbo Brand salami; that while his firm carried other brands of salami and other firms' coppe, they always kept each firm's product in a separate place in the shipping room; that the words "San Francisco coppe" were used by his company's salesmen to designate the coppe of the defendant wholesaler. The plaintiff wife testified that the salami when received by her had the paper marker indicating it was Columbo Brand. From this evidence it is too obvious to require further comment that the finding that the salami and coppe in question were sold to plaintiffs by defendant retailer and manufactured by defendant wholesaler, if not compelled by the evidence, at least finds ample support therein.

[10] The next basic findings attacked are those to the effect that the salami and coppe in question were infested with the larvae of trichinella, that plaintiff wife and her two children contracted trichinosis; and that such disease resulted from eating the salami and coppe in question. These three findings may well be considered together. The evidence is perfectly clear that the usual source of the disease in question is uncooked or improperly cooked pork or bear meat. Other meats and poultry may become infected by coming into contact with infected pork or bear meat, but this is not usual, and, moreover, the normal cooking of these other meats or poultry would kill the larvae. Plaintiff wife testified that she and her family ate no other pork, cooked or uncooked, during the months of October and November, 1938, and for some time prior thereto, than the salami and coppe here involved. The family had had no bear meat at all. It is obviously a reasonable, if not inevitable, inference that if plaintiff wife and her two children were suffering from trichinosis such disease must have been contracted from eating infested salami or coppe purchased from defendant retailer and manufactured by defendant wholesaler. No other inference is reasonably deducible from the record.

A strong attack by all defendants is made upon the finding that plaintiff wife and her two children were actually suffering from trichinosis. The evidence shows that the two boys became ill in November, 1938; that the first country doctor called in diagnosed their condition as influenza, which was then in epidemic stage in the area; that the boys continued ill and the mother called in Dr. John Rosasco, who was then practicing in Stockton. This doctor, prior to this time, had participated in caring for ten to fifteen patients suffering from trichinosis. He had the two boys immediately sent to the hospital. He took blood counts and tests of both boys. He found the white count of both boys materially over 20,000, the normal count being around 11,000, which demonstrated to him that both boys had a virulent infection. The eosinophiles in the blood were of such a percentage, which he gave, as to indicate trichinosis. The blood picture as a whole demonstrated that the boys had some intestinal parasite. In addition, both boys had pain upon the movement of certain muscles; both had the classical symptom of pain upon motion of the eyes; both had fluctuating and high temperatures; both had characteristic puffiness around the eyes; both had edema of both extremities. He diagnosed their illness as trichinosis and testified that he never had any doubt at all that this was what the two boys had. They were in the hospital from November 23rd to November 30th, and were kept in bed for some time thereafter.

Plaintiff wife testified that she became ill while the boys were still in the hospital but did not then complain. She was ordered to bed by Dr. Rosasco the last of November, was sent to the hospital by him on December 6th, and was discharged December 21st. She described her symptoms in detail and they, according to Dr. Rosasco, were the classical symptoms of trichinosis. The doctor diagnosed her case as trichinosis. To check his diagnosis he gave her a skin test by injecting trichinella antigen, which he testified was a recognized laboratory procedure to test for trichinosis. The test reacted definitely and positively in less than a minute, which clearly indicated to him that she had trichinosis. Stool tests, although they did not show any trichinella, did demonstrate she had no other intestinal parasite. Blood tests indicated the presence of trichinosis. He also performed a biopsy by removing a half grain of muscle tissue from the calf of her leg. A larger amount was not removed because of the discomfort of the patient. No trichinella were found in the tissue, the doctor testifying that the amount of tissue removed was not large enough to make a positive test. However, he testified that laboratory examination of the removed muscular tissue showed that the fibres were swollen, edematous and infiltrated with eosinophiles, and showed cellular infiltrations of a nature which were entirely compatible with the presence of trichinosis. He testified that he knew of no other illness than trichinosis that would have caused all of the symptoms possessed by these three patients, and that no other parasite could have produced the clinical picture possessed by them.

Dr. Alden H. Alexander, a doctor who had treated or observed thirteen cases of trichinosis, described the symptoms of the illness, all of which were possessed by these three parties. In response to a hypothetical question embodying the material facts testified to by Dr. Rosasco he gave it as his opinion that the wife and children had trichinosis. Although he was of the opinion that a skin test might not be too reliable, he placed considerable reliance upon the eosinophile count, testifying that no other parasite gives the same high eosinophile count as does trichinosis.

It is true that various competent doctors and experts were called by defendants, and that they contradicted these two doctors produced by plaintiffs. They testified that combinations of illnesses might produce the same symptoms here present. There was evidence, however, that such combinations might have other symptoms not here present. They disparaged the skin test and the eosinophile count and described other tests that should have been given. They testified that the tests performed and the symptoms possessed did not positively prove the existence of trichinosis.

Defendants also place considerable reliance on the facts that but two and one-half sticks of salami and one-half stick of coppe were consumed and that laboratory tests of the remaining stick and one-half of salami and the remaining coppe failed to show that those portions were infested. This factor is not conclusive. Salami and coppe were manufactured by the defendant wholesaler in large quantities and parts of many hogs purchased from different sources went into each batch. The larvae in the pork remains dormant. It is perfectly obvious that in any batch of salami or coppe that but one stick, or only a portion of one stick, might be infested while the remainder of the batch might be entirely free from infestation. The fact that the remainder of the salami and the coppe were free of the larvae, while of some evidentiary weight, was not conclusive. It was a factor to be weighed and which was weighed by the trial court.

Great emphasis is also placed upon the fact that plaintiff husband and two hired men also consumed some of the salami and coppe and did not become ill. This is explainable on the theory that the portions consumed by them may not have been infested. The doctors also testified that many people eat infested meat but never develop a disabling illness because the parasites are eliminated before they start to breed in the digestive tract. They pointed out that post mortem examinations indicate that about 17% of the population has consumed infested meat, but that only a very small proportion of that percentage ever develop a disabling illness. One of the doctors was of the opinion that the husband and hired men might not have contracted the disease even if they ate some infested meat because they consumed wine with their meals which aids the digestive processes, thus inducing the elimination of the parasites.

As already indicated, all the witnesses agreed that pork and bear meat are the usual hosts of the parasites. Other meats, or poultry, can be infected by coming into contact with infested pork or bear meat. Poultry and meats other than pork are not eaten raw, however, and cooking normally will kill the parasites. Plaintiff wife testified that she had served no bear meat during all relevant periods, and that the only pork, cooked or uncooked, served at her table during the summer and through November of 1938 was the salami and coppe purchased from defendant retailer. Obviously, it is a reasonable inference, under such circumstances, that the pork purchased from defendant retailer and manufactured by defendant wholesaler was the source of the infection.

[11] Defendant wholesaler testified at length concerning its method of manufacturing salami and coppe, produced health regulations governing the manufacture of these products, produced the health director and his inspectors, and testified that the regulations were strictly followed. All admit that if the regulations were followed, all trichinella would be killed in the manufacturing process. This evidence is undoubtedly of considerable persuasive force. But as opposed to it are the facts found by the trial court, and supported by substantial evidence, that plaintiff wife and her two children became ill with trichinosis shortly after eating the pork in question; that they had eaten no other pork for a considerable period prior thereto; and that the main source of the infection is diseased pork. It was for the trial court to weigh the evidence. Its findings, being supported by substantial evidence and by reasonable inferences from the evidence, cannot be disturbed. Gindraux v. Maurice Mercantile Co., 4 Cal.2d 206, 47 P.2d 708.

[12, 13] The defendants argue that the diagnosis of Dr. Rosasco and his testimony supporting the diagnosis were not evidence of facts but were merely inferences. It is then pointed out that since it can only be inferred that the disease was caused by eating the coppe or salami, the finding that it was so caused is predicated upon an inference based upon an inference. Other chains in the reasoning processes of the trial court are also attacked as being supported only by inferences based on other inferences. These contentions are without merit. An inference is defined as a deduction which the trier of the fact makes from the facts proved. Code Civ.Proc. § 1958. Expert testimony may, of course, be used to prove a fact. Dr. Rosasco, as an expert, and as attending physician, testified that his patients had trichinosis. The court found as a fact that they did. This finding was, in effect, a finding that Dr. Rosasco's testimony as to that fact was true. It was not an inference that the trial court drew from the symptoms recited. Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933, did not hold, as defendants apparently contend, that a doctor's testimony as to the nature and cause of a disease is not evidence, but simply that a doctor's testimony based upon a premise which was untrue as a matter of common knowledge, was not substantial evidence. No such situation here exists. In the cases cited by defendants from other states either there was no expert evidence at all or the plaintiff testified to facts which, if true, negatived the possibility that he had trichinosis. These situations do not here exist. It is apparent, therefore, that the reasoning process used in this particular by the trial court did not involve predicating an inference on an inference.

[14, 15] It may be true that some of the other facts here found to exist are based on circumstantial evidence and that such facts are used as a basis of proving, by inference, other facts. But the mere fact that a found fact is based upon circumstantial evidence and is used as a partial basis for another found fact does not of itself violate the reasoning processes permitted by our law. See 1 Wigmore on Evidence, p. 434, § 41; 1 Jones on Evidence, Horwitz Ed., p. 39, § 6e. The statement appearing in some cases that an inference cannot be based upon an inference, usually without citation and certainly without adequate discussion, does not and cannot mean that an inference cannot be based upon a fact which is itself based upon circumstantial evidence. If that were the rule it would mean that few cases based on circumstantial evidence could ever be tried because it is seldom indeed that but one fact, in such a case, is based on circumstantial evidence. If that were the rule the hundreds of decisions in our books affirming judgments where the findings contain a series of facts each proved by circumstantial evidence would necessarily be wrong. Nearly all departments of reasoning are based upon deducing one fact from another fact that has itself been deduced from a prior fact. The only fallacy that may occur in such reasoning is where a deduced fact is based upon circumstantial evidence that

is unreliable, is too remote or is too conjectural. The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural. In a civil case, if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference. This is the only conceivable basis upon which the otherwise apparently conflicting cases can be reconciled.

The expression that an inference cannot be based upon an inference has been used to dispose of evidence which the appellate court considered too conjectural and too weak in probative value in such cases as Hamilton v. Pacific Elec. R. Co., 12 Cal.2d 598, 86 P.2d 829; Tucker v. City of San Francisco, 111 Cal.App. 720, 296 P. 101; Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466; Jenkins v. National Paint & Varnish Co., 17 Cal.App.2d 161, 61 P.2d 780; People v. Kazatsky, 18 Cal.App.2d 105, 63 P.2d 299; see, also, Stewart v. Norsigian, 64 Cal.App.2d 540, 149 P.2d 46, 150 P.2d 554.

The cases where the point has been adequately discussed all recognize that facts from which with other facts another fact is deduced may be proved by circumstantial evidence. In Paiva v. California Door Company, 75 Cal.App. 323, 330, 242 P. 887, 890, it is stated: "Respondent contends that the foregoing reasoning is faulty, in that 'an inference cannot be based on another inference.' The second inference is not based upon the first inference alone, but upon the inferred fact that the stump was burning, and the further fact, proved by direct evidence, that a strong wind was blowing from the stump towards the origin of the fire. The statement that an inference cannot be based upon another inference appears itself to be based upon an unsubstantial foundation. 'An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.' Code Civ.Proc., § 1958. 'An inference must be founded on a fact legally proved.' Code Civ.Proc., § 1960. Facts established by circumstantial evidence are 'proved' and 'legally proved,' and the foregoing sections do not provide that the facts upon which an inference may be founded must be proved by direct evidence. To hold that an inference cannot be based upon facts inferred from testimonial evidence would be to confine circumstantial evidence within narrow limits. In Wigmore on Evidence, § 41, it is said: 'It was once suggested that an "inference upon an inference" will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence; and this suggestion has been repeated by a few courts, and sometimes actually enforced. There is no such rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. * * * In * * * innumerable daily instances we build up inference upon inference, and yet no court ever thought of forbidding it. * * * The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon.' "

The problem is also discussed in West Coast L. Ins. Co. v. Crawford, 58 Cal.App.2d 771, 138 P.2d 384, where the court, after discussing the circumstantial evidence there involved, and after stating that appellant contended that the chain of reasoning to support the judgment was based on inferences based on inferences, stated (58 Cal.App.2d at page 779, 138 P.2d at page 389): "We have reached the conclusion that there is no such rule in this state save where the second inference does not follow logically from the fact established by the first inference."

The court discussed the problem as follows (58 Cal.App.2d at page 779, 138 P.2d at page 389): "An interpretation of the rule that would result in its forbidding the use of exhibit 7 in a chain of reasoning, would make it conflict with the rule of daily experience. Let us suppose a man is found dead, with a cut in his heart an inch wide. At his side is a bloody knife with a blade an inch wide, and a blood stained handle bearing fingerprints. An acquaintance of the slain man is found to have fingerprints matching those on the handle. This acquaintance was reported to have said a week before the incident: 'I warned him not to cross my path again.' A group of ordinary citizens would conclude, in the absence of any satisfactory explanation, that the man had been deliberately slain by his acquaintance, arriving at this conclusion by adding inference to inference to inference. Would a group of judges be compelled to resolve that the evidence was legally insufficient to enable them to affirm a conviction of murder in the first degree? Of course not. See People v. Reed, 1941, 17 Cal.2d 405, 110 P.2d 394, and People v. Walsh, 1942, 50 Cal.App. 2d 164, 122 P.2d 671. The explanation may be made that the rule does not ban a course of reasoning which adds inference to inference, so long as any inference is not based upon a prior inference. What then of our supposititious case, and of People v. McQuate, 1934, 2 Cal.2d 227, 39 P.2d 408 and People v. Greig, 1939, 14 Cal.2d 548, 95 P.2d 936, where the facts of intent were inferred from facts established by inferences? Section 1832, Code of Civil Procedure, illustrates its definition of indirect evidence with this statement: 'For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.' In the McQuate case a fact that was proved by direct evidence was defendant's statement that he had attempted to dig a grave two days before the killing took place. From the defendant's making of this statement it was inferred that he did his work on the grave on Wednesday. From the fact thus legally proved, it was inferred that on Wednesday he had an intent to kill his victim. Still a further inference is involved (is it not?) that on Friday, when the killing took place, it was deliberate, because the intent of Wednesday still persisted."

The Court (58 Cal.App.2d at page 780, 138 P.2d at page 390) then refers to the case of People v. Graves, 1934, 137 Cal. App. 1, 29 P.2d 807, 813, 30 P.2d 508, where the conviction of the defendant on a charge of bribery was upheld, although the evidence was entirely circumstantial, and quotes from that case as follows: " 'Courts have sometimes used the expression that an inference cannot be based upon an inference and appellant has sought to apply this principle as a reason for rejecting the evidence under consideration. In the first place, the expression itself is far from an accurate one. Just as the language we speak is said to be made up of dead metaphors, so our ordinary statements as to facts are really made up of dead inferences. These inferences are so intimately associated with known or obvious facts that we habitually accept them as facts. Wigmore, at section 41, volume 1, of his treatise on Evidence, says flatly, "There is no such rule, nor can be." But using the term as loosely as you please, how does it apply to the situation here? The fact is the large amount of currency was withdrawn from the bank. We know by inference from other facts that on the same day appellant had a large sum of currency in hand. We know from other facts and inferences all of the other circumstances. It is from the reasonable relation of all of these separate relevant facts each to the other that an inference of the greater fact, to wit, the corrupt agreement and its consummation, is drawn.' "

The Court then quotes at length from the Paiva case, referred to above, and continues as follows (58 Cal.App.2d at page 782, 138 P.2d at page 391): "Hearings in the Graves case and in the Paiva case were denied by the Supreme Court, and in no subsequent case has an expression of doubt about the soundness of the conclusion there reached been voiced. We do have, however, some cases in this state where the rule there criticized is apparently used as the yardstick by which a chain of reasoning is measured and found wanting. We do not consider ourselves bound by the reference to the 'rule' in these cases, however, because in none of them was there a sound chain of reasoning. For example, in the only Supreme Court case which mentions the rule, Hamilton v. Pacific Elec. R. Co., 1939, 12 Cal.2d 598, 601, 86 P.2d 829, 830, it appears in this setting: 'Indeed, considering the fact that at 8:30 o'clock p.m., many persons were making use of the waiting room, it is not improbable that during the time that plaintiff was an occupant thereof, several persons either did enter or leave it,—in which event it would have been possible that at any given moment of such time any one of them might have caused the oil to be deposited upon the floor of the waiting room. However, in order to arrive at the indicated conclusion it would be necessary that one inference be made to depend upon a precedent inference; and, as has been repeatedly ruled, such a course of reasoning is not permitted in the law.' No case was cited in support of this declaration, but these might have been, where reasoning as tenuous as that just noted was condemned. Tucker v. City of San Francisco, 1931, 111 Cal.App. 720, 726, 296 P. 101; Jenkins v. National Paint & Varnish Co., 1936, 17 Cal.App.2d 161, 169, 61 P.2d 780; People v. Kazatsky, 1936, 18 Cal.App.2d 105, 110, 63 P.2d 299. See, also, Robbiano v. Bovet, 1933, 218 Cal. 589, 597, 599, 24 P.2d 466. We are of the opinion that in this state this quotation from 31 C.J.S., Evidence, § 116, p. 728, aptly describes the status of the rule we have been discussing: '* * * it has been broadly asserted in many decisions that inferences cannot be founded on inferences. This rule has been said to be not a rule of general application but a rule of reason governing only when the proved facts and their reasonable implications furnish no basis for agreement or disagreement by persons of average intelligence as to whether the factum probandum has been established; but there is in fact no rule of law that forbids the resting of one inference on facts whose determination is the result of other inferences. On the contrary, inferences may be based on facts whose determination is the result of other inferences, so long as the first inference is based on such evidence as to be regarded as a proved fact and the conclusion reached is not too remote.' "

In the present case each fact found by the trial court, although many of them are based on circumstantial evidence, is a reasonable and probable deduction from the evidence. The deductions or inferences are not too remote or too conjectural. They are not based on guesswork, but on reasonable probabilities. This being so, the findings cannot be disturbed by this court under the rules of law discussed in the first part of this opinion.

The judgment appealed from is affirmed.

WARD and SCHOTTKY, Justice pro tem., concur.

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71 Cal.App.2d 676

STEVENS et al. v. HUTTON et al.

Civ. 14645.

District Court of Appeal, Second District, Division 3, California.

Nov. 15, 1945.

As Corrected Dec. 11, 1945.

Hearing Denied Jan. 10, 1946.

1. Trusts 🔑283(2)

Trustees in purchasing from their beneficiaries have burden of proving that the price paid was adequate, that they dealt openly and fairly, that they were not guilty of any abuse of confidence or of any misrepresentation and that they made a full and complete disclosure of all facts which they knew or had reason to believe would influence beneficiaries in their decision whether they would make sale. Civ.Code, §§ 2228 to 2235.

2. Principal and agent 🔑78(6)

In action against agent to recover profits alleged to have been made in breach of duty, evidence sustained finding for agent with reference to stock transaction that he was not guilty of concealment of any material matter and did not advise principal to sell. Civ.Code, §§ 2228 to 2235.

3. Principal and agent 🔑78(6)

Evidence failed to establish that agent knew or should have known that apartment property which he purchased from principal would be rendered more saleable if improvements should be made and that he knew or should have known and disclosed to principal possibility of obtaining a higher price at a future time and did not authorize recovery from agent of profits resulting from a fortuitous sale subsequently made.

4. Principal and agent 🔑69(3)

The failure of principal to receive independent advice concerning a sale of property to agent does not necessarily void sale and is merely one of the facts to be weighed in determining whether agent performed his full duty; the primary consideration being whether consent was given competently, voluntarily and with a clear understanding of the material facts.

5. Appeal and error 🔑842(1)

In transaction between principal and agent, where principal is found to have been competent, conclusion of court that receipt of independent advice was or was not indispensable under the circumstances is one of fact.

6. Principal and agent 🔑69(3)

With respect to a transaction between principal and agent, the requirements for disclosure and independent advice are subject to limitation that if principal manifests that he knows all material facts, or is willing to deal without knowing them, agent is not liable if he fails to reveal them, and accordingly there is no duty on agent to insist or suggest that principal obtain independent information on the subject.

7. Principal and agent 🔑69(3)

Where evidence disclosed that principals were competent, had no desire to keep any of their real estate for a possible appreciation in value, were interested only in disposing of it at what would be at the time a fair value and were not interested in receiving advice as to prospects for better prices in the future, and agent in purchasing realty from principals dealt fairly with them, there could be no recovery from agent for profits he thereafter realized in further dealings with such realty.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Winona B. Stevens and Norman F. Stevens against Major E. Hutton, Jr., and others to recover from named defendant, who was plaintiffs' agent, gains and profits alleged to have been made by him in the course of disloyal conduct and breach of duty. Judgment for defendants and plaintiffs appeal.

Affirmed.

Forrest A. Betts and William J. Currer, Jr., both of Los Angeles, for appellants.

Tapper & Tapper, of Los Angeles, and Swaffield, Swaffield & Madden, of Long Beach, for respondents.

SHINN, Justice.

Plaintiffs and appellants brought their action to recover from defendant Hutton, who was their agent, gains and profits alleged to have been made by him in the course of disloyal conduct and breach of duty. The trial resulted in findings in favor of said defendant upon the material issues, and judgment in his favor. Upon the findings, judgment necessarily went in favor of others who were sued for alleged participation in the same transactions.

Plaintiffs are husband and wife. In May of 1933, being the owners of extensive properties, including numerous parcels of real estate which they operated under the name of "Bassett Estate," by memorandum in writing they engaged defendant Hutton, a real estate broker, to dispose of 11 parcels of realty, and gave him an exclusive agency to sell or exchange the same within a period of six months for prices and on terms which might be acceptable to them. Hutton, herein referred to as defendant, was to receive no compensation for his services other than commissions at Realty Board rates on deals which he consummated. Plaintiffs had had in their employ as manager a competent and eminent certified public accountant, but in July of 1933, at the suggestion of defendant, they decided to open an office in one of their buildings in Pasadena, to employ a bookkeeper to assist in the management of the several properties, and to dispense with the services of their former manager. Through advertising they met and employed defendant Jones as office manager. Defendant Hutton gave up his employment with a realty company in December, 1934, and thereafter devoted his full time to plaintiffs' properties. In April, 1935, no sales having been made, the parties entered into a new agreement, which was prepared by Mr. Stevens after consultation with his attorney, and this agreement included proposed leasing of the properties, as the first one had not. It also made provision for 10 percent commission under certain circumstances, instead of the Realty Board commission. The agreement recognized that defendant had performed services "in the management of the properties," stated that this had been done to keep them in good order, and that he expected no remuneration in addition to commissions which he might earn. There was nothing in either agreement which obligated defendant to render any services other than those pertaining to the finding of purchasers or lessees of the real estate.

[1] The complaint stated three causes of action, the first for an accounting, alleging on information and belief that defendant had wilfully and fraudulently appropriated considerable sums of money which belonged to plaintiffs and had caused false books and accounts to be kept to conceal such misappropriations. The third cause of action alleged the receipt by defendant of a secret profit of $4,000 upon the sale of one of plaintiffs' properties. As to the first cause of action an accounting was had with the assistance of an auditor appointed by the court, and it was found upon the accounting that nothing was due to plaintiffs. The third cause of action was dismissed by plaintiffs at the commencement of the trial. The second cause of action alleged that in February, 1938, defendant purchased from Mrs. Stevens for the sum of $6,250 all the capital stock of the Hillhurst-Finley Corporation, which represented ownership of two apartment houses in Los Angeles, known as the Hillhurst-Finley Apartments. It was alleged that defendant concealed from plaintiffs the fact that he was the purchaser of the property and advised plaintiffs that it would be to

their best interests to sell the stock, and that they transferred the stock to a third person in reliance upon the advice of defendant and without knowledge that he was the real purchaser. There was no allegation as to what the property was worth, nor was it alleged that it was not to the best interests of plaintiffs to sell it for the price which they received. Plaintiffs' theory of the case at the time the second amended complaint was filed evidently was that defendant, having concealed the fact that he was purchasing the property for himself, acquired it subject to a constructive trust and was due to account to plaintiffs for the same and for any profits made in the operation or sale of the property or any part of it. No attempt was made by plaintiffs to rescind the transaction. Four years after the sale was made they brought this action. There was a general allegation that defendant, through concealing the true value of various properties, had been able to obtain them for himself at a fraction of their true value, but there was no allegation that he obtained any advantage in the purchase of the Hillhurst-Finley stock. Nevertheless, the action was tried, and it is argued on appeal, as if the mere purchase of the stock by defendant placed upon him the burden of proving that the price paid was adequate, that he had dealt openly and fairly with plaintiffs, had not been guilty of any abuse of confidence or of any misrepresentation, and that he had made a full and complete disclosure of all facts which he knew or had reason to believe would influence plaintiffs in their decision whether they would sell the property. These, generally, are the duties of trustees in transactions with their beneficiaries, under principles stated in sections 2228 to 2235 of the Civil Code.

[2] The court found that defendant paid full value for the property, that he disclosed to Mrs. Stevens the fact that he was the purchaser, and was taking title in the name of defendant Lawrence as his agent, and that he "fully and fairly disclosed all material facts concerning the said Corporation, its shares of stock and the properties owned by it, and concerning the affairs of said Corporation * * * and that he (defendant Hutton) did not conceal from her (Mrs. Stevens) any material or other facts known to him concerning the said shares of stock of said Corporation, or the affairs of the said Corporation, or the properties owned by the said Corporation." The court also found that defendant did not advise Mrs. Stevens to sell the property and that he did not conceal or misrepresent its value. These findings find substantial support in the evidence; indeed, it is not contended that they are unsupported.

Plaintiffs alleged in each cause of action of their complaint that "Defendant Hutton undertook and assumed the duty of caring for and protecting in all particulars the financial interests and welfare of the plaintiffs insofar as related to the Bassett Estate and to the properties held in connection therewith." Although the court expressly found this allegation to be untrue, the appeal is argued by plaintiffs as if it had been found to be true. They do not directly challenge the sufficiency of the evidence to justify the finding; they merely assert that defendant was the manager of their business interests, was under a general duty to advise and protect them in all respects as to their real property, and that they relied implicitly upon the advice which he gave them.

Plaintiffs preface their argument as follows: "Where the agent is employed for the purpose of making possible a sale at an advantageous price, which price is gained by reason of improvements made or the care or skill of the agent, the agent must advise the principal fairly and fully as to the possibilities and character of the property, the nature of the improvements which could be made and their probable effect upon the sales price. He is also bound to disclose the possibility of a gain by holding the property and to advise the principal as to any such possible gain in value." Plaintiffs quote from the Restatement, Agency, section 390, Comment a, on the subject of disclosure, as follows: "Hence, the disclosure must include not only the fact that the agent is acting on his own account (see sec. 389), but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal. This includes, in the case of sales to him by the principal, not only the price which can be obtained, but also all facts affecting the desirability of sale, such as the likelihood of a higher price being obtained later, the possibilities of dealing with the property in another way, and all other matters which a disinterested and skillful agent advising the princpal would think reasonably relevant."

In order to give full treatment to plaintiffs' argument, it is necessary to state the facts upon which it is based. In November, 1935, a property owned by Mrs. Stevens at the corner of Colorado and Euclid in Pasadena was leased, through defendant's efforts, to the Thrifty Drug Company for 15 years at a rental of 3 percent of gross receipts, with a minimum of $1,500 per month. In order to make this lease, Mrs. Stevens expended, under defendant's direction and management, some $37,000 in improving the property. Defendant spent two months superintending the alterations, although he handled none of the money. This property was later sold by plaintiffs for $190,000, which was greatly in excess of what it had been considered to be worth before the improvements and the lease were made. Thereafter defendant attended to the remodeling of the adjoining building at an expense of $4,000 and made leases of store rooms therein at substantial monthly rentals. In November, 1936, he negotiated a sale of this property to one MacMurray for a price of $106,000. Early in 1938 he received $15,300 in commissions for the transactions which he had negotiated up to that time. Defendant made somewhat extensive studies of a 5-acre parcel, with a view to its subdivision and development, but the project was deferred in 1938. He also negotiated a sale of a bungalow court for plaintiffs for $6,000.

[3] Plaintiffs insist that defendant knew or should have known that the apartment property which he purchased would be rendered more saleable if improvements should be made, and that he knew or should have known and disclosed to plaintiffs the possibility of obtaining higher price at a future time. In brief, the argument is that if defendant believed it was wise for him to buy, he must have believed that it was unwise for plaintiffs to sell; that he must have believed that the property would advance in value or he would not have bought it, and that he therefore should have urged plaintiffs not to sell it to him. Plaintiffs direct attention to the varied and competent services of defendant, which we have but briefly stated, and they deduce from them an agency which bound defendant to render the same services with respect to the several other properties of plaintiffs, and particularly the properties of Hillhurst-Finley Corporation. This argument ignores the findings as to the limited terms of the agency, and also the patent fact that the apartment property was in nowise comparable to the business property. After defendant bought the property he increased the encumbrance on the Finley Apartments from $11,600 to $17,000 and expended several thousand dollars in improvements. A year and a half after he purchased it he sold the Finley Apartments for a gross price of $27,500, still retaining the encumbered Hillhurst Apartments, which were owned by the corporation. There was evidence that the sale he made was an exceptionally good one, both the broker who made the sale and the purchaser having recently come from a foreign country. The argument that defendant deliberately neglected the apartment property, in order that he might acquire it, is not supported by the evidence. Considerably more was spent on the apartments at defendant's suggestion before its purchase by him than was spent afterwards, and efforts to sell the property had been unavailing. It is not claimed that defendant had or should have had knowledge of any particular facts which indicated that the property would advance in value. The implied finding was that defendant had no knowledge of impending improvement of market conditions or of any facts affecting the value of the property which should have been disclosed to plaintiffs. There was no evidence which would have required the court to find that the fortuitous events which occurred in the 18 months following the purchase were reasonably foreseeable.

[4, 5] A further contention of appellants is that "defendant Hutton was duty bound as a matter of law to procure independent advice for Mrs. Stevens," that she had no independent advice and is therefore not bound by the transaction. It does not appear that Mrs. Stevens received independent advice concerning the sale in question, but the receipt of such advice was not indispensable to a valid sale. In reviewing transactions between trustee and beneficiary, if the proof shows that the latter received no independent advice, the courts invariably give careful consideration to that fact. The importance of it depends upon the circumstances of the transaction, but in any case, if no independent advice was received, it is only one of the facts to be weighed in determining whether the trustee performed

his full duty. Brown v. Canadian Indus. Alcohol Co., 1930, 209 Cal. 596, 289 P. 613; Smith v. Lombard, 1927, 201 Cal. 518, 258 P. 55; In re Estate of Cover, 1922, 188 Cal. 133, 204 P. 583; Johnson v. Studley, 1926, 80 Cal.App. 538, 252 P. 638; Heney v. Heney, 1926, 80 Cal.App. 301, 251 P. 841; Hemenway v. Abbott, 1908, 8 Cal.App. 450, 97 P. 190; Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 3, p. 796 et seq. The primary consideration is whether the consent of the beneficiary was given competently, voluntarily, and with a clear understanding of the material facts which would reasonably have influenced his judgment. Where the beneficiary is found to have been competent, the conclusion of the court that the receipt of independent advice was or was not indispensable under the circumstances is one of fact.

A brief reference to the evidence will demonstrate that the conclusion of the trial court upon this point was fully justified. Mr. and Mrs. Stevens were wealthy people, Mr. Stevens being a mining engineer by profession, with mining interests in Mexico and Canada. Although they had heavy investments in real estate, they were primarily interested in dealing in securities. There was evidence that Mr. Stevens operated in the stock market on a large scale and that he maintained a stock quotation ticker in his residence. They did not neglect their real estate interests, but employed competent managers. Mrs. Stevens had owned the apartment properties for at least five years before she disposed of them to defendant. They had not been profitably operated and she knew this from the monthly statements which she had received. It was the desire of Mr. and Mrs. Stevens to liquidate their real estate holdings. That was the reason for their employment of defendant. In their closing brief their counsel say: "In other words, it is obvious that appellants were anxious to sell; they were anxious to sell all of their properties * * * they were also anxious to make deals. They wanted to liquidate as fast as possible." There was evidence that defendant first proposed to Mrs. Stevens that he purchase the property on Saturday, February 21, 1938, and that an agreement for the transfer of the stock was entered into the following Monday. Mrs. Stevens first asked $7,000 for her stock, but in the discussion the price of $6,250 was agreed upon and Mrs. Stevens replied that she thought she would sell it. The deal was closed through escrow within a week. Defendant then endeavored to induce Mrs. Stevens to pay for certain termite work on the premises and after a discussion she gave him a check for $312.50, which would have been the amount of a broker's commission on a $6,250 sale.

[6, 7] As already noted, the law does not require that one who is fully informed as to the facts should have independent advice concerning them nor that one who is fully competent to form a sound and advised opinion must have assistance in forming it. The requirements for disclosure and advice are subject to the limitation "that if the principal manifests that he knows all material facts or is willing to deal without knowing them, the agent is not liable if he fails to reveal them." Restatement, Agency, sec. 390, Comment b. Manifestly, if there is no duty upon the part of the agent to further inform his principal, there is no duty to insist or to suggest that the principal obtain independent information on the subject. There is abundant evidence in the record which tends strongly to prove that Mr. and Mrs. Stevens had no desire to keep any of their real estate for a possible appreciation in value, that they were interested only in disposing of it at what would be at the time fair values, and that they were not interested in receiving advice as to the prospects for better prices in the future. Defendant was dealing with intelligent, well-informed people who had definite opinions as to what they wished to do with their property and who evidently believed they could do better in securities than in real estate. The findings to the effect that defendant dealt honestly with plaintiffs as their agent are sustained by the evidence, and the findings support the conclusions of law and judgment.

It is unnecessary to consider respondent's further contention that plaintiffs had to rescind the transaction before they could escape from it.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

71 Cal.App.2d 703

PEOPLE v. BRENNAN et al.

Cr. 3920.

District Court of Appeal, Second District, Division 3, California.

Nov. 19, 1945.

1. Robbery ⚿26

Question of identification of defendant charged with robbery was one of fact for jury under conflicting evidence positively identifying defendants as persons committing robbery and other evidence tending to establish an alibi.

2. Criminal law ⚿1159(2, 4)

Appellate tribunal does not weigh testimony or pass upon credibility of witnesses.

3. Criminal law ⚿1159(6)

If the circumstances shown in evidence reasonably justify the verdict, a reviewing court is not warranted in disturbing it.

4. Robbery ⚿24(3)

Evidence in prosecution for robbery consisting of testimony positively identifying defendants as persons committing robbery was sufficient to justify conviction notwithstanding other evidence tending to establish alibi.

5. Criminal law ⚿351(2)

Circumstances attending arrest of defendants charged with robbery were admissible in subsequent prosecution for offense.

6. Criminal law ⚿351(2)

In prosecution for robbery, admission of testimony by police officer that at time of arrest of defendants together with a companion in an automobile that the companion dropped a revolver on floor of automobile was not error where there had been direct testimony that defendants were the robbers and that one was armed with a gun on the day of the robbery.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Daniel Brennan and another were convicted of robbery in the first degree, and they appeal.

Appeal dismissed.

Martin S. Ryan, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants were accused in an information of the crime of robbery, a felony. Defendant Buras admitted the further charge therein that he had been convicted of two felonies, forgery and possession of narcotics. In a jury trial both defendants were found guilty of robbery in the first degree. Defendants' motion for a new trial was denied.

Defendants contend that the evidence is insufficient to support the verdict, and that the court erred in receiving certain evidence over the objection of defendants.

On Sunday, October 15, 1944, about 4:45 p. m., two men robbed a grocery market, located at 10811 South Main Street, Los Angeles, of the sum of $350. The cashier testified that on that day, while she was checking the groceries of two customers, two men whom she identified as defendants walked into the checking stand behind her and said, "Be calm and open the till"; that she turned around, and saw Buras' face; that she "looked him squarely in the face," and he was then closer than 2 feet from her; that Buras had a gun against her back, and she opened the till; that she saw Brennan step behind one of the customers, and that was the first time the witness saw him; that Brennan walked to the other side of the till and took the money therefrom; that while Brennan was taking the money from the till she was facing him and observed his face at that time; that they told her "to be quiet and nobody would be hurt," and then they walked out of the market; that they were about 10 feet from her as they walked away, and she then saw the side of Buras' face; that they walked out of the store directly away from her, with their backs toward her; that she watched them as they walked away; that she did not see which direction they went after they left the market; that Buras had a small, dark mustache; that she identified Buras by his "peculiar shaped nose," his complexion, height, and color of his hair; that she identified Brennan by his complexion, his "long slim face, long nose"—"long features"; that both men were wearing dark suits, and Buras wore a tie; and that Buras was bareheaded, and she was not positive whether Brennan was wearing a hat.

Another witness, called on behalf of the People, testified that she had resided 18 years in a store building on the same side of the street on which the market is located; that only a vacant lot about 20 feet wide is between the store building and the market; that the front of the store building is "even with the front of" the market; that the store building (her residence) is about 27 feet wide, and glass windows cover the front of the building; that the window frames have a ledge which is "high" enough off the ground for a person to sit on; that all the windows have venetian blinds; that on the day of the robbery the blinds were slanting toward the sidewalk so that one on the inside could see out, but no one on the outside could see in; that about 10 a. m. the witness was on the vacant lot between her residence and the market, and she saw the defendants walking south on the sidewalk which extends in front of the two buildings; that she knew most of the people in the neighborhood and her attention was attracted to defendants because they did not "belong" in the neighborhood; that she was in the vacant lot about 1 p. m. of the same day and again saw the defendants pass by, walking south; that she also saw the defendants about 4:40 p. m.; that at said time she was sitting in her living room, and looked up and saw defendants sitting on the window ledge at the front of her residence, and she got up and walked over and stood directly behind them; that she was not a foot away from them; that she then went to the other window and saw their "whole faces" through the blind when they turned around, and she "looked them over good"; that she looked at a clock on the wall and it was 4:40 p. m.; that she could hear them talking and they said "something" about $35; that they sat there about 5 minutes; that she was standing there studying them; that they "got off the window seat and started north"; that they stopped and struck a match on the corner of her residence, and Buras lighted a cigarette for Brennan, and then they walked on and she saw them "turn as they went in the market"; that she then stood in her front door, and saw defendants "coming back" and when they were opposite her front door they started to run; she then stepped out of the door and stood on the sidewalk, and they ran around the corner of the property, then across the street, and down the alley; that Brennan wore a hat; that both defendants wore dark clothing, but Brennan's suit was a lighter shade than that of Buras; and that the witness immediately ran to the market, and there had a conversation with the cashier.

Another witness, called on behalf of the People, testified that she lived on 109th Place, near the market; that "around 4 or 4:30" on the afternoon of the robbery she saw a green automobile which was parked in the alley near her home; that no one was in it when she first saw it, and the motor was running; that she saw two persons walk by the alley, and then she saw them run in the direction of the automobile, but did not see them get in it; and that they drove away.

A police officer testified that about 11 p. m. on October 23rd (8 days after the robbery), he saw a green 1943 Chevrolet sedan parked on Crocker Street; that no one was in the automobile and he and another officer called the robbery squad, and then "staked out" and watched the automobile about 1½ hours until three men entered it; that he and the other officer then rushed to the automobile, and he told them to throw up their hands; that Buras and Brennan raised their hands; that the third man did not raise his hands immediately, but he dropped something on the floor; that the robbery squad arrived at that time; that the witness found a revolver with four cartridges in it on the floor; that neither defendant had a gun on his person at the time of his arrest; that the key to the automobile was in Brennan's coat pocket; and that Buras said the automobile was his, and that he and Brennan had "changed coats."

Defendant Brennan testified that he had known Buras four or five years; that he (the witness) worked at the Los Angeles Shipbuilding Corporation; that he went to work at 12:30 a. m. on October 15, 1944. and left work at 8 a. m., then went to his home, which was in San Pedro, and went to sleep; that he awakened about 1:30 p. m., and he and his wife then went to a restaurant; that after they ate, they went to the electric railway station and at 2:30 p. m. boarded the train for Los Angeles; that they arrived in Los Angeles at Seventh and San Pedro Streets at 3:50 p. m.; that he knew what time they arrived in Los Angeles, and that is how he determined what time they left San Pedro; that they alighted from the train and went "across the street to a cocktail lounge," known as the Harbor Cafe, where he saw three persons he knew—George Coulter, Howard Hill, Clifford Downard, and the proprietor, a Mr. Schultz; that while he was there he gave Buras' home telephone number to Hill; that after he had consumed four or five bottles of beer, the witness, his wife and Hill left the Harbor Cafe "just right around 5:00" o'clock and went to the Yankee Club which is about one block west of the Harbor Cafe, where he saw two persons he knew—George Small and Nina Day (also known as Nina Todd); that after he had been at the Yankee Club 35 or 40 minutes, and had drunk 2 bottles of beer, he went alone to a drug store at Third and Spring Streets to have a prescription filled; that he went on a streetcar and returned to the Yankee Club at 6:10 p. m.; that Buras had arrived during his absence; that after he returned from the drug store the witness drank two or three small bottles of beer; that Mrs. Day wanted to look for her sister, and about 6:30 the witness, his wife, Buras, Hill and Mrs. Day went in Buras' automobile, a green Chevrolet, to Third and Flower Streets to look for Mrs. Day's sister, and then "just drove around"; that he and his wife had an argument and they took her to the Harbor Cafe about 7:30, and then he, Buras, Hill and Mrs. Day went riding "around"; that they drove out on Central Avenue and purchased a pint of whiskey, and "took a few drinks"; that they went to the Cricket Club at Washington and Vermont to a dance, arriving there about 8:30, and remaining there until midnight; that he was considerably under the influence of liquor when they arrived at the Cricket Club, and while he was there he drank seven or eight bottles of beer; that he remembered where they went after they left the Cricket Club—that Buras drove, and they took Mrs. Todd home, and then they went to Seventh and Maple Streets; that he (the witness) was more or less asleep; that he intended to go home but he had "taken too much to drink" and decided to rent a room, but just as Buras drove away the witness was arrested (in the early morning following the robbery) because he did not have his draft registration card; and that he was taken to the city jail, and released the next day.

Buras testified that he was living with his mother and sister on October 15, 1944, at 4058 South Main Street, Los Angeles; that he went to bed late on Saturday, October 14th, and slept until noon on Sunday, the 15th; that he then "stayed around the house" until Hill telephoned about 4 p. m.; that Hill told him Brennan and Mrs. Brennan were with him, and Buras agreed to meet Hill at the Yankee Cafe at 6 p. m.; that he left home about 5:45; and that he arrived at the Yankee Cafe about 6 p. m., at which time Mrs. Day, Mrs. Brennan, Hill and Small were there. His testimony as to the following events that evening was in substance the same as the other witnesses for the defense. He also testified that he never wore a mustache; that on October 15th he wore a brown suit, red shirt and no tie; that the shirt in evidence as exhibit A is the one he wore on October 15th; that he had access to the green Chevrolet sedan and was in possession of it on October 15, 1944; that at the time of his arrest he was wearing Brennan's coat; that Brennan had the witness' coat on; that they exchanged coats in the Harbor Cafe; and that on July 14, 1942, he was convicted of two felonies—forgery, and possession of narcotics.

Brennan's testimony concerning his whereabouts at the time of the robbery was corroborated by his wife, by the manager, the bartender and two customers of the Harbor Cafe, and by a customer of the Yankee Cafe. Buras' testimony concerning his whereabouts at the time of the robbery was corroborated by his mother and his sister.

The People called a police officer in rebuttal, and he testified that on November 2, 1944, after the preliminary hearing, Brennan said, "I have got this beat, I was in jail on the day these people say I held them up," and that Buras said, "I don't remember where I was on that day."

[1-4] In support of their contention that the evidence was insufficient to support the verdict, appellants argue in effect that the identification of appellants was not sufficient, and that the testimony offered by the defense outweighed that offered by the prosecution. As shown above, two witnesses positively identified appellants as the robbers. Both of them testified they had a full view of the robbers' faces at a time when they were close to and facing them, and one of them testified that she had observed them on three different occasions during the day of the robbery. Al-

though the witnesses were unable to give an exact description of the robbers' clothing, the jury believed that their opportunity for observing the robbers was sufficient to enable them to identify the appellants as the robbers. In denying the motion for a new trial, the trial judge approved the verdict and the necessarily implied finding that the appellants were the persons who committed the robbery. The question of identification was one of fact for the jury. It is not the province of an appellate tribunal to weigh the testimony or pass upon the credibility of witnesses. It is true that appellants produced eight witnesses, six of whom testified that Brennan was in a cocktail cafe at or about the time of the robbery, and two of whom testified that Buras was at his home at the time of the robbery; however, there was a conflict in the evidence and that conflict was resolved against appellants. If the circumstances shown in evidence reasonably justify the verdict, a reviewing court is not warranted in disturbing it. The reason for this rule is stated in the case of People v. Ohman, 67 Cal.App.2d 467, at page 476, 154 P.2d 463, 467, wherein it is said: "The peculiar advantages which juries and trial judges have of determining whether witnesses are entitled to credence, not upon what they testify to, but by their manner of testifying, has given rise to the familiar rule that reviewing courts will not and cannot set aside verdicts of juries or findings of the trial court based upon evidence on which there appears to exist a substantial conflict." The evidence was sufficient to justify the verdict as to each defendant.

[5, 6] Appellants further contend that it was error to receive the following testimony (given by the first police officer above mentioned): "I hollered for them to keep their hands in the air. Buras and Brennan raised their hands and Palmer [their companion] didn't—he came to almost being shot, and he dropped something on the floor. I said, 'Put your hands in the air,' and he put them up, and at that instant the robbery squad drove up there"; and "I found a .38 Iver Johnson revolver with four cartridges in it [on the floor of the automobile]." Appellants argue that it was not charged that they were armed with a deadly weapon at the time of their arrest and that said evidence was introduced for the sole purpose of making it appear more probable, since their companion was armed at the time of their arrest, that appellants committed the robbery. Circumstances attending the arrest were admissible. People v. Williams, 14 Cal.2d 532, 538, 95 P.2d 456. There had been direct testimony that appellants were the robbers, and that Buras was armed with a gun on the day of the robbery. It was not error to receive the above quoted testimony, relating to occurrences at the time appellants were arrested.

The attempted appeal from the verdict is dismissed. The judgment as to each defendant and order denying defendants' motion for a new trial are, and each is, affirmed.

DESMOND, P. J., and SHINN, J., concur.

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71 Cal.App.2d 714

MORVAY v. FONDREN et al.

Civ. 14968.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1945.

Rehearing Denied Dec. 7, 1945.

Hearing Denied Jan. 17, 1946.

Appeal and error ⇨931(1)

Where judge who presided at trial was familiar with prior actions having made findings and rendered judgment therein, appellate court assumed that when such judge found issues presented in the present injunction action had been presented and adjudicated by the former judgment his decision was based on sufficient evidence and therefore his judgment in injunction action that plaintiff take nothing by his action was affirmed.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Zoltan Morvay, also known as Sam Morvay, against Carl P. Groves and others to enjoin defendants from using a registered trade-name "Granitize" and from selling any products manufactured thereunder on the ground of unfair competition and seeking an accounting for articles so sold wherein named defendant filed cross-complaint for damages. From an adverse judgment, plaintiff appeals.

Affirmed.

Bertram S. Harris and Samuel A. Rosenthal, both of Los Angeles, for appellant.

William R. Law and Gerald A. Coxe, both of Los Angeles, for respondents.

YORK, Presiding Justice.

The facts which form the background of the instant litigation are briefly as follows:

On or about May 1, 1939, respondent Groves and his brother received from the U. S. Patent office a trade mark authorizing them to use for a period of twenty years the name "Granitize". On May 24, 1940 the said Groves brothers, as owners of the trade mark and of a secret formula for the manufacture of an automobile polish, entered into a written contract with plaintiff by the terms of which the latter claims he was given the right to be the exclusive distributor of Granitize in the United States for a term of ten years. In an action thereafter instituted in the Superior Court of Los Angeles County (462-547) by the plaintiff, he recovered judgment against the Groves brothers and others for a stated sum of money, as well as an injunction restraining defendants therein from selling Granitize to any person other than said plaintiff. Under an execution issuing out of said action all the right, title and interest of said Groves brothers in the contract of May 24, 1940 was sold to plaintiff Morvay on December 23, 1941, and on August 10, 1942, under an execution sale held by the sheriff of the City and County of San Francisco, all the right, title and interest of said Groves brothers in and to a secret formula for the manufacture of Granitize, an automobile polish, was sold at public sale to said plaintiff Morvay.

Thereafter in a series of litigation, findings and judgment were entered in the consolidated cases numbered 465931, 470430 and 474646 in favor of plaintiff Morvay, to the effect that said Morvay "is entitled to the use of the name 'Granitize' for a period of 20 years and to manufacture the same, through and by virtue of the purchase at a sheriff's execution sale of all of the right, title and interest of Carl P. Groves and Harold L. Groves in and to that said contract dated May 24, 1940 * * * that (Plaintiff) is the owner of the secret formula for the manufacture of 'Granitize' through and by virtue of his purchase at a sheriff's execution sale of said secret formula."

By the instant action, plaintiff seeks to enjoin defendant Carl P. Groves, individually, and Pauline Fondren, C. H. Fondren, doing business as Fondren Dust Cloth and Wiping Rag Company, from using the name Granitize and from selling any products manufactured thereunder upon the ground of unfair competition, and also seeks an accounting from defendants for each and every article sold by them under the name of Granitize. Defendant Groves filed his answer herein alleging a present ownership in the name Granitize, and the right to manufacture, sell and distribute automobile polish under such name, and also set up as a bar to the instant action, the judgment rendered in the consolidated cases heretofore mentioned, which said defendant alleges "involved the same issues as are alleged in the Complaint herein." Said defendant Groves also filed a cross-complaint in which he prayed for $10,000 damages against plaintiff for the latter's interference with the right and ownership of said defendant in the name Granitize.

The trial court herein found: "1. That the defendant Carl P. Groves is the real party in interest in the above entitled matter. 2. That the defendants Pauline Fondren and Crycie H. Fondren are not the real parties in interest but that their interest, if any, arises solely by virtue of transactions with defendant Groves and in privity of contract with him. 3. That the gist of the instant action and the real issue between the plaintiff and the defendant Groves is the respective rights of the plaintiff and said defendant Groves to manufacture and sell automobile polish and compounds and accessories under the trade name 'Granitize'. 4. That such issue was tried and determined between the said parties in Consolidated Actions Nos. 465.931, 470,430 and 474,646, Superior Court of the County of Los Angeles, State of California, on or about the 25th day of September, 1942, and that the judgment in said action was as follows, to-wit:

"'It is ordered, adjudged and decreed:

"'I. That Zolten Morvay * * * have Judgment against the said * * * Carl P. Groves in cause of action No. 470430.

"'II. That Zolten Morvay * * * have judgment against * * * Carl P. Groves in Cause of Action No. 474646.

"'III. That the said Zolten Morvay * * * is entitled to the use of the name "Granitize" for a period of twenty years and to manufacture the same under and by virtue of a purchase at a Sheriff's execution sale of all of the right, title and interest of * * * Carl P. Groves in and to that certain contract dated May 24th, 1940 * * *.

"'IV. That the said Zolten Morvay * * * is the owner of the secret formula for the manufacture of "Granitize" by virtue of his purchase at a Sheriff's Execution Sale of said secret formula.'

* * * * * *

"5. That said judgment fully adjudicated the said issue between the said parties upon its merits and is now final and conclusive between them. That by said judgment the said defendant Groves was not deprived of his right to manufacture and sell said products under said trade name 'Granitize', nor was the plaintiff therein given or granted the exclusive right to manufacture and sell said products under said trade name 'Granitize'.

"6. That on account of said prior judgment the plaintiff is estopped from again raising said issue in the suit at bar and from a second trial upon or retrial of said issue."

From the judgment which followed that plaintiff "take nothing by this action", this appeal is prosecuted.

Appellant includes in his opening brief arguments respecting the rights he claims he acquired under the execution sales. It is apparent that such claims have no bearing upon this appeal. An examination of the record discloses that the question for determination on appeal is whether the judgment rendered in the consolidated actions is a bar to the instant action, and as to this appellant urges that the trial court was under the erroneous impression that the issues here involved and those determined in the former actions were the same, and that there was no evidence before the trial court herein to establish such an inference.

At the trial of the instant cause, the original agreement between appellant and respondent Groves, and as well the findings and judgment in the consolidated cases were introduced in evidence by reference, being plaintiff's exhibit 1 and defendants' exhibit A, respectively. Thereafter appellant called respondent Groves as a witness under section 2055 of the Code of Civil Procedure and interrogated him as follows: "By Mr. Rosenthal: Q. Mr. Groves, are you manufacturing an automobile polish or solution under the name of 'Granitize'?" Whereupon, counsel for respondent Groves objected to the introduction of any evidence concerning "any facts that were either pleaded, proved or covered by the former judgment, on the grounds that the thing is now estopped, and the judgment has become final, and that these facts have been adjudicated." This objection was sustained, and counsel for appellant then made a lengthy offer of proof, to the receipt of which respondent interposed objection "on the ground that a great many of the facts offered to be proved have been tried and adjudicated." The court sustained such objection, stating, "It seems to me they were all adjudicated in the three actions, in the findings I made in the judgment I rendered."

After similar objections were sustained to the introduction of evidence and receipt of offers of proof with respect to two other witnesses called by appellant, the court gave judgment in favor of respondents with the comment: "I believe all of these matters were determined in the earlier action."

Since the judge who presided at said trial was familiar with the consolidated actions, having made the findings and rendered the judgment therein, it must be assumed that, when he found that the issues here presented had been adjudicated by the former judgment, his decision was based upon sufficient evidence.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

71 Cal.App.2d 710

POTTER v. ENTLER et al.

Civ. 3406.

District Court of Appeal, Fourth District, California.

Nov. 20, 1945.

1. Appeal and error ⚷980

Where motion for new trial was on grounds other than the death or disability of reporter, record did not indicate that any inability to obtain reporter's transcript either existed or was called to attention of trial court, and there was no showing that any attempt was made to secure an adequate record through an agreed statement of facts or otherwise, no abuse of discretion was shown in denying new trial. Code Civ.Proc. § 953e.

2. Appeal and error ⚷673(1)

Contention that foreclosure proceeding did not shut off owner's right of redemption, and that the mortgagees' right of redemption was lost because the state acquired title in tax proceedings, was without merit where the record failed to disclose the facts upon which such contention was based. St. 1941, p. 1430, § 4101.

3. Taxation ⚷697(5)

Where mortgagees became owners of mortgaged property through judicial sale, the mortgagees, as successors in interest of original owners, had right to redeem from tax sale until the state had taken steps to terminate right of redemption. St.1941, p. 1430, § 4101.

4. Quieting title ⚷10(5)
Taxation ⚷796(3)

Where mortgagor's right to redeem from tax sale passed to mortgagees by virtue of foreclosure decree, mortgagor had no right or interest which could pass by deed, so as to permit the grantee thereunder to maintain quiet title action against mortgagees and purchasers at foreclosure sale whose right to redeem from tax sale had not terminated. St.1941, p. 1430, § 4101.

5. Quieting title ⚷14

A plaintiff, claiming title from mortgagors whose right to redeem from tax sale had been foreclosed, should not be permitted to quiet his title against a valid mortgage debt without offering to pay the mortgage. St.1941, p. 1430, § 4101.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action to quiet title by M. Potter against Norman M. Entler and Cora M. Entler, husband and wife, and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

L. G. Hayford, of Los Angeles, for appellant.

R. Bruce Findley, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is a quiet title action and the plaintiff has appealed from a judgment in favor of the defendants. The appeal is presented on a clerk's transcript and four original exhibits.

The complaint is in the usual form, alleging that the plaintiff is the owner of certain real property, that the defendants wrongfully claim an interest therein, and that the defendants have abandoned any interest which they may have had in or to the property. The prayer is that the defendants be required to set forth the nature of their claims, that it be adjudged that the plaintiff is the owner of the property, and that the defendants be restrained from asserting any claims in or to the land adverse to the plaintiff. The defendants Entler answered admitting that they claimed an interest in the property, and denying that their claim was without right. The court found that the plaintiff was not the owner of this property and had no interest therein; that the defendants Entler claimed an interest in the property; that said interest is a valid claim; that as against the plaintiff these defendants are the owners of the property and have the right to redeem the same from any sale or sales which might have been previously made for delinquent taxes; and that it is not true that these defendants have abandoned any right, title or interest which they may have had in and to the property. A judgment was entered quieting title in the defendants Entler as against the plaintiff and all persons claiming under or through him.

The plaintiff moved for a new trial pursuant to a notice of intention specifying as grounds therefor, the insufficiency of the evidence, that the judgment is against law, and errors in law occurring at the trial. The motion for new trial was denied on December 7, 1944, and on December 30, 1944, a notice of appeal was filed, together with a notice for the preparation of both a clerk's and a reporter's transcript.

The only record before us, other than the clerk's transcript, is four original exhibits, as follows: 1. A notice of tax sale giving notice that unless sooner redeemed this land will be sold on June 30, 1932, for delinquent taxes for the years 1925 and 1926. 2. Three redemption receipts signed by the county auditor, one for $569.71, dated June 25, 1931, one for $10, dated June 25, 1931, and one for $541.73, dated June 21, 1932. 3. A commissioner's deed dated March 11, 1937, conveying the property to N. M. Entler pursuant to a judgment and decree made by the superior court of San Bernardino County on January 27, 1936, in an action between N. M. Entler as plaintiff, and Leslie D. Stephens et al., as defendants, and reciting that the land was duly sold at public auction on March 9, 1936, for the sum of $35,000. This deed was recorded August 27, 1943. 4. A deed dated November 2, 1942, executed by the guardian of the Estate of Leslie D. Stephens, an incompetent person, conveying all of his right, title and interest in the property in question to M. Potter. It is recited in this deed that Leslie D. Stephens' interest in the property had been sold to Potter for $50, subject to the confirmation of the court, and that the court had confirmed this sale. This original deed contains no marks indicating that it has ever been recorded.

[1] Appellant's first contention is that the court abused its discretion in denying his motion for a new trial. It is argued that the reporter's notes "seem to have been lost or destroyed" and that the motion for a new trial "was based wholly on the provisions of section 953e of the Code of Civil Procedure." We find nothing in the record to support this contention and it was in effect, abandoned at the oral argument. The appellant states in his brief that the fact that the reporter's notes were not available was not discovered until after the appeal was taken. The only motion for a new trial disclosed by the record was made earlier and was based upon other grounds. There is nothing in the record to indicate that any inability to obtain a reporter's transcript either existed or was called to the attention of the trial court. Moreover, there is no showing that any attempt was ever made to secure an adequate record through an agreed statement of facts, or otherwise. No abuse of discretion appears. Moore v. Specialty Oil Tool Co., 128 Cal. App. 662, 18 P.2d 82; Kroeker v. Jack, 51 Cal.App.2d 272, 124 P.2d 619; Norris v. Norris, 50 Cal.App.2d 726, 123 P.2d 847; Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 144 P.2d 570.

Appellant's main contention is that the findings and judgment are not supported by the evidence. This is based upon certain alleged facts which nowhere appear in the record. It is stated in his brief that in 1922 the Entlers sold this land to Leslie D. Stephens and Mary S. Stephens, his wife, as joint tenants, and took back a mortgage for $41,000 as part of the purchase price; that the purchasers defaulted in the payment of taxes; and that the land was sold to the state for delinquent taxes in 1933.

While it is not contended that the state has ever sold this land or that the appellant has acquired the interest therein formerly held by Mrs. Stephens, it is argued that the supposed sale to the state in 1933 extinguished the lien of the respondents' mortgage because the state then took the land free from all liens, that the foreclosure proceeding was ineffective for any purpose and did not shut off Leslie D. Stephens' right of redemption, that the respondents' right of redemption as mortgagees was lost because the state acquired full title, and that it follows that the plaintiff, as the successor of Leslie D. Stephens, is now entitled to redeem the property, free from any lien or claim on account of the mortgage debt.

[2, 3] A sufficient answer to these contentions, if they were otherwise valid, is that there is nothing in the record to disclose the main facts upon which the argument is based. Nor do we think the appellant would be any better off if those facts were admitted and were in the record. It is unnecessary to go into the question raised by the appellant as to whether the lien of this mortgage was, as between the parties, extinguished by the sale of the property to the state for delinquent taxes. In any event, the mortgagors, as owners of the land, had a right of redemption until that right should be terminated as provided by law. Having that right, they had an interest in the property which was subject to and could be reached by the foreclosure proceedings. This was done and the mortgagees became the owners of that right and interest through the judicial sale. As suc-

cessors in interest of the original owners the respondents had a right to redeem the land from the tax sale until that right should be terminated. Revenue and Taxation Code, Sec. 4101, St.1941, p. 1430. It is not even claimed that the state has taken any steps to terminate that right of redemption.

[4, 5] Any right of redemption which existed in the mortgagors was foreclosed and passed to the mortgagees by virtue of the decree and judgment entered in the foreclosure action. Any such rights having been ended by the foreclosure proceedings, Mr. Stephens had no right or interest which could pass by the deed given in the guardianship proceedings. The mortgagees still had a right to redeem the property, which was a sufficient interest in the land to enable them to defend this action and to furnish support for the judgment. The appellant showed no title in himself, having only a quitclaim deed from one of the former owners who had lost all his rights in the property. Under general equitable principles he should not be permitted to quiet his title against a mortgage debt, the mortgage not being void, without offering to pay the mortgage.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

PEOPLE v. TRIEBER.*

Cr. 2347.

District Court of Appeal, First District, Division 1, California.

Nov. 21, 1945.

Rehearing Denied Dec. 6, 1945.

Hearing Granted Dec. 20, 1945.

1. Torts 🔑8

Wire tapping except when legally authorized is an invasion of the right of privacy.

2. Telegraphs and telephones 🔑19, 79

If a subscriber makes an unauthorized tap or connection without the consent of the telephone company when consent may be required, such company has a remedy in tort or under the provisions of the Penal Code, depending upon circumstances. Pen.Code, § 591.

3. Grand jury 🔑26

A grand jury's function is to return an indictment against a person only when the evidence presented to it indicates that he has committed a public offense. Pen. Code, § 921.

4. Indictment and information 🔑60, 75(1)

An indictment need not contain allegations of matters not essential to be proved, but it must contain a statement of the acts constituting the crime in ordinary and concise language. Pen.Code, §§ 950, 952.

5. Indictment and information 🔑61

So far as the pleading is concerned, matters of which judicial notice is taken need not be stated if the other allegations definitely apprise the defendant of the offense of which he is accused. Pen.Code, §§ 952, 961.

6. Indictment and information 🔑10

An "indictment" is something more than a mere accusation based on probable cause but is an accusation based upon legal testimony.

See Words and Phrases, Permanent Edition, for all other definitions of "Indictment".

7. Indictment and information 🔑137(4)

An indictment charging violation of law prohibiting tapping or making unauthorized connection with any telegraph or telephone wire, line, cable or instrument under control of telegraph or telephone company without evidence showing that instrument or telephone wires involved were under control of telephone company as alleged in indictment was without evidence to support it and was properly set aside. Pen.Code, § 640.

8. Criminal law 🔑562

If a fact established by evidence has a tendency to prove an essential feature of the charge, courts will not determine weight of evidence but if it has no probative value in the sense that it arises from a surmise which reason repels as unauthorized, then there is a lack of any evidence.

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* Subsequent opinion 171 P.2d 1.

9. Indictment and Information ⇨10
Grand jury ⇨33

The best evidence reasonably obtainable should be presented to the grand jury, but some evidence will be held sufficient even should it be obtained unlawfully.

10. Criminal law ⇨862

A jury may take judicial notice of physical facts but not of civil rights that have not been legally determined.

11. Grand jury ⇨26

The grand jury is judicial only in that it is permitted under some circumstances to determine whether certain evidence is admissible, etc., but it is primarily an inquisitorial and not a judicial body.

12. Criminal law ⇨304(9), 817, 887

The courts take judicial notice of matters set forth in statute relating to judicial notice and may declare such knowledge to the jury and the jury is bound to accept it. Code Civ.Proc. §§ 1875, 2102.

13. Grand jury ⇨33

The grand jury is restricted by statute in the reception of evidence. Pen.Code, § 919.

14. Indictment and Information ⇨10

A rule or regulation not offered as evidence, or otherwise to grand jury, although it might have supplied defects in proof before the grand jury, cannot be said to supply a defect ex post factum of the hearing before the grand jury.

15. Grand jury ⇨33

The grand jury sitting as an inquisitorial body of laymen may not judicially notice the rules and regulations of an administrative body unless that rule or regulation is offered in evidence before them.

16. Grand jury ⇨1

A "grand jury" is a part of the machinery of the government having for its object the detection and punishment of crime, and is an appendage of the court under whose supervision it is impaneled, having no existence aside from the court which calls it into existence, and upon which it is attending.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Jury".

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

Prosecution by the People of the State of California against Morris Trieber pursuant to an indictment charging the violation of law prohibiting the tapping or making any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company. Motion to set aside and dismiss the indictment granted, and the People appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist Atty., and James F. Brennan, Chief Trial Deputy Dist. Atty., both of San Francisco, for appellant.

J. W. Ehrlich, of San Francisco (Joseph A. Brown, of San Francisco, of counsel), for respondent.

WARD, Justice.

This is an appeal by the People from an order of the superior court granting a motion to set aside and dismiss an indictment charging a violation of Penal Code section 640 which provides in part: "Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company * * * is punishable as provided in section 639."

From the testimony before the grand jury which returned the indictment, it appears that Morris Trieber, without the knowledge or consent of the Pacific Telephone and Telegraph Company's officers or managers, but through the assistance of an employee, secured at least seven extensions to telephones which led to an apartment on Ashbury Street and several extensions to an apartment on Haight Street. These extensions were put upon the telephones listed to residents of other apartments in the houses, with the consent of the subscribers, at the direction of the defendant, who paid the phone bills of all the subscribers in exchange for the use of the extensions for his business. The actual work was performed by an employee of the telephone company.

The indictment in the present case charged two violations of the above section at different addresses in the City and County of San Francisco in that there was tapped, and an "unauthorized" connection made with, telephone wires and instruments, and that the wires and instruments were under the "control" of the Pacific Telephone and Telegraph Company, a corporation engaged in the business of operating a telephone business.

In People v. Earl, 19 Cal.App. 69, 124 P. 887, the court was called upon to construe Penal Code section 619, involving the disclosure of the contents of telegraphic or telephonic messages, as it applied to a publication of the former. At pages 71–72 of 19 Cal.App., at page 888 of 124 P., the court said: "The function of the courts in construing statutes is not restricted to a view which shall give literal effect to every word and phrase appearing by the letter of the law. In that analysis reason must have its just proportion, and the intent of the law makers is to be ascertained by taking into account several considerations, as the history of the legislation upon the subject treated, and concurrent legislation affecting the same or closely kindred subjects. The fact that the enforcement of a statute according to its literal import will have the effect of prohibiting otherwise necessary and useful acts may also furnish an entirely sufficient reason for concluding that the intent of its framers was not that it should so operate."

The words "makes any unauthorized connection" refer to making a "connection" without authority of the subscriber. Reference to certain sections of the code indicate that a "tap or connection" could not be made even by the telephone company without the consent of the subscriber.

That section 640 was not intended to protect the telephone company is demonstrated when within the chapter of the Penal Code dealing with malicious injuries to railroad bridges, highways and telegraphs, there is found the following: "Injuring or Tapping Phone or Telegraph Line.—Every person who unlawfully and maliciously takes down, removes, injures or obstructs or makes any unauthorized connection with any line of telegraph or telephone, or any other line used to conduct electricity, or any part thereof, or appurtenances or apparatus connected therewith, or severs any wire thereof, is punishable * * *." Penal Code, sec. 591. This section is for the protection of the owners of telephone equipment, whether for public or private use. Davis v. Pacific Telephone and Telegraph Co., 127 Cal. 312, 59 P. 698. One charged with injuring telephone lines is charged under section 591. People v. Holmes, 130 Cal.App. 507, 20 P.2d 67. Tapping wires to aid in a system of "spying," including tapping telephone connections, "is an offense under section 640 of the Penal Code." People v. Kynette, 15 Cal.2d 731, 745, 104 P.2d 794, 802.

[1] The acts denounced as crimes in section 640 are included in Penal Code, Pt. 1, Ti. 15, Chap. 2, wherein other offenses are set forth, such as refusal or neglect or delay in sending or delivering a telegram or telephone message, use or disclosure of contents of a telegram or telephone message, inducing disclosure of a telephone message or telegram by bribery, installing a dictagraph without consent of an owner or occupant in any house, etc. The penal provisions in these sections show that the purpose is the protection of the sender or recipient of the contents of a message by telephone or telegraph. Wire tapping, except when legally authorized, is an invasion of the right of privacy. The requirement of control in section 640 is left out of other sections of the chapter and is eliminated even in the balance of section 640 which forbids reading a message while in transit or communicating in any way the information so obtained. The primary purpose of section 640 is the protection of the subscriber's wires from being tapped by third parties. If the secrecy in transmission of a telephone message is violated by one who has a duty to perform in its transmission a prosecution may be instituted under Penal Code, section 619. People v. Earl, supra. If one not connected with a telephone company opens a sealed envelope containing a transcribed telephone message the prosecution should be under section 621, but tapping wires without the consent of the subscriber is a violation of section 640. If the consent of the subscriber is obtained there is no violation of section 640 but there may be a violation of section 591.

If the word "unauthorized" in section 640 refers to the authorization of the telephone company, then the subscribers here would be equally guilty with Trieber of the offenses charged, and that result would ensue under a statute passed primarily for the benefit of such subscribers. Lack of consent by the subscriber is an essential element in all of the offenses set forth in section 640. Conversely, consent by the subscriber negatives an essential element which fact may be presented as a valid defense to a prosecution under the provisions of that section. The evidence taken before the grand jury shows the consent of the subscriber to the acts set forth in the two counts of the indictment.

[2] If a subscriber makes an unauthorized tap or connection without the consent of the telephone company, when consent may be required, such company has a remedy in tort or under the provisions of Penal Code, section 591, depending upon the circumstances of the case.

The purpose of amending section 640 in 1915 (Stats. 1915, Chap. 117, p. 210) by inserting the words "under the control of any telegraph or telephone company" appears to be to distinguish the tapping of wire operated and controlled by a company engaged in serving the public as distinguished from a telephone system controlled by a private individual or company and operated for the benefit of a particular business, such as an inter-communicating telephone system in a hotel or other business. Evidently the legislature determined that the punishment should be greater when wires of a business conducted in the interest of the public were tapped than when the same act was performed in connection with a private business concern. This is manifest in the punishment provided for a violation of sections 640 and 591. (Cf. sections 639, 591.) This control, as distinguished from the authorization by the subscriber as above noted, is an essential statement in the crime under section 640 that must be proved. The absence of any evidence on the issue of control of the wires presents an additional reason why the ruling of the trial court must be upheld.

[3-5] The general rules governing the sufficiency of an indictment and the proof necessary therefor have undergone a change in the last few years. "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." Penal Code, sec. 921. "A grand jury's function is to return an indictment against a person only when the evidence presented to it indicates that he has committed a public offense." Greenberg v. Superior Court, 19 Cal.2d 319, 321, 121 P.2d 713, 715. A public offense is an act committed or omitted in violation of a law forbidding or commanding it, and upon conviction of which there is a punishment provided. Penal Code, sec. 15. An indictment need not contain allegations of matters not essential to be proved, but it must contain a statement of the acts constituting the crime in ordinary and concise language. Penal Code, secs. 950, 952. So far as the pleading is concerned, matters of which judicial notice is taken need not be stated, Penal Code, sec. 961, if the other allegations definitely apprise the defendant of the offense of which he is accused, Penal Code, sec. 952.

[6] An indictment has been said to be "something more than a mere accusation based upon probable cause; it is an accusation based upon legal testimony" (People v. Tinder, 19 Cal. 539, 543, 81 Am.Dec. 77) sufficient to determine if criminal proceedings shall be commenced. In re Lemon, 15 Cal.App.2d 82, 59 P.2d 213. At common law an indictment was unimpeachable and even courts were not permitted to invade the sanctity of secrecy with which the grand jury was clothed. Penal Code, section 995 sets forth, as it has since 1872, the grounds upon which an indictment may be set aside. The grounds have changed since the original adoption of the section. In 1939 the only ground noted upon which an indictment must be set aside is: "Where it is not found, indorsed, and presented as prescribed in this code." In 1907 in Brobeck v. Superior Court, 152 Cal. 289, 92 P. 646, it was held that it was immaterial that there was no evidence introduced before the grand jury, showing the petitioner for a writ of prohibition, guilty of the public offense charged. In 1932 in Morehouse v. Superior Court, 124 Cal.App. 38, 39, 12 P.2d 133, it was said: "The fact that the grand jury may have received incompetent evidence upon which it found an indictment, or have based the same either wholly or in part upon incompetent evidence, does not constitute one of the grounds enumerated in section 995 of the Penal Code upon which an indictment may be set aside." In People v. Panagoit, 25 Cal.App. 158, 143 P. 70, it was contended that testimony taken before a grand jury was insufficient to support the indictment on a jurisdictional question. Defendant demurred and subsequently raised the point on motion in arrest of judgment. On appeal, the court said (25 Cal.App. at page 162, 143 P. at page 72): "This contention cannot be maintained. There is no provision in our law for thus reviewing the action of a grand jury in finding an indict-

ment. The validity of an indictment cannot be attacked upon the mere ground of insufficiency of evidence to support it. Courts cannot, in the absence of a statute permitting it, inquire into the sufficiency of the evidence upon which the grand jury acted, in order to invalidate an indictment returned by them." See, also, 59 A.L.R. 579, annotation IV; People v. Tinder, supra; Brobeck v. Superior Court, supra; In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L.R.A. 406, 103 Am.St.Rep. 117, 1 Ann. Cas. 840; People v. Fealy, 33 Cal.App. 605, 165 P. 1034; People v. Hatch, 13 Cal. App. 521, 109 P. 1097; People v. Beach, 122 Cal. 37, 54 P. 369; People v. Schmidt, 33 Cal.App. 426, 165 P. 555. However, it was said in Greenberg v. Superior Court, 19 Cal.2d 319, 323, 121 P.2d 713, 716, referring to the Tinder, Kennedy and Brobeck cases: "At the time each case was decided, section 925 of the Penal Code merely permitted the district attorney at his discretion to have testimony before the grand jury reported but did not make such reporting mandatory. The cases therefore do not control the present situation and the views expressed therein inconsistent with this opinion are disapproved." The court further said, 19 Cal.2d at page 322, 121 P.2d at page 715: "If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573), but the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning an indictment." "A grand jury that indicts a person when no evidence has been presented to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution and laws of the State of California and encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty."

[7] It must be stated that the reporter's transcript of the grand jury in the present proceedings shows the lack of any evidence that the instrument or telephone wires were under the control of the Pacific Telephone and Telegraph Company, as alleged in the indictment. There is evidence that the installations were made by an employee of the telephone company and that the tapping was without the knowledge or consent of an investigator on this case, but no evidence that such investigator's consent or refusal would have been of any avail. There is also evidence that the employee of the telephone company who performed the physical work and was paid by the defendant did not inform the company of the work performed on the instruments. This evidence does not lend itself to any inference of control by the telephone company.

[8] The reference in the Greenberg case, supra, to "some evidence" presupposes that the evidence must be "rational." Its credibility may not be weighed on a motion to dismiss upon the ground that there is a "lack of any evidence" to uphold the charge, but there must be presented relevant evidence of some kind from a competent source. This rule is founded in reason and good sense (People v. Arnold, 15 Cal. 476, 481) and does not do violence to the right to draw an inference from a proven fact. People v. Latona, 2 Cal.2d 714, 43 P.2d 260. If a fact established by evidence has a tendency to prove an essential feature of the charge, courts will not determine the weight of the evidence, but if it has no probative value in the sense that it arises from a surmise which reason repels as unauthorized, then there is a "lack of any evidence." Greenberg v. Superior Court, supra.

It is urged in support of appellant's contention that the evidence shows control by the company: (1) that the defendant was operating an illegal business; (2) that defendant paid the company for the use of the telephones though he permitted the subscriber also to use the telephone. How an inference may be drawn from the above facts that the telephone company had "control" of the instruments after installation in the private homes of the subscribers is not pointed out by appellant. "Control" is one of the essentials of the offense set forth in section 640. Lack of "control" played a part in the ruling of the trial court as demonstrated in a "Memorandum Opinion on Motion to Dismiss" appearing in the clerk's transcript on appeal.

[9-14] Appellant also contends in lieu of such proof of "control" that *"this court* must take judicial notice as a matter of common knowledge" that this particular telephone company has exclusive control over telephone service in San Francisco, and that subscribers are not authorized to permit any one to make any connection with any telephone instrument or wire. (Emphasis added.) Further, that *this*

court should take judicial notice that the Pacific Telephone and Telegraph Company is a public utility and that the Railroad Commission has approved certain regulations prepared by the company to the effect that a subscriber is not authorized to change or alter instrumentalities or the equipment of the company. We are not considering the sufficiency of a pleading, Penal Code, sec. 961, but the sufficiency of the evidence. Greenberg v. Superior Court, supra. The issue is not of what this court may take judicial notice, but it is of what the grand jury may take "notice" without proof. A grand jury is primarily an inquisitorial body. The best evidence reasonably obtainable should be presented (Samish v. Superior Court, 28 Cal.App.2d 685, 83 P.2d 305), but *some* evidence will be held sufficient even should it be obtained unlawfully. Ex parte McDonough, 21 Cal. App.2d 287, 68 P.2d 1020. There is a form or species of "judicial knowledge" which may be exercised by jurors. They may compare their own experiences in life with the testimony produced in deciding whether a witness has told the truth. 1 Wharton's Criminal Evidence, 11th Ed., p. 39, sec. 25. A jury may take notice of physical facts but not of civil rights that have not been legally determined. Juries under the direction of courts may take notice that an office or a corporation has civil rights and duties but may "not take judicial notice of the nature and scope of such civil rights and duties" (Archbishop v. Industrial Acc. Com., 194 Cal. 660, 677, 230 P. 1, 8), until there is a determination of the scope of the right. See Liberty Mut. Ins. Co. v. Superior Court, 62 Cal.App.2d 601, 145 P.2d 344; Mound W. Co. v. Southern Cal. Edison Co., 184 Cal. 602, 194 P. 1014; Wallace Ranch W. Co. v. Foothill D. Co., 5 Cal.2d 103, 53 P.2d 929. In Varcoe v. Lee, 180 Cal. 338, 345, 181 P. 223, 226, the court said: "* * * as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized." The grand jury is judicial only in that it is permitted under some circumstances to determine whether certain evidence is admissible, etc., but it is primarily an inquisitorial and not a judicial body. The courts take judicial notice of matters set forth in section 1875, Code Civ. Proc. The court may declare such knowledge to a jury and the jury is bound to accept it. Code Civ.Proc. sec. 2102. A grand jury is restricted in the reception of evidence. "In the investigation of a charge, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness, in the cases mentioned in the third subdivision of section six hundred and eighty-six. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." Penal Code, sec. 919. See, also, 13 Cal.Jur. 77; 12 R.C.L., p. 1034, sec. 20; 38 C.J.S., Grand Juries, p. 1058, § 42, subsec. b.

[15, 16] It is urged that if the grand jury may not take judicial notice of matters of common knowledge, the court may take judicial knowledge of the fact that the "company" is a public utility operating in San Francisco under such rules and regulations and schedules of rates as the Railroad Commission may prescribe. Appellant then refers to "Rule and Regulation, No. 19." That regulation was not offered as evidence or otherwise to the grand jury. Its existence is evidently an afterthought. A copy is attached to appellant's opening brief. It was not offered as an exhibit and so far as the record discloses was not referred to in the trial court upon the motion to dismiss the indictment. In substance, the rule purports to provide that all instrumentalities, equipment, etc., remain the property of the company; that only duly authorized employees of the company shall be allowed to change or alter any of the equipment, etc., and that the subscriber will be held for damages to any apparatus furnished by the company. Although this rule, if offered in evidence before the grand jury, might have supplied the defect in proof heretofore found, it can not be said to supply a defect ex post factum of the hearing before the grand jury. It is not here decided whether this court or the trial court would take judicial notice of this rule, because such decision is unnecessary inasmuch as the sole issue is the sufficiency of the facts before the grand jury. It is here decided that the grand jury sitting as an inquisitorial body of laymen may not "judicially" notice a rule or regulation of an administrative body unless that rule or regulation is offered in evidence before them. "A grand jury is a part of the machinery of government, having for its object the detection and punishment of crime; it is an appendage of the court un-

der whose supervision it is impaneled, having no existence aside from the court which calls it into existence, and upon which it is attending. It does not become, after it is summoned, impaneled, and sworn, an independent planet, as it were, in the judicial system, but still remains an appendage of the court on which it is attending. The grand jury is regarded as an informing or accusing body rather than as a judicial tribunal." 24 Am.Jur., pp. 832, 833, sec. 2.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, J., pro tem., concur.

71 Cal.App.2d 773

PEOPLE v. SCHUBER.

Cr. 1929.

District Court of Appeal, Third District, California.

Nov. 26, 1945.

1. Indictment and information 🔑144

An information charging accused with lascivious conduct upon his nine-year old stepdaughter was properly dismissed on ground that preliminary examination failed to show that a public offense had been committed or that there was probable cause to believe that accused was guilty thereof, where, independently of accused's extrajudicial statements, there was no evidence of even a prima facie showing of corpus delicti. Pen.Code, §§ 288, 872.

2. Criminal law 🔑238

Where information charged accused with lascivious conduct upon his nine-year-old stepdaughter, evidence that stepdaughter had made extrajudicial statements contradictory of her testimony at hearing did not furnish proof of commission of alleged public offense or that accused might have been guilty thereof, but at most merely impeached stepdaughter's evidence. Pen. Code, §§ 288, 872.

3. Criminal law 🔑238

To justify a magistrate in holding accused for trial upon preliminary examination, it must appear from competent evidence adduced at the hearing that a public offense has been committed and there is sufficient cause to believe accused guilty thereof. Pen.Code, § 872.

4. Criminal law 🔑238

The proof which will authorize a magistrate in holding accused for trial must consist of legal competent evidence. Pen. Code, § 872; Code Civ.Proc. § 1825.

5. Constitutional law 🔑263, 266

The constitutional guaranty of due process of law requires adherence to recognized rules of evidence in trials and in preliminary examinations.

6. Criminal law 🔑409

The extrajudicial uncorroborated admissions of a defendant may not be considered in absence of substantial independent proof of corpus delicti and there must be competent proof independently of such admissions that a public offense has been committed and that defendant is guilty thereof. Pen.Code, § 872; Code Civ.Proc. § 1825.

7. Criminal law 🔑234, 238

While a preliminary examination is less formal than a trial and less evidence is required to hold accused for trial than is exacted to support a conviction, the rule merely goes to quantum, sufficiency or weight of evidence, and not to its competency, relevancy or character. Pen.Code, § 872; Code Civ.Proc. § 1825.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

William Schuber was charged in an information with lascivious conduct upon his nine-year-old stepdaughter, and, from an order dismissing the information on the ground that the preliminary examination failed to show that a public offense had been committed or that there was probable cause to believe that accused was guilty thereof, the People of the State of California appeal.

Affirmed.

Robt. W. Kenny, Atty. Gen., Jess Hession, Asst. Atty. Gen., James O. Reavis, Deputy Atty. Gen., Claude H. Adams, Dist. Atty., of Merced, and William Elam, Deputy Dist. Atty., for appellant.

C. Ray Robinson, Samuel V. Cornell, and Margaret A. Flynn, all of Merced, for respondent.

THOMPSON, Justice.

The People have appealed from an order dismissing an information filed against the defendant under Section 288 of the Penal Code, on the ground that the preliminary examination fails to show that a public offense has been committed as alleged, or otherwise, or that there is probable cause to believe that the defendant is guilty thereof.

This same case was previously before this court on a petition for a writ of habeas corpus, which was granted for lack of competent evidence to show that a public offense had been committed or that the defendant was guilty thereof. In re Schuber, 68 Cal.App.2d 424, 156 P.2d 944. The prisoner was discharged. He was thereafter rearrested upon the same charge, and another preliminary examination was held. He was accused of lascivious conduct upon his nine year old stepdaughter.

The child was not called at the first preliminary examination. She testified to no incriminating facts at the present examination. She had a lacerated vagina, but she was not asked what caused that injury. No witness testified in that regard. We have no way of telling from competent evidence what caused the injury. In response to all pertinent questions she insisted that she "did not know" what, if anything, her stepfather did to her.

The transcript on this appeal contains no new competent evidence of the commission of a public offense, or that the defendant is guilty thereof. The defendant's extrajudicial statement against interest is substantially the only evidence relied upon at both hearings. Independently of that statement there is no evidence of even a prima facie showing of the corpus delicti.

The appellant has filed elaborate briefs contending that the rule of evidence with respect to the competency of testimony to be adduced at a regular trial of a criminal case does not apply to a mere preliminary examination, and that the extrajudicial statement of the defendant may be sufficient upon which to hold him for trial, or at least, that the statement, together with other circumstances appearing at the hearing, warranted the magistrate in determining there was evidence of probable cause to believe he was guilty of the offense.

[1, 2] We think there are no circumstances shown by the record, or reasonable inferences to be drawn therefrom, which tend to prove, independently of the extrajudicial statement, that a public offense has been committed. The evidence which was adduced for impeachment purpose that the child had made extrajudicial statements contradictory to her testimony at the hearing does not furnish proof of the commission of the alleged public offense, or that the defendant may have been guilty thereof. At most, it merely impeached her evidence, which leaves the record without competent proof of the crime.

There is no competent evidence of the commission of a public offense or that the defendant was guilty of an offense.

[3-7] To justify a magistrate in holding an accused person for trial upon a preliminary examination under Section 872 of the Penal Code, it must appear from competent evidence adduced at the hearing that "a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof." Penal Code, sec. 872; In re Schuber, supra; In re Williams, 52 Cal.App. 566, 199 P. 347. The proof which will authorize a magistrate in holding an accused person for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. The rules of evidence require the "production of legal evidence" and the exclusion of "whatever is not legal." Sec. 1825, Code Civ.Proc.; 31 C.J.S., Evidence, § 2 page 505; Vol. 15 Words & Phrases, Perm.Ed., "Evidence", p. 396. The constitutional guarantee of due process of law requires adherence to the adopted and recognized rules of evidence. There cannot be one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations. The rule for the admission or rejection of evidence is the same for both proceedings. The invariable rule which is supported by numerous California cases is that the extrajudicial uncorroborated admissions of a defendant may not be considered in the absence of substantial independent proof of the corpus delicti. There must be competent proof, independently of such admissions, that a public offense has been committed and that the defendant is guilty

thereof. People v. Gilbert, 86 Cal.App. 8, 260 P. 558; People v. Cornett, 61 Cal.App. 2d 98, 105, 141 P.2d 916; Underhill's Crim. Ev., 4th Ed., 506, sec. 262. It is true that a preliminary examination is less formal than a trial, and that less evidence is required to hold an accused person for trial than is exacted to support a conviction. In re Williams, supra. But the court said in the case last cited [52 Cal.App. 566, 199 P. 348]: "It cannot be held that the essential principles of procedure and of evidence may be departed from by committing magistrates in the conduct of such examinations." The rule which requires less evidence at a preliminary examination, or even slight evidence, merely goes to the quantum, sufficiency or weight of evidence and not to its competency, relevancy or character.

In the present case we are driven to the conclusion there is no competent evidence that a public offense prohibited by Section 288 of the Penal Code, or otherwise, was committed. The child did have a laceration or cut, one-half an inch in length at the posterior entrance to her vagina. But there is absolutely no competent evidence to show how she received that injury. There is also evidence that the little girl, together with her little sister, had been sleeping in the same bed with the defendant, their stepfather, just before that injury occurred. She was examined as a witness at length. It must be conceded that she either lacked understanding or that she was deliberately concealing the truth. Nevertheless, she repeatedly answered the direct question, "Did he do anything to you?" by asserting "I don't know." She was not asked what caused the laceration or how she received that injury. The record is devoid of evidence of what caused that injury, except for the extrajudicial statement of the defendant. There is therefore no competent evidence under the accepted rule previously mentioned, that the injury was received by unlawful means, or that a public offense had been committed. It is also true that after the district attorney had tried in vain to obtain a statement from her that the defendant caused the injury by unlawful act, that he was permitted to read to her a statement which she previously made to him in his office to the effect that her stepfather "could" have placed his finger in her vagina. When she was then asked if she had not so stated, she repeatedly said "I don't know." The defendant's attorney objected to the reading of those questions on the ground that no foundation had been established for that procedure. The prosecution failed to prove by any witness that that extrajudicial statement was made or transcribed. But assuming that such extrajudicial contradictory answers were given by the witness, it was admissible only to impeach her testimony at the hearing. Sec. 2052, Code Civ.Proc. Conceding that she was successfully impeached, there is no competent evidence in the record that a public offense was committed upon her. The testimony of a doctor who examined the child adds nothing material to indicate that she was injured by unlawful means. He merely testified that he found the laceration which was "of recent origin," and that the hymen was "intact."

We commend the district attorney for his conscientious prosecution of this case. We may even concur with him in speculating or surmising that the defendant may be guilty, but we cannot escape the conclusion that the record contains no competent evidence that the defendant caused the injury received by the child, or that a public offense was committed with relation thereto. There is actually no more competent evidence in this record of the commission of a public offense than there was on the former hearing of the petition for a writ of habeas corpus which involved the same transaction.

On the authority of In re Schuber, supra, the order dismissing the Information is affirmed.

ADAMS, P. J., and PEEK, J., concur.

71 Cal.App.2d 235

WILSON et al. v. CITY OF LONG BEACH et al.

Civ. 14653.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1945.

Hearing Denied Dec. 20, 1945.

Appeal and error 🔑1078(1)

Where notice of appeal included an appeal from order denying defendants' motion for a judgment notwithstanding verdict and record of that fact was noted in the opinion, but no reference thereto was made in appellants' brief, question as to order denying defendants' motion for judgment notwithstanding verdict was abandoned and was therefore not included in order of reversal.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

On petitions for rehearing.

Petitions denied.

Prior opinion, 162 P.2d 658.

Joseph A. Ball, of Long Beach, for plaintiffs and respondents.

Irving M. Smith, City Atty., and Frank C. Charvat and Dewey L. Strickler, Deputy City Attys., both of Long Beach, for defendants and appellants.

DORAN, Justice.

Both appellants and respondents petition for a rehearing. Appellants request a modification to clarify the question as to whether the judgment of reversal includes a reversal of the order denying defendants' motion for a judgment notwithstanding the verdict. Although the notice of appeal included an appeal from said order and, the record of that fact is noted in the opinion, nevertheless, no reference thereto is to be found in the briefs.

Appellants' opening brief specifies but three questions involved in the appeal and no question is raised therein concerning the above-mentioned order. Nor does respondent make any reference thereto. So far as the briefs are concerned, the question was abandoned. The questions raised were all considered in the opinion and a reversal of the order denying the motion for judgment notwithstanding the verdict is therefore not included in the order of reversal.

Respondents' petition for a rehearing relies apparently, on the court's failure to base the opinion upon the rule that "Plaintiffs' cause of action was predicated upon". The trial court's order denying defendants' motion for a judgment notwithstanding the verdict, is also referred to for the first time.

For the reasons stated, both of the petitions for rehearing are denied.

YORK, P. J., and WHITE J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

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71 Cal.App.2d 734

PRICE v. PRICE et al.

Civ. 15015.

District Court of Appeal, Second District, Division 2, California.

Nov. 23, 1945.

1. Divorce 🔑130

In wife's divorce suit, plaintiff's testimony was sufficient to sustain trial court's finding of defendant's extreme cruelty to plaintiff.

2. Divorce 🔑127(4)

In wife's divorce suit, testimony of plaintiff's sister that she heard defendant threaten to strike plaintiff, saw marks and bruises, which plaintiff stated were caused by defendant, on plaintiff's body, and that plaintiff became very nervous and upset as result of such beatings, constituted sufficient corroboration of plaintiff's testimony as to defendant's extreme cruelty. Civ. Code, § 130.

3. Divorce 🔑127(4)

Corroborative evidence of one or more facts showing husband's cruelty, as testified to by wife suing for divorce, is sufficient. Civ.Code, § 130.

4. Divorce 🔑127(4), 184(6)

Where wife's divorce action is contested and no collusion appears, only slight corroboration of wife's testimony as to husband's cruelty is required, and sufficiency of corroborative evidence is largely for trial judge. Civ.Code, § 130.

5. Divorce 🔑111

In wife's suit for divorce on ground of extreme cruelty, plaintiff's testimony on cross-examination that she had been in school for incorrigible girls before her marriage was properly stricken as irrelevant.

6. Trial 🔑91

A motion to strike out evidence admitted without objection is properly denied, if opportunity to object is presented.

7. Appeal and error 🔑205

A ruling sustaining objection to question, which does not in itself indicate that witness' answer will be favorable to party seeking to introduce testimony, will not be reviewed on appeal unless offer of what is proposed to be proven is made to trial court.

8. Appeal and error 🔑205

Whether trial court erred in sustaining objection to question on direct examination will not be considered on appeal, in absence of offer to prove answer which witness would have given.

9. Witnesses 🔑275(7)

In wife's divorce suit, question on cross-examination of defendant as to whether he mentioned any bonds in connection with allegations in copy of complaint, filed in his action against wife, as to personalty and cash included in parties' community property, was proper as against objection that plaintiff's attorney was not reading from verified complaint, in absence of attempt to introduce such copy in evidence or use it to impeach defendant's testimony.

10. Divorce 🔑249(3)

Where divorce is granted on ground of extreme cruelty, parties' community property may be awarded in such manner as court deems just. Civ.Code, § 146, subd. 1.

11. Divorce 🔑286

The District Court of Appeal is without authority to disturb trial court's order awarding spouses' community property on granting divorce for extreme cruelty, in absence of clear abuse of discretion. Civ. Code, § 146, subd. 1.

12. Divorce 🔑252

Disposition of spouses' community property by award of $2,500 to wife and furniture, trucks and automobile worth $1,000, $1,200 and $1,450, respectively, and milk route of undetermined value to husband in interlocutory judgment granting wife divorce on ground of extreme cruelty, was not unfair to either party and hence not abuse of trial court's discretion. Civ. Code, § 146, subd. 1.

13. Divorce 🔑252

In wife's divorce suit, where defendant conceded that cash, found to be community property, was consumed in payment of attorney's fees, and there was no evidence sustaining trial court's finding that such property included war bonds, court did not err in failing to dispose of such bonds and cash in division of community property by judgment granting wife divorce. Civ. Code, § 146, subd. 1.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by Charlotte Price against Jack Price and the Security First National Bank of Los Angeles for a divorce from defendant Price and division of community property, in which defendant Price filed a cross-complaint against plaintiff. From an interlocutory judgment granting plaintiff a divorce and dividing the community property, defendant Price appeals.

Affirmed.

Samuel Marks and Newby, Holder & Newby, all of Los Angeles, for appellant.

Frank J. Indovina, of Santa Monica, for respondent.

McCOMB, Justice.

Defendant appeals from an interlocutory decree of divorce entered in favor of plaintiff predicated upon extreme cruelty of defendant.

The evidence being viewed in the light most favorable to the plaintiff (respondent), and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, et seq., the essential facts are:

Defendant on numerous occasions struck and kicked plaintiff; pointed a gun at plaintiff and on one occasion had her arrested.

The trial court found that the community property consisted of (1) $2800 (maturity value) of war bonds, (2) a 1942 De Soto automobile, (3) household furniture, (4) two milk trucks, (5) a milk business, and (6) $286 in cash.

The court awarded plaintiff the sum of $2500 and also her personal effects. The court gave defendant the furniture in his possession, the 1942 De Soto automobile, the two trucks and the milk business. No disposition was made of the war bonds nor the cash of $286.

[1] Defendant relies for reversal of the judgment on four propositions which will be stated and answered hereunder seriatim:

First: *There is not sufficient evidence to sustain the finding that defendant was extremely cruel to plaintiff.*

This proposition is untenable. Plaintiff testified that defendant struck her, threw her clothing on the floor, kicked her and pointed a gun at her; also that he had caused her to be arrested. This evidence, if believed, as it was by the trial judge, was substantial evidence to sustain the trial court's finding that defendant was extremely cruel to plaintiff.

[2, 3] Second: *There is not any corroborative evidence of the acts of extreme cruelty.*

This proposition is likewise untenable. Mrs. Dorothy S. Farrel, the sister of plaintiff, testified that she had heard defendant threaten to strike plaintiff and that she had seen marks and bruises on the arms and face and other parts of the body of plaintiff which plaintiff stated were caused by defendant. She further testified that plaintiff became very nervous and upset as the result of these beatings.

This testimony constituted sufficient corroboration of plaintiff's testimony as to defendant's cruelty in view of the established law in California that if there is corroborative evidence of one or more facts showing cruelty, such evidence is sufficient to satisfy the requirements of section 130 of the Civil Code. (Ungemach v. Ungemach, 61 Cal.App.2d 29, 34, 142 P.2d 99.)

[4] It is also to be noted that in such a case as the present, where the action is contested and it is apparent that no collusion exists, the corroboration required is slight and its sufficiency is largely for the determination of the trial judge. (Ungemach v. Ungemach, supra, 61 Cal.App.2d at page 36, 142 P.2d 99.)

[5] Third: *The trial court committed prejudicial error in its rulings upon the admission and rejection of evidence in the following instances.*

(a) During the cross-examination of plaintiff the following occurred:

"Mr. Marks: Were you ever in a school for incorrigible girls? A. Yes.

"Mr. Indovina: I make a motion that be stricken on the grounds it is incompetent, irrelevant and immaterial.

"The Court: Motion granted."

The trial court's ruling was correct. The issue before the court was whether plaintiff or defendant had been extremely cruel to the other subsequent to their marriage. It was entirely immaterial whether plaintiff had been in a school for incorrigible girls prior to her marriage and such fact had no bearing on the issue before the trial court.

[6] (b) During the examination of Mrs. Dorothy S. Farrel the following occurred:

"Mr. Indovina: What was the cause of his losing his job? A. Dishonesty. He was taking his customer's milk bills.

"By Mr. Marks:

"Q. Who told you that? A. A very dear friend of Mr. Price's.

"Q. What was the name of this friend? A. I do not recall. I know his wife's name is Rita. Jimmie Walker.

"Q. He told you that? A. Yes, sir.

"Mr. Marks: I ask that the answer be stricken out. It is hearsay, what somebody else told her.

"The Court: Motion is denied."

The trial court's ruling was correct. The law is established in California that where evidence is admitted as in the instant case without objection, a motion to strike it out is properly denied provided, as here, an opportunity to object is presented. (Murphy v. Davids, 181 Cal. 706, 720, 186 P.143; Nisbet v. Rhinehart, 2 Cal.2d 477, 482, 42 P.2d 71; Oakland Barge etc. Co. v. Foster, 25 Cal.App. 193, 198, 143 P. 83.)

[7, 8] (c) While defendant was being examined, the following occurred:

"By Mr. Marks:

"Q. Did you have any conversation with your wife in May, 1944, about Carl Dunster? A. Yes.

"Q. Did she say anything about Carl Dunster giving her a venereal disease?

"Mr. Indovina: This is the second time counsel has done this, tried by subterfuge to get this evidence before the court, when he promised us he was not naming this man as corespondent.

"Mr. Marks: I think it is part of our cruelty charges whether or not she had a venereal disease, and whether or not she informed her husband she had a venereal disease.

"The Court: Objection sustained."

We will not consider whether the trial court properly sustained the objection to the question set forth above for the reason that the law is established in California that where a question to which an objection is sustained does not in itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. (Sumida v. Pacific Auto. Ins. Co., 51 Cal.App.2d 472, 478, 125 P.2d 87.) In the present case the question to which objection was sustained did not indicate that the answer would be in the affirmative and thus material or beneficial to defendant nor was any offer of proof made as to the answer the witness would give to the question.

[9] (d) During the cross examination of defendant this occurred:

"Mr. Indovina: Now do you remember signing a complaint you filed in Los Angeles, an original complaint in an action wherein you sued your wife at the same time she filed an action here? A. Yes.

"Q. On page 2 of the complaint, paragraph IV: 'That the community property of the parties hereto consists of furniture and furnishings of the value of $500.00, and $2,400.00 in cash.' Did you mention any bonds in that connection? * * *

"Mr. Marks: That is objected to, your Honor, he is not reading from a verified complaint. * * *

"The Court: What are you reading from?

"Mr. Indovina: A copy served on us.

"The Court: Overruled. You may answer."

The trial court's ruling was correct. The document was not offered in evidence. Counsel apparently used it merely for the purpose of refreshing his memory as to questions he desired to ask the witness. There was no attempt to introduce the document in evidence or to use it for the purpose of impeaching the witness's testimony.

Fourth: *The court erred in its division of the community property.*

[10] The law is established in California that community property may be awarded where a divorce is granted on the ground of extreme cruelty in such manner as the court from all the facts of the case and the condition of the parties may deem just. (Section 146, subdivision 1 of the Civil Code.)

[11, 12] In the absence of a clear abuse of discretion this court is without authority to disturb the order of the trial court awarding the community property. In the instant case there is no showing that the trial court abused its discretion. Plaintiff received the sum of $2500, while the defendant was awarded (a) furniture valued at $1000, (b) trucks valued at $1200, (c) a De Soto automobile worth $1450, and (d) a milk route of undetermined value. It is evident the foregoing disposition of the community property was not unfair to either party.

[13] It is unnecessary for us to consider the failure of the trial court to make disposition of the war bonds and cash which it found to be community property, for the reason that defendant concedes that the cash was consumed in the payment of attorney's fees and that there was no evidence to sustain the trial court's finding that there was $2800 (maturity value) war bonds. Based on defendant's concession such community property did not exist and therefore the trial court did not err in failing to dispose of the same.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

71 Cal.App.2d 719

In re KRAUSE'S ESTATE.

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES et al. v. BUETTNER et al.

Civ. 14973.

District Court of Appeal, Second District, Division 2, California.

Nov. 21, 1945.

1. Wills 🔑50

A testator is of "sound and disposing mind and memory" if he has sufficient mental capacity to understand the nature of the act he is doing, the nature and situation of his property, and his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Sound and Disposing Mind and Memory".

2. Wills 🔑386

In reviewing sufficiency of the evidence in a will contest, question is whether there is any substantial evidence to support jury's verdict.

3. Wills 🔑386

In a will contest, the weight of the evidence and the credibility of the witnesses are for the jury and the trial court.

4. Wills 🔑55(1)

In will contest, evidence sustained verdict that testator lacked testamentary capacity.

5. Insane persons 🔑26

A judgment in guardianship proceedings was evidence of mental condition of respondent and where guardian was appointed on ground that respondent was incapable of comprehending his property and of managing and caring for it, the judgment would justify an inference that respondent lacked testamentary capacity at that time.

6. Wills 🔑386

In will contest, any conflict in the evidence was for the determination of the jury and trial court in passing on motion for a new trial.

7. Wills 🔑386

In will contest, conflicts of the testimony of an individual witness was for the determination of the trier of facts.

8. Appeal and error 🔑1048(6)

Contention that court unduly restricted cross-examination of witness would be overruled where questions sought to be put to witness were not proper cross-examination and evidence on the subject was thereafter admitted and jury were fully and fairly instructed.

9. Wills 🔑322

In will contest where decree in guardianship proceeding had been admitted in evidence and decree found that testator had been under the dominating influence of a certain witness, an agreement between testator and such witness was properly admitted in evidence to show relation of parties and as bearing on credibility of such witness.

10. Wills 🔑384

In will contest any error in admitting immaterial testimony was not prejudicial to proponents.

11. Wills 🔑164(5)

Where one of the grounds of will contest was undue influence by children, the testimony of grandchildren that the children of decedent failed to notify them of death or funeral was admissible.

12. Wills 🔑53(1)

In will contest, the findings and judgments in actions by guardian at instance of proponents to set aside deeds and contract executed by decedent, were admissible as tending to show the mental condition of decedent on date of execution.

13. Trial 🔑260(5)

In will contest refusal of requested instructions on testamentary capacity was not error where the matter was adequately covered in instructions given.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceeding in the matter of the estate of John Krause, deceased, by Farmers & Merchants National Bank of Los Angeles, petitioner, and William H. Krause, J. A. Krause, Lucile Krause, Madelyn Welsh, proponents, and Frederick Buettner and others contestants. From a judgment denying probate of purported will, the petitioner and proponents appeal.

Judgment affirmed.

Musgrove and Cannan and Robert M. Miller, all of Los Angeles, for proponents, petitioner and appellants.

Paul G. Breckenridge and Derthick, Cusack & Ganahl, all of Los Angeles, for contestants and respondents Buettner and others.

John J. Beck, of Los Angeles, for respondent John Robertson.

FOX, Justice pro tem.

This is a will contest. The verdict of the jury was in favor of the contestants on both grounds of contest, viz., mental incapacity and undue influence. From the ensuing judgment denying probate of the purported will of the decedent, John Krause, bearing date of August 1, 1940, the proponents have appealed.

At the time said document was executed the decedent was 85 years of age. He had been married three times. Each of his wives had predeceased him. To the first marriage one child, a daughter, Belle, was born. She married a man named Buettner. To that union eight children were born. Belle predeceased her father. Five children were born of the second marriage of Mr. Krause, four of whom survive. They are the proponents of the will here offered for probate. The fifth child of the second marriage, a daughter, married a man named Robertson. One child, John Robertson, was born of this union. This daughter also predeceased her father. These nine grandchildren are the contestants. There was no issue of Mr. Krause's third marriage.

Mr. Krause had accumulated property of the approximate value of $100,000. Most of it was real estate rented for residential purposes. In February, 1938, he made a will by which he gave each of his grandchildren $100 and the rest and residue of his estate to his four living children in equal shares. About the early part of 1940, with the assistance of his housekeeper and secretary whom he had employed only a few months previously, he worked out a new plan of disposing of his property and providing for his own future care. Generally speaking, this new plan had the effect of giving to his grandchildren by representation the share which their respective mothers would have received had they survived. This plan included an agreement between Mr. Krause and his housekeeper, Minnie Zeuch, by which she agreed to remain with him and care for him for the remainder of his life at a salary of $50 per month plus room and board and the house, valued at $5,000, in which he lived, reserving, however, a life estate therein. The plan also contemplated that his grandson, John Robertson (the only child of one of his deceased daughters), would then receive title to a piece of property valued at $8,000. Also, a niece would get another piece of property. This new plan took the form of a new will dated March 28, 1940, a written contract of that same date between Mr. Krause and his housekeeper, a deed to her reserving a life estate in himself to the property where he lived and deeds to the grandson, John Robertson, and to the niece of the pieces of property they were to receive. These documents were prepared by his attorney, Dell Schweitzer, who retained possession of the executed will.

Mr. Krause's children learned of this new plan the next day and on April 1, 1940, they all joined in a petition to have him declared an incompetent. The hearing on said petition was concluded on May 17, 1940, resulting in the appointment of his two sons as guardians of his person and the bank herein as guardian of his estate. The grandchildren who were available came to their grandfather's aid during the trial. The housekeeper was immediately dismissed. Shortly after the appointment of the guardian one of the sons called Mr. Schweitzer and asked Mr. Schweitzer to deliver Mr. Krause's will to him. Mr. Schweitzer told him he could not deliver the will to anybody but Mr. Krause notwithstanding a guardian had been appointed. Then Mr. Krause appeared at Mr. Schweitzer's office with one of his sons and requested the will and Mr. Schweitzer handed it to him. This will later disappeared. Actions were filed by the guardian of the estate to set aside the aforesaid contract and deeds which Mr. Krause had executed in his attorney's office on March 28, 1940. These actions resulted in the cancellation of these several documents. Each action was preceded by a notice of rescission which stated that "at the time said John Krause executed and delivered said deed, he was of unsound mind," that is, on March 28, 1940. In the complaints for rescission it was alleged that he "is and for more than two years last past has been suffering from the effect of a paralytic stroke and from arterio sclerosis, a disease of the kidneys, and is and at all times herein mentioned was feeble and sick in mind and body and mentally and physically incompetent to take care of himself or to manage and take care of his property." The order appointing the bank guardian of the estate of John Krause stated that "he is unable and incapable, and has been since the first day of December, 1939, incapable of comprehending his property and of managing and caring for same."

After the appointment of the sons as guardians of his person the grandchildren were not admitted to the house to see their grandfather. Finally his grandson, John Robertson, got a court order permitting him to see his grandfather and took an attorney with him. Will Krause, one of the guardians, refused to permit the grandson and attorney to talk to Mr. Krause alone. This court order was later revoked. The grandchildren were not permitted to talk to their grandfather on the telephone. When the caretaker and his wife took the day off one of the guardians or their sister took charge.

The will of August 1, 1940, which is here offered for probate undertakes to dispose of the decedent's property in much the same fashion as did the will of February, 1938.

[1-3] The proponents of the will contend that the evidence is insufficient to support the verdict; that the court prejudicially erred in the admission and exclusion of certain evidence; and that the jury was erroneously instructed. None of these contentions, however, warrants a reversal. The rule with respect to the mental capacity necessary to enable a person to make a will is stated as follows in Estate of Sexton, 199 Cal. 759, at page 764, 251 P. 778, at page 780: "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument." See, also, Estate of Arnold, 16 Cal.2d 573, 588, 589, 107 P.2d 25; Estate of Downey, 51 Cal.App.2d 275, 284, 124 P.2d 637. In reviewing the sufficiency of the evidence in a will contest the rule to be applied by an appellate court is the same that applies on other appeals, namely, whether or not there is any substantial evidence to support the jury's determination of incapacity. Estate of Pessagno, 58 Cal.App.2d 390, 136 P.2d 644; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. The weight of the evidence and the credibility of the witnesses are for the jury and the trial court. Estate of Ramey, 62 Cal.App. 413, 425, 217 P. 135; Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384.

[4] Tested by these rules it must be said that the testimony together with the inferences that could be reasonably drawn therefrom furnish substantial support for the jury's verdict that the testator lacked the requisite testamentary capacity to make a valid will on August 1, 1940.

In the early part of 1940, and prior to the guardianship trial, a physician, Dr. Roland Cummings, was employed to examine Mr. Krause and thus prepare himself to testify at said hearing as to his mental condition. He testified that "He [decedent] knows that he has certain properties that are rented, but he does not remember specifically where they are or how many there are, or what his income is from them, or who is collecting the rents." He indicated that the decedent was suffering at that time from senile dementia; that it was a disease that grows progressively worse and never becomes better. He testified that Mr. Krause had "a rather severe sclerosis of the cerebral vessels" and hence his mind was "not very alert and active"; that he was "somewhat childlike." He also testified that he had had a stroke of paralysis sometime prior to 1940. The doctor also indicated that Mr. Krause might understand who his sons and daughters were and "yet might not understand thoroughly about his grandchildren." As a result of his examination of Mr. Krause in April, 1940, the doctor "thought that he was not of sound mind."

Forest Norquist, the husband of one of the granddaughters, who drove Mr. Krause to court during the early part of the guardianship hearing, testified that he attempted to carry on a conversation with him during that time but that he would start to say something and would stop and not finish the sentence.

In July, 1940, Mr. Krause mistook one of his grandsons for the paper boy. In

August he asked another grandson, John Robertson, who met him at a nearby grocery store to come to see him and bring an attorney. The grandson got a court order and complied with this request. When the attorney asked him if he wanted his competency restored, "Grandpa said 'Yes' and then said 'No'; he just didn't give no definite answer like he didn't quite catch on what he was there for." After a little more conversation, "Grandpa just kind of dozed away, dozed off * * *." The evidence also indicated that Mr. Krause had physically deteriorated by the summer and fall of 1940 to the point where he did not have control of certain of his physical organs and in that respect was like a baby. He did not pass away, however, until December, 1943.

[5-7] The judgment of May 17th in the guardianship proceeding was evidence of the mental condition of Mr. Krause on that date (Estate of Loveland, 162 Cal. 595, 599, 123 P. 801; Estate of Johnson, 200 Cal. 299, 303, 252 P. 1049; Estate of Worrall, 53 Cal.App.2d 243, 247, 127 P.2d 593), and would justify an inference that Mr. Krause lacked testamentary capacity at that time, Estate of Loveland, supra; Estate of Ehle, 115 Cal.App. 656, 659, 660. 2 P.2d 398. Like inferences could reasonably be drawn from the findings of the court in the actions to set aside the deeds Mr. Krause executed on March 28, 1940, on the ground, among others, that he was incompetent to execute said instruments. These inferences lend support to the jury's special verdict that on August 1st of the same year Mr. Krause lacked mental capacity to make a valid will. This is particularly true since there was testimony indicating that his physical and mental condition had gradually become worse with the passage of time (Estate of Loveland, supra, 162 Cal. at pages 599, 600, 123 P. 801; Estate of Pessagno, supra, 58 Cal. App.2d at pages 390, 400, 136 P.2d 644), and that senile dementia is a condition which does not improve, Estate of Alexander, 111 Cal.App. 1, 11, 295 P. 53. Certain testimony was also given by some of his children which would justify an inference in support of the jury's verdict of lack of mental capacity. It is true that there was a sharp conflict in the evidence. This, however, was for the determination of the jury and the trial court in passing on the motion for a new trial. Estate of Teel, supra, 25 Cal.2d at page 530, 154 P.2d 384; People v. Newland, 15 Cal.2d 678, 104 P.2d 778. The proponents point to certain testimony on behalf of the contestants which would support a conclusion different from that arrived at by the jury. Such conflicts in the testimony of an individual witness are also for the determination of the trier of the facts. Firth v. Southern Pac. Co., 44 Cal.App. 511, 514, 186 P. 815; Showalter v. Western Pac. R. Co., 16 Cal.2d 460, 479, 106 P.2d 895; People v. Moulton, Cal.App., 162 P.2d 317.

Since we have determined that the evidence is sufficient to support the jury's finding of mental incapacity it is not necessary to pass upon the sufficiency of the evidence to support their other finding of undue influence.

[8] The proponents complain of the refusal of the court to permit Minnie Zeuch on cross-examination to answer these questions: (1) "Miss Zeuch, during the year 1940, while you were with Mr. Krause, did Mr. Krause appear to know his own properties?" (2) "Miss Zeuch, Mr. Krause did the marketing for the house?" Objection to both questions was made upon the ground that it was not proper cross-examination. The rulings were correct. Counsel for the proponents should not have been misled since counsel for the contestants suggested in reference to the first question and the objection thereto that if the proponents desired to make Miss Zeuch their witness for the question he would have no objection. The proponents complain that during the discussion between the court and counsel to the first question and the objections thereto the court erroneously indicated in the presence of the jury that the adjudication of incompetency of Mr. Krause was a final determination of the fact that he did not know his properties in May, 1940. The remarks of the trial judge do not warrant the interpretation placed upon them. Furthermore, evidence was thereafter admitted on that issue and the jury was fully and fairly instructed on it.

The proponents complain that the court erred in admitting in evidence: (1) the agreement of March 28, 1940, between Miss Zeuch and Mr. Krause; (2) testimony of the grandson, John Robertson, that he was not permitted to keep the property that was conveyed to him on March 28, 1940; (3) the testimony of the grandchildren that they did not receive notice of their grandfather's death and funeral; and (4) the complaints, findings of fact and judgments in the actions to set aside and cancel the deeds and contract that John Krause executed on March 28, 1940.

[9] It was not improper to admit in evidence the agreement between Miss Zeuch and Mr. Krause. The decree in the guardianship proceeding had been admitted in evidence and read to the jury. This decree stated that Mr. Krause had been "under the dominating influence" of Miss Zeuch since December, 1939, and had been subject to her "desires and wishes." This agreement served to show the arrangement that the parties had entered into and their relationship, and had a bearing on the weight and credibility of her testimony. This was evidently appreciated by counsel for the proponents since he read the entire agreement to the jury.

[10] There was no error in admitting the testimony of John Robertson that he was not permitted to keep the property his grandfather had deeded to him on March 28, 1940. It was the theory of the contestants that the decedent had expressed his intention of giving to his grandchildren the share in his estate which their mothers would have received had they survived him; that is to say, Robertson was to receive one-sixth of the estate and the Buettner heirs one-sixth. The piece of property deeded to Robertson was valued at $8,000, and in the will executed on the same date he was named as one of four residuary legatees. This deed, however, had been set aside in an action by the guardian of Mr. Krause's estate. Under contestants' theory it was proper to show this chain of events so that the jury might have the entire picture before them. Even if such evidence be considered immaterial it is difficult to see how it could be prejudicial to the proponents. No such showing is made.

[11] One of the grounds of contest was undue influence. The testimony of the grandchildren that the children of Mr. Krause failed to notify them of his death or funeral was admissible on that issue. There is considerable evidence in the record indicating that the children sought to isolate Mr. Krause from his grandchildren and from which the inference could be drawn that the children were attempting to alienate him from them. This testimony would tend to indicate unfriendliness on the part of the children toward the grandchildren and an attempt to prevent them from knowing anything about their grandfather or his affairs. Such evidence was proper for the consideration of the jury in passing on the question as to whether or not the children unduly influenced their father to substantially disinherit his grandchildren. See Estate of Teel, supra, 25 Cal.2d at page 529, 154 P.2d 384.

[12] The findings and judgments in the actions to set aside the deeds and contract executed on March 28, 1940, were admissible in evidence as tending to show the mental condition of Mr. Krause on that date and from which the jury might reasonably draw an inference that he then lacked testamentary capacity and, when considered with the other evidence of his mental and physical condition thereafter, that he lacked such capacity when the will of August 1st was executed. In view of the manner in which the findings were drawn, viz., that certain allegations of the complaint were true, it was necessary to have the complaints in evidence so that the findings might be intelligible. In this connection it must be remembered that it was the execution by Mr. Krause of the deeds and contract which these actions were brought to cancel that caused the four children to jointly petition to have him declared incompetent and a guardian of his person and estate appointed. The inference is therefore clear that these actions by the bank as guardian of his estate, if not filed at the instigation of the children, were filed and prosecuted with their knowledge and consent and co-operation. They should therefore not be permitted to escape the effect of reasonable inferences that might be drawn from the findings and judgments which they were instrumental in procuring. Harlan v. Harlan, Cal.App., 161 P.2d 490.

[13] Finally, the proponents complain of the refusal of the trial court to give one of their proposed instructions on testamentary capacity. The instruction was "Refused as repetitious." There was clearly no error in not giving the requested instruction since the court gave an instruction on the subject, the correctness of which is not challenged and which is practically identical with the rejected instruction.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

BROOKS v. METROPOLITAN LIFE INS. CO.

L. A. 19453.

Supreme Court of California.

Nov. 27, 1945.

Rehearing Denied Dec. 27, 1945.

1. Appeal and error 🔑1015(3)

In passing on motion for new trial based on alleged insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony, and weigh the evidence.

2. New trial 🔑70

The trial court, in considering sufficiency of evidence on motion for new trial based on alleged insufficiency of evidence to sustain verdict, may draw inferences opposed to those drawn at trial, and, where only conflict consists of inferences deduced from uncontradicted probative facts, court may resolve such conflict in determining whether case should be retried.

3. Appeal and error 🔑1015(1)

An appellate court will reverse trial court's order granting a new trial for insufficiency of evidence to sustain verdict only where it can be said as matter of law that there is no substantial evidence to support a contrary judgment.

4. Appeal and error 🔑1015(2)
New trial 🔑71

In action on accident policy providing double indemnity in case of death resulting from a burning building and excluding from coverage death by suicide, conflicting testimony as to physical facts surrounding insured's death in burning building and conflicting inferences deducible from facts proved would warrant findings that insured took his own life or that death was caused by accidental means; hence, trial court's action in granting new trial for insufficiency of evidence after verdict for insurer would not be disturbed.

5. Appeal and error 🔑996

It is not function of appellate court to determine what inferences should be drawn from facts proved on question of propriety of granting new trial for alleged insufficiency of evidence to sustain verdict.

6. Insurance 🔑466

Under accident policy containing double indemnity provision, but providing that policy should not cover injury or death caused wholly or partly, directly or indirectly, by disease or mental infirmity, the presence of pre-existing disease or infirmity does not relieve insurer from liability if accident is proximate cause of death, and recovery may be had on policy even though a diseased or infirm condition appears to actually contribute to cause death if accident sets in progress the chain of events leading directly to death.

7. Insurance 🔑466

That insured was suffering from incurable cancer and was under influence of narcotics given to relieve pain, and because of his weakened condition he may have been less able than a normal person to withstand effect of injuries sustained in burning of building, did not preclude finding that proximate cause of his death was burns received in a fire of accidental origin, within double indemnity clause of accident policy providing that policy should not cover death caused wholly or partly, directly or indirectly, by disease or mental infirmity or medical or surgical treatment therefor.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Maxine Fogarty Brooks against the Metropolitan Life Insurance Company to recover on an accident insurance policy. From an order granting a new trial on the ground of insufficiency of the evidence to sustain a verdict for defendant, defendant appeals.

Affirmed.

Prior opinion, App., 159 P.2d 424.

Walker, Adams & Duque and A. Andrew Hauk, all of Los Angeles, for appellant.

Ray Howard and W. W. Comstock, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is a suit on an accident insurance policy issued by defendant to plaintiff's husband, S. B. Brooks. The policy insured Brooks "against the results of bodily injuries * * * caused directly and independently of all other causes by violent and accidental means," and provided for double indemnity if the injuries be received "in consequence of the burning of any building in which the insured shall be at the commencement of the fire." The policy further provided: "This insurance shall not cover suicide or any attempt thereat while sane or insane; * * * nor shall it cover accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or mental infirmity or medical or surgical treatment therefor."

After a jury verdict in favor of the defendant, the court granted plaintiff a new trial on the ground of insufficiency of the evidence. Defendant contends that in so doing the court erred because (1) the evidence without conflict discloses that the insured committed suicide, and (2) the evidence fails to show that insured's death was not caused "wholly or partly, directly or indirectly, by disease or mental infirmity."

[1-3] In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934; Green v. Soule, 145 Cal. 96, 102, 78 P. 337. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial (Mercantile Trust Co. v. Sunset etc. Co., 176 Cal. 451, 456, 168 P. 1033), and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried. Cauhape v. Security Savings Bank, 118 Cal. 82, 84, 50 P. 310. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. See Dempsey v. Market Street R. Co., 23 Cal.2d 110, 142 P.2d 929.

[4] Brooks met his death between 7 and 8 o'clock on the morning of November 19, 1941, in a fire which started in his bedroom. There were no eyewitnesses and the evidence is wholly circumstantial as to what happened at that time. Two years prior to his death, Brooks had undergone an operation for a cancerous condition which was diagnosed as incurable. Until August, 1941, he was able to drive his automobile but thereafter his condition was such that by October he was confined to his room. He spent most of his time in bed but continued to have an active interest in current affairs and could walk unassisted about the bedroom and to the adjoining bathroom. Brooks was attended by day and night nurses, and for several weeks before his death he was given morphine and other drugs in large quantities to relieve constantly increasing pain. The night nurse was on duty until 7 a.m. and Mrs. Brooks was customarily present with him until the day nurse arrived at 8 a.m. On the morning of November 19, however, Mrs. Brooks left home before 7 o'clock in order to attend to some business.

When the night nurse left, Brooks was lying in his bed with his eyes closed. A large pile of newspapers and magazines was on top of the bed within easy reach and other newspapers were on a low bench nearby. There was a pint bottle of rubbing alcohol, one-half to two-thirds full, on top of a dresser in a corner of the room. A cot used by the nurse stood at a right angle with the bed and there was a space three feet in width between the foot of the bed and the side of the cot. A portable gas stove, connected with an outlet in the bathroom by six feet of rubber hose, was left burning when the night nurse went off duty. The witnesses are not in agreement in fixing the location of the stove in the room. Mrs. Callahan, the night nurse, said it was at the foot of the cot. Mrs. Brooks testified that when she left the room shortly before 7 o'clock, it was in the narrow space between the cot and the foot of the bed. The testimony of Mrs. Brooks was corroborated by Mr. Olson, the owner of the premises, and Mrs. McCulley, the day nurse, who were the first witnesses to observe the room after the fire started. They testified that the stove was between the bed and the cot. The location of the stove is relevant in view of plaintiff's claim that one reasonable explanation of the origin of the fire is that newspapers accidentally fell from the bed and were ignited by contact with the stove. If the stove was between the cot and bed instead of at the foot of the cot it would be nearer the papers piled on the bed, and the explanation therefore would be more probable.

The night nurse stated that during the previous evening Brooks said that he hated to die without leaving his wife more money. She further testified that about 15 minutes before 7 on the morning of the 19th Brooks said to her "it's time you are going." She said that when she went off duty the shades were up and the front door was unlocked.

When the day nurse arrived a little before 8 o'clock, she was unable to open either the front or side doors. She smelled, smoke and called Mr. Olson who lived next door. Olson was unable to open the front door with his keys but entered the house through a living room window and opened the front door on the inside by turning the knob. He testified that so far as he knew the door was not locked. The fire in the bedroom was extinguished by water from a garden hose. Brooks was found dead on the cot, the lower portion of his body being badly burned. A pad on the cot had been burned around his body and there were burned newspapers on the cot and ashes of newspapers or magazines on the floor. A portion of the bed also had been burned, partly burned bedding was on the floor near the stove, and the floor was burned under and around it over an area of about three feet in diameter. There was an odor of alcohol on the upper portion of Brooks' pajamas and the bottle that had contained alcohol was found empty in the wastepaper basket near the bed. The shades in the bedroom were drawn.

[5] It is clear from the foregoing statement that not only is there some conflict in the testimony as to the physical facts but conflicting inferences may be deduced from the facts proved. The inferences that might be drawn in explanation of an accidental origin of the fire are in conflict with those that point to suicide, and although the evidence would warrant a conclusion that the insured took his own life, it would also support a finding that his death was caused by accidental means. It is not our function to determine what inferences should be drawn from the facts proved but since the facts are subject to conflicting inferences, we cannot say, as a matter of law, that the evidence compels the conclusion that the cause of death was suicide.

[6, 7] Defendant next urges that the evidence fails to show, as required in the policy, that the death was not caused wholly or partly, directly or indirectly, by disease or mental infirmity. The report of the autopsy surgeon states that insured's death was caused by second and third degree burns, but defendant argues there can be no liability under the policy because it does not appear that disease and mental infirmity did not in some measure contribute to the cause of death.

The decisions interpreting risk exclusion clauses similar to the one here involved, are not in accord. Some of the cases hold that the insurer is not liable unless the accidental injury is sufficient of itself to cause death to a healthy man, and that recovery is precluded if death would not have resulted except for preexisting disease or infirmity. Commercial Travelers' Mut. Acc. Ass'n v. Fulton, 2 Cir., 79 F. 423, 24 C.C.A. 654; National Masonic Acc. Ass'n v. Shryock, 8 Cir., 73 F. 774, 775, 20 C.C.A. 3; Thomas v. Fidelity & Casualty Co., 106 Md. 299, 67 A. 259; Ryan v. Continental Casualty Co., 5 Cir., 47 F.2d 472, 473; 6 Couch on Insurance (1930), § 1249, p. 4569.

On the other hand there is authority for what in our opinion is the correct rule, that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause. Scanlan v. Metropolitan Life Ins. Co., 7 Cir., 1937, 93 F.2d 942, 946; Kelly v. Prudential Ins. Co. of America, 1939, 334 Pa. 143, 6 A.2d 55, 59; 1 Appleman, Insurance Law & Practice (1941) § 403, pp. 497, 498; 6 Couch on Insurance (1930), § 1249, p. 4569; cf. Hanna v. Interstate B. M. Acc. Ass'n, 41 Cal.App. 308, 310, 182 P. 771.

Although it appears that the insured was suffering from an incurable cancer and was under the influence of narcotics given to relieve pain, and that by reason of his weakened and infirm condition he may have been less able than a normal person to withstand the effect of the injuries, there is evidence from which the court could conclude that the proximate cause of his death was burns received in a fire of accidental origin.

The order granting a new trial is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

27 Cal.2d 220

PEOPLE v. WILLIAMS.

Cr. 4666.

Supreme Court of California, in Bank.

Nov. 16, 1945.

1. **Burglary 🔑28(5)**

An information charging that accused burglarized butcher shop at 3299 Sixteenth street was not at variance with evidence because one of owners of shop in his testimony placed it at 3297 Sixteenth street, where the other owner testified that shop was located at 3299 Sixteenth street.

2. **Burglary 🔑28(5)**

Where information charged that accused burglarized butcher shop at 3299 Sixteenth street, evidence that building was located at 3297 Sixteenth street was not a fatal variance.

3. **Criminal law 🔑1167(1)**
Indictment and Information 🔑166, 171

Every fact or circumstance necessary to constitute crime charged must be alleged and proved, and proof must correspond with allegations in pleading but technical or trifling matters of discrepancy will not furnish ground for reversal.

4. **Indictment and Information 🔑171**

A variance is not "material" unless it is of such a substantive character as to mislead accused in preparing his defense, or is likely to place him in second jeopardy for same offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Variance".

5. **Criminal law 🔑295**

On a plea of double jeopardy, extrinsic evidence is admissible on trial to identify the crime of which accused has been convicted.

6. **Burglary 🔑20**

In prosecution for burglarizing a butcher shop, it was not necessary that exact address of building should have been included in information so long as building was described with sufficient particularity to show that it came within classification set forth in statute, and so long as accused was apprised of particular crime against which he had to defend. Pen.Code, § 459.

7. **Indictment and Information 🔑86(2)**

The information need go no further in particularizing place than to allege the county in which crime was committed. Pen.Code, § 459.

8. **Burglary 🔑45**

In prosecution for burglarizing butcher shop, sufficiency of identification of stolen turkeys, and reconciliation of any discrepancies in respective witnesses' statements were for jury.

9. **Witnesses 🔑337(6)**

Where accused in burglary prosecution on cross-examination denied that he had ever pleaded guilty to a felony or to burglary, municipal court record of accused's previous commitment to Preston School of Industry on a plea of guilty to burglary in the second degree was properly admitted. Code Civ.Proc. § 2051.

10. **Witnesses 🔑337(5)**

The rule that testimony may be impeached by proof that witness has suffered prior conviction of a felony applies to accused who testifies in his own behalf in criminal trial notwithstanding such evidence may tend to prejudice him before jury. Code Civ.Proc. § 2051.

11. **Witnesses 🔑337(5)**

The nature of crime of which accused has been convicted is a proper subject of inquiry in establishing fact of his conviction, and a "conviction" for purposes of impeachment means nothing more than a verdict of guilty. Code Civ.Proc. § 2051.

See Words and Phrases, Permanent Edition, for all other definitions of "Conviction".

12. **Criminal law 🔑273**

A plea of guilty is equivalent to verdict of a jury.

13. **Burglary 🔑49**
Criminal law 🔑27

Burglary in second degree is punishable by imprisonment in state prison and is therefore a felony, and while it is also punishable in the alternative by a county jail sentence, its status can be changed only by a judgment imposing a punishment other than imprisonment in the state prison. Pen.Code, §§ 17, 461.

14. **Criminal law 🔑27**

Character of sentence is not changed from a felony to a misdemeanor by mere imposition of a fine or jail sentence.

15. Witnesses ⚷337(6)

Accused's plea of guilty to burglary charge in municipal court constituted proof of his conviction of a felony within statute providing that witness may be impeached by showing that he had been convicted of a felony, and his commitment to Preston School of Industry, unlike a county jail sentence, was not a judgment imposing a punishment other than imprisonment in state prison so that it should thereafter be deemed a mere misdemeanor. Pen.Code, § 17, Code Civ.Proc. § 2051.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Vernon Williams was convicted of burglary in the second degree, and he appeals.

Affirmed.

Prior opinion, 160 P.2d 589.

Vernon Williams, pro. per.

Robert W. Kenny, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., and James F. Brennan, of San Francisco, for respondent.

SPENCE, Justice.

Defendant was found guilty by a jury of burglary in the second degree. He appeals from the judgment of conviction and from the order denying a new trial. As grounds for reversal he urges the following points: (1) that there is a fatal variance between the pleading and proof; (2) that the evidence is insufficient as a matter of law to sustain the verdict; and (3) that the trial court erred in its rulings on the admissibility of evidence.

This appeal follows the second trial of the defendant. The jury disagreed on the first trial. The present record discloses the following matters of evidence: Giacomi Tassi and William Fey, as partners, operated a butcher shop on the corner of Sixteenth and Dolores Streets in San Francisco. Tassi testified that the shop was located at 3297 Sixteenth Street, while Fey placed it at 3299 Sixteenth Street. The latter designation accorded with the information's recital of address in the charge of burglarious entry.

On the evening of November 23, 1943, just before Thanksgiving, Tassi and Fey closed their place of business and locked the doors about 6 p.m. At that time they had in their shop an uncertain number of turkeys, which belonged to various customers who had brought them there to be cleaned. Neither partner was able to state definitely the exact number of turkeys in their possession—their estimates varying from a dozen to eighteen or twenty— nor whether all of the turkeys were tagged or marked. When the partners arrived for business the next morning, November 24, they found that the door of an adjoining garage and the door to their shop had been forced open, and that the large plate glass window on the door to their shop had been smashed. The lock on the door was broken and the floor of the shop was covered with turkeys and papers. Both partners positively testified that four of the turkeys were missing.

Officer Loftus of the San Francisco Police Department testified that he was on duty in the Mission district during the early morning hours of November 24. While patrolling on foot about 1:15 a.m. along Twenty-fourth Street, near South Van Ness Avenue, some eight blocks from the butcher shop, he noticed a Ford panel delivery truck. In the body of the truck he saw some large bags with turkey legs protruding. He watched the truck from a nearby doorway, and in a few minutes he saw two men come out of a barber shop and start to enter the truck. Defendant was admittedly one of the men. The other was one De Mato. According to the officer, defendant was in the act of seating himself behind the wheel of the truck when he approached and asked the two men for some identification. Defendant produced his draft card. He then asked defendant if he was going to take the truck. Defendant answered that he was not because the truck did not belong to him. When asked why he had climbed into the truck, defendant replied that he had no reason to do so as the truck was not his. The officer decided to arrest the men and took them to a police call box on the corner of Twenty-fourth and Mission Streets. According to his testimony, the men ran away in different directions while he was telephoning. The officer pursued De Mato, chasing him for several blocks and finally shooting at him. He wounded De Mato and after seeing him removed in an ambulance, he returned to the barber shop where he secured a turkey from the proprietor. He put that turkey in the truck with the others. While he was not certain just how many turkeys were then in the truck, he thought there were four or five. Admittedly three turkeys were taken to the police station and ultimately returned to Tassi and Fey.

Both Tassi and Fey testified that the three turkeys returned to them by the police had been stolen from their shop. Tassi stated that after having handled a turkey, he would know it later by just looking at it. With respect to the identification of one of the turkeys, he testified that it belonged to a lady by the name of White; that it carried a tag from the California Poultry Company and had the salesman's name—Al—written thereon. The tag was introduced in evidence. Fey testified that he believed all three turkeys had, for purposes of identification, tags from the California Poultry Company showing the persons to whom they belonged, but only the one mentioned was produced at the trial.

Inspector McCann of the San Francisco Police Department testified that defendant was apprehended by him in a Market Street theatre on December 1, 1943. He stated that he saw defendant on the stairway coming from the balcony; that defendant, upon seeing him, turned and ran up the stairs; that he chased defendant; that defendant tried to escape through a balcony fire door, but was caught when the door failed to open. He further testified that he questioned defendant in the lobby of the theatre and later that day at the Hall of Justice. The officer's testimony is to the effect that during such questioning defendant denied that he could drive an automobile but that in searching through defendant's papers, he found a driver's license in defendant's name, and that after defendant admitted it was his, he returned it to defendant; that defendant denied that he had stolen the turkeys; that defendant gave the following account of his actions on the night the butcher shop was burglarized: that he had met De Mato in a pool room; that De Mato had asked him to borrow the truck; that he decided that he, rather than De Mato, should drive the truck because it had bad brakes; that De Mato wanted to pick up some turkeys; that when De Mato denied ownership of the truck so did he; that after standing a moment at the police call box, he and De Mato "split and ran." Resting upon defendant's admission during the questioning that the truck was his, that he had a driver's license and could drive, the officer stated that he never investigated further the ownership of the truck nor did he try to ascertain whether the Motor Vehicle Department had issued a driver's license to defendant.

Inspector Hunt of the San Francisco Police Department also testified as to conversations had with defendant at the Hall of Justice. He stated that he was present during McCann's questioning of defendant, and he generally corroborated that officer's account as above noted, with the exception that he said that defendant then told them that the truck belonged to his brother. With respect to another conversation had with defendant the same day, Hunt testified that defendant said that he had driven De Mato to Eighteenth and Mission Streets; that there De Mato got out and he stayed in the truck; that a few minutes later De Mato returned with four turkeys, which he threw in the back of the truck; that they then drove to the barber shop on Twenty-fourth Street and delivered one of the turkeys. Hunt also testified that defendant had a driver's license with him that day and that it, with other papers, was returned to defendant by McCann, but unlike the latter officer he had not examined the license and was unable to say whether or not it was in defendant's name. Hunt further testified that he saw three turkeys at the Hall of Justice and that on one was the tag that had been introduced in evidence; that at that time there were no bags on the turkeys, as some one had thrown them off. The barber was not produced as a witness.

Defendant took the stand as the sole witness on his own behalf. He produced a letter from the Motor Vehicle Department stating that no operator's license had been issued to him since 1927. He denied stealing the turkeys, or burglarizing the shop. He denied many of the statements attributed to him by the police officers. He testified that on the night in question he was coming out of the barber shop on Twenty-fourth Street and South Van Ness Avenue when he met De Mato; that De Mato asked him for a ride home; that they were just getting into the truck when Officer Loftus yelled at them from across the street; that upon request for identification he showed the officer his draft card; that he told the officer that the truck belonged to his brother; that there was no registration on the truck; that the officer then said that he would have to arrest them; that on the way to the police call box at Twenty-fourth and Mission Streets, De Mato and the officer engaged in an argument; that the officer slapped De Mato in the face; that while the officer was phoning, De Mato ran down Twenty-fourth Street and the officer started shooting at him; that when De Mato was about a half block distant, he, defendant, ran away too; that he ran because he was afraid. When asked why he had run from Officer McCann at the theatre, defendant testified that the officer had a pistol in his hand (which McCann denied on being recalled to the witness stand) and that he was afraid that he would be shot. Defendant described in detail his activities on November 23 but produced no corroboration. He testified that he purchased two turkeys that day at the California Poultry Company, and that these were the turkeys in the truck when he was arrested.

[1-5] Turning now to the points presented by defendant on this appeal, his first argument rests upon the fact that the information charged that he burglarized a butcher shop at 3299 Sixteenth Street, San Francisco, while Tassi, one of the owners of the shop, in his testimony placed it at 3297 Sixteenth Street. But, as above noted in the recital of the evidence in this case, Fey, the other owner, in exact substantiation of the charge, testified that the building was located at 3299 Sixteenth Street—thus a complete answer to defendant's objection of variance between pleading and proof. However, even if the testimony did establish the location of the shop to be 3297 instead of 3299 Sixteenth Street, the variance would not be fatal. Of course, it is elementary that every fact or circumstance necessary to constitute the crime charged must be alleged and proved, and the proof must correspond with the allegations in the pleading. But technical or trifling matters of discrepancy will not furnish ground for reversal. Under the generally accepted rule in criminal law a variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense. See many cases collected in Wharton's Criminal Evidence, vol. 2, 11th Ed., § 1028, p. 1799 et seq.; People v. Terrill, 132 Cal. 497, 499, 64 P. 894; People v. LaMarr, 20 Cal.2d 705, 711, 128 P.2d 345; People v. Guerrero, 22 Cal.2d 183, 187, 137 P.2d 21; People v. Evanoff, 45 Cal.App. 108, 112, 187 P. 54; People v. Harrington, 92 Cal.App. 245, 254, 255, 267 P. 942; People v. Larrabee, 113 Cal.App. 745, 747, 748, 299 P. 85; People v. Foster, 117 Cal.App. 439, 443, 4 P.2d 173. Here, of course, in preparing his defense defendant was in nowise prejudiced by the alleged variance. Nor can he successfully maintain that he may be placed in jeopardy again for the same offense. It is well settled that on a plea of double jeopardy, extrinsic evidence is admissible on the trial to identify the crime of which a defendant has been convicted. Dunbar v. United States, 156 U.S. 185, 191, 15 S.Ct. 325, 39 L.Ed. 390; United States v. Remington, 3 Cir., 64 F.2d 386, 388.

[6, 7] It was not necessary that the exact address of the building should have been included in the information so long as the building was described with sufficient particularity to show that it comes within the classification set forth in the statute, and so long as defendant was apprised of the particular crime against which he had to defend. Pen.Code, § 459. The information need go no further in particularizing the place than to allege the county in which the crime was committed. 4 Cal.Jur. § 14, p. 728; People v. Geiger, 116 Cal. 440, 442, 48 P. 389; People v. Webber, 133 Cal. 623, 624, 66 P. 38; People v. Redman, 39 Cal. App. 566, 568, 179 P. 725. The Geiger case is directly in point. There the information charged a burglary in feloniously entering "a building at St. Helena, in the county of Napa." The proof was that the building was situated a mile and a half from St. Helena. In holding the variance not to be material, the court said, 116 Cal. at page 442, 48 P. at page 389: "It does not appear that a designation of the local vicinage of the building was at all important for its identification, and, unless necessary for that purpose, it was surplusage to allege or prove its situation, further than that it was in the county of Napa."

[8] For his second point of argument defendant attacks the sufficiency of the evidence upon the claim that the prosecution failed to prove that the turkeys in the truck were turkeys stolen from Tassi and Fey. While it must be conceded that there is some confusion in the evidence on this issue and the record is not so clear as might be desired, still the sufficiency of the identification of the stolen property and the reconciliation of any discrepancies in the respective witnesses' statements at the trial were for the jury. Pertinent to observe here is the fact that both Tassi and Fey positively identified a certain tag of ownership as having been affixed to a turkey in their shop the night before the burglary, and that tag, later found attached to one of the turkeys in the truck admittedly operated by defendant, was introduced in evi-

dence. In these circumstances it was for the jury to determine whether or not to accredit defendant's entirely uncorroborated account of his previous purchase of the turkeys in his possession at the time of his arrest. "If it were the rule that trial judges or juries must decide cases in conformity with the defendant's testimony, few criminals would ever be convicted." People v. Rose, 26 Cal.App.2d 513, 517, 79 P.2d 737, 739. As was said in People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467, 470, with regard to the function of an appellate court in reviewing the correctness of factual determinations made in the course of a criminal trial: "This court has uniformly held that where there is evidence tending to support a verdict we cannot disturb the verdict upon the ground that it is not sustained by the evidence; and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond controversy that the weight to be accorded the evidence is a question for the jury."

[9-12] Connected with the point of defendant's credibility is his third and final argument challenging the propriety of the trial court's ruling in admitting into evidence a record of defendant's previous commitment to the Preston School of Industry. As above stated, defendant was the sole defense witness. On cross-examination he was asked if he had ever been convicted of a felony. He replied he had not. He was then asked if he had ever pleaded guilty to a felony. The objections of his counsel having been overruled, he replied that he had not. He was finally asked if he had ever pleaded guilty to a burglary. He answered that he had not. Thereafter, over objection, there was introduced into evidence a certain record of the Municipal Court of San Francisco. It showed that on May 16, 1941, defendant pleaded guilty to a burglary, that he was then certified to the superior court, that the degree of crime was there fixed as second degree, and that thereafter defendant, then "nineteen years and nine months" of age, was committed to the Preston School of Industry for a period of two years.

There was no error in allowing this record to be presented to the jury. In this state the testimony of a witness may be impeached by proof that he has suffered the prior conviction of a felony. Code Civ. Proc. § 2051. This rule applies to a defendant who testifies in his own behalf in a criminal trial despite the fact that such evidence may tend to prejudice him in the eyes of the jury. People v. La Verne, 212 Cal. 29, 32, 297 P. 561; People v. Romer, 218 Cal. 449, 452, 453, 23 P.2d 749. The nature of the crime of which he was convicted is a proper subject of inquiry in establishing the fact of his conviction. People v. David, 12 Cal.2d 639, 646, 86 P.2d 811, and cases there cited. That a "conviction" for purposes of impeachment means nothing more than a verdict of guilty is firmly held in People v. Ward, 134 Cal. 301, at page 307, 66 P. 372, at page 374, where it is said: "It is contended that, at the time the witness testified, he had not been 'convicted of a felony'; that to sustain the ruling of the court, it must be assumed, as a matter of law, that the verdict of guilty constituted a 'conviction.' That such verdict does constitute a conviction, within the ordinary as well as the technical meaning of the word, seems to be well settled." See, also, Pen.Code, § 1151; In re Anderson, 34 Cal.App.2d 48, 51-53, 92 P.2d 1020. A plea of guilty is equivalent to the verdict of a jury. Wharton's Criminal Evidence, vol. 3, § 1376, p. 2263; People v. Kepford, 52 Cal. App. 508, 513, 199 P. 64.

[13, 14] Burglary in the second degree is punishable by imprisonment in the state prison (Pen.Code, § 461) and is therefore a felony. Pen.Code, § 17. While it is also punishable, in the alternative, by a county jail sentence (Pen.Code, § 461), its status can be changed only by "a judgment imposing a punishment other than imprisonment in the state prison." Pen.Code, § 17; In re Miller, 218 Cal. 698, 700, 701, 24 P.2d 766; In re Rogers, 20 Cal.App.2d 397, 400, 66 P.2d 1237. This principle is stated in no uncertain terms in the Rogers case as follows, 20 Cal.App.2d at page 400, 66 P.2d at page 1238: "The necessary inference to be drawn from the language of section 17 of the Penal Code that 'when a crime punishable * * * by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes *after a judgment imposing a punishment other than imprisonment in the state prison,*' is that *the offense remains a felony* except when the discretion is actually exercised and the prisoner is punished only by a fine or imprisonment in a county jail."

[15] Defendant's plea of guilty to the burglary charge in 1941, under the record,

constituted proof of his conviction of a felony (27 Cal.Jur. § 117, p. 142; People v. Dail, 22 Cal.2d 642, 652, 140 P.2d 828; People v. Jacobs, 73 Cal.App. 334, 351, 238 P. 770), but his commitment to the Preston School of Industry—unlike a county jail sentence, the alternative penal term prescribed by statute—was not "a judgment imposing a punishment other than imprisonment in the state prison," so that under authority of section 17 of the Penal Code it should thereafter be deemed a mere misdemeanor. Rather, the record shows that defendant was subjected to regular criminal prosecution upon the felony charge and the degree of his crime was determined under the general law; and that thereafter the superior court suspended the pronouncement of judgment of sentence, defendant then being nineteen years of age, and ordered his commitment to the Preston School of Industry "to reform and retrieve him" to society as "an upright and useful citizen." People v. De Fehr, 81 Cal.App. 562, 572, 254 P. 588, 592. That such order of commitment did not affect defendant's status with respect to his conviction of a felony is well demonstrated in the De Fehr case, where the court said, 81 Cal.App. at page 574, 254 P. at page 593: "* * * while the minor is in the custody of the reform school authorities and until he has attained the age of majority, the superior court shall retain jurisdiction of his case and may at any time recall the commitment of such school and impose a judgment of sentence upon the minor for the offense with which he was charged." Accordingly, in the De Fehr case under comparable initial facts—defendant's plea of guilty to a felony charge in the superior court, suspension of sentence and commitment to the Preston School of Industry—it was held proper for the superior court, with just cause, to recall the order of commitment and sentence defendant to imprisonment in the state prison. The conviction, unmodified as the result of the reform school commitment, furnished the basis for the imposition of sentence involving penal punishment.

Analogous factual considerations formed the basis of the decision in People v. Maloney, 92 Cal.App. 371, 268 P. 472, that it was not error to admit in evidence for impeachment purposes the record of a reform school commitment. There, after defendant, on cross-examination, had denied previous conviction of a felony, the prosecution introduced documentary proof of his having "pleaded guilty in the superior court * * * of violating section 146 California Vehicle Act, a felony" and his "commitment * * * to the Preston School of Industry." In sustaining the propriety of the challenged procedure, the appellate court aptly distinguishes the cases of People v. Hoffman, 199 Cal. 155, 248 P. 504, and People v. Adams, 76 Cal.App. 178, 244 P. 106, on which defendant here relies as ground for reversal. Accordingly, it is said, 92 Cal.App. at page 373, 268 P. at page 472: "The facts in those two cases were very different from the facts in the case at bar. In the Hoffman case the record of the juvenile court was held to be erroneously admitted for the reason that the proceedings in that court are not penal in their character. In the Adams case the error consisted in the admission of evidence showing that defendant had been committed to the Whittier Industrial School at the age of 13 years. In neither case could it be said that defendant had been convicted of a felony. The commitment which was admitted in evidence in the case now before us did not issue in a proceeding in the juvenile court." Following the Maloney case and quoting at length therefrom is the opinion in People v. Goodwin, 105 Cal.App. 122, 124-126, 286 P. 1087, holding that the trial court had properly admitted evidence that the defendant had been convicted of grand larceny and had then been committed to the Preston School of Industry. To like effect is People v. Dykes, 107 Cal.App. 107, 116, 290 P. 102.

In so far as concerns the controverted point now under consideration, it manifestly is immaterial whether the defendant's plea of guilty be made, as in the Maloney case, to a statutorily designated felony or, as here, it relates to an offense punishable in the alternative but deemed a felony "unless the [trial] court actually exercises [its] discretion by imposing only a fine or a jail sentence." In re Rogers, 20 Cal. App.2d 397, 400, 66 P.2d 1237, 1238. In either case proof of the defendant's unchanged status with regard to his prior conviction of a felony is the governing factor for impeachment purposes. There is nothing contrary to this reasoning in the decision of People v. Trimble, 18 Cal.App. 2d 350, 63 P.2d 1173. There the defendant, as in the Maloney case, had a prior conviction of a violation of section 146 of the California Vehicle Act, St.1931, p. 2133, which section expressly provided that a person committing the acts prohibited "shall be deemed guilty of a felony." After conviction the defendant was sentenced to pay a fine. The question involved was whether such a conviction made him a two-time loser. In holding that it did not, the appellate court stated, 18 Cal.App.2d at page 351, 63 P.2d at page 1174: "The characterization given a penalized act by the Legislature is immaterial in determining whether or not it is a misdemeanor or a felony, the sole test being the nature and extent of the punishment imposed. People v. Sacramento Butchers' Ass'n, 12 Cal.App. 471, 489, 107 P. 712. If the punishment imposed is other than death or imprisonment in the state prison, the penalized act is for all purposes thereafter deemed a misdemeanor. Section 17, Penal Code." But, as above stated, here defendant's prior felony conviction was unaffected as the result of the order of commitment to the Preston School of Industry, since it did not involve "penal punishment." People v. De Fehr, 81 Cal.App. 562, 572, 254 P. 588.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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27 Cal.2d 187

CULLEY v. NEW YORK LIFE INS. CO.

L. A. 19336.

Supreme Court of California, in Bank.

Nov. 5, 1945.

1. Insurance 🔑362

Where premiums were waived under life policy only if due after receipt of proof of total disability and proof of disability was not received by insurer until February, 1941, finding that no premium was due and payable on August 20, 1940, because insured was totally and presumably permanently disabled could not be sustained.

2. Insurance 🔑362

Where premiums were waived under life policy only if due after receipt of proof of total disability, and proof of disability was not received until February, 1941, the policy lapsed for nonpayment of August, 1940, premium.

3. Insurance 🔑665(5)

In action on life policy containing provision for waiver of premiums after receipt of proof of total disability, evidence sustained trial court's finding that insured was totally and presumably permanently disabled before August 20, 1940, the premium payment date.

4. Insurance 🔑516

"Total disability" within life policy is a disability that prevents insured from working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage.

See Words and Phrases, Permanent Edition, for all other definitions of "Total Disability".

5. Insurance 🔑516

A finding that insured is totally disabled is not precluded by fact that he still goes to his office irregularly and engages sporadically in business matters.

6. Insurance 🔑95

Where inspector was sent by insurer to investigate claim under life policy, knowledge that inspector acquired in course of his investigation was knowledge of his principal.

7. Insurance 🔑665(7)

In action on life policy involving issue whether proof of insured's disability was received by insurer within six months after insured's default in payment of premium due August 20, 1940, evidence disclosing that an inspector, sent by insurer to investigate claim, called at insured's office on February 20, 1941, that inspector brought a form for proof of disability which was filled out in his presence and signed at hospital on behalf of insured, but that claim form was not filed with insurer until following day, sustained finding that proof of insured's disability was furnished within six months after his default.

8. Insurance 🔑543

The term "due proof" of disability, in absence of a specific requirement in policy, does not require any particular form of proof which insurer might arbitrarily demand, but only a statement of fact as, if established in court, would require payment of claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Proof".

9. Insurance ⚷543

Due proof of disability of insured is required to enable insurer to form an estimate of its rights and liabilities but what the reasonable requirements for that purpose are will depend on circumstances of particular case.

10. Insurance ⚷362

Where life policy provided for restoration thereof if due proof that insured was totally and presumably permanently disabled was received by insurer not later than six months after default and insured's representative had advised insurer of insured's disability and of intention to base thereon claim that policy had not lapsed, and insurer sent inspector to investigate claim on last day of the six month period and parties regarded the meeting as a matter of making proof of disability, fact that they also contemplated filing of proof in written form did not render ineffective proof previously given to inspector.

11. Insurance ⚷362

Where life policy provided that it would be restored provided due proof that insured was totally and presumably permanently disabled was received by insurer not later than six months after default, proof of disability was not required to be given in writing.

12. Insurance ⚷362

The specification of receipt of due proof at insurer's home office in life policy provision relating to income payments and waiver of premiums and omission of such a requirement in provision relating to restoration of policy after lapse because of default in payment of premium indicated that such a requirement was not intended in case of restoration.

13. Insurance ⚷146(3)

Any doubt regarding meaning of life policy must be resolved in favor of insured.

14. Insurance ⚷362

Where written form furnished by insurer for proof of disability of insured contained question "From what date has your disability prevented you from engaging in any occupation whatsoever for remuneration or profit?" the question called for a legal conclusion as to meaning of total disability and date of its commencement and therefore the answer given was subject to explanation and correction.

15. Insurance ⚷550

In absence of estoppel, statements of insured in proof of loss are not conclusive.

16. Insurance ⚷550

A statement in proof of loss that is not true does not estop beneficiary as a matter of law where insurer is not prejudiced thereby, but it is merely evidence to be considered and given such weight as the jury think it entitled to in connection with all other evidence.

17. Insurance ⚷362

Where clause for restoration of life policy required arrears in premiums to be paid with 5 per cent. interest but did not specify any period within which such payment should be made and insurer denied liability for disability benefits, not on ground that no payment had yet been made, but on ground that total disability had not begun until after default, such unconditional denial of liability gave rise immediately to a cause of action and rendered any tender of premiums unnecessary.

18. Insurance ⚷362

Where insurer improperly refused to restore life policy and denied liability for disability benefits so that cause of action arose while insured was alive, action on policy was not barred because complaint was filed after insured's death.

19. Insurance ⚷362

Where disability payments under life policy were to begin only on receipt of proof of disability at insurer's home office and such proof was not received there until March 3, 1941, disability benefits were recoverable only from that date.

20. Insurance ⚷362

An insurer's denial of liability for disability benefits amounts to a waiver of requirement that proof be submitted.

21. Insurance ⚷362

Where letter in which insurer notified insured that life policy had no further insurance value was written in answer to an inquiry from insured without any knowledge on insurer's part that insured was disabled, the letter was not a denial of liability for disability benefits and did not amount to a waiver of requirement that proof of disability be submitted.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Dorothy K. Culley against the New York Life Insurance Company on a life policy. Judgment for plaintiff, and defendant appeals.

Judgment modified, and as modified, affirmed.

Prior opinion, 155 P.2d 383.

Meserve, Mumper & Hughes and Hewlings Mumper, all of Los Angeles, for appellant.

C. H. Hartke, of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action to recover the face value and disability benefits of a life insurance policy issued in 1923 by defendant on the life of plaintiff's husband, who died on April 14, 1941, of cancer of the chest. The insured defaulted in the payment of the quarterly premium of $70 due on August 20, 1940, and failed to pay the premium during the one-month period of grace allowed in the policy. On September 22, 1940, defendant agreed to give the insured until October 20th to make good the default. The insured paid defendant $20 in cash, which gave him term insurance at the rate of $2.00 per thousand for one month, and signed a so-called blue note for $50, plus interest, payable on October 20th. All rights under the policy were to be restored upon payment of the note, whereas failure to pay would make the default in the payment of the premium final as of August 20th. Eddie v. New York Life Ins. Co., 75 Cal.App. 199, 242 P. 501; Talsky v. New York Life Ins. Co., 244 App.Div. 661, 280 N.Y.S. 69. The insured failed to pay the note when it fell due, and on October 26, 1940, defendant notified him that his policy had lapsed.

Plaintiff relies on section 1(4) of the policy, which provides: "In the event of default in payment of premium after the Insured has become totally disabled, the policy will be restored upon payment of arrears of premium with interest at 5%, provided due proof that the Insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default and the benefits under this section shall then be the same as if said default had not occurred." The trial court found that the insured was totally and presumably permanently disabled before August 20th; that defendant received due proof of such disability on February 20, 1941; and that defendant denied liability under the policy on February 18, 1941, and thereby waived any further premiums. The court also found that no premium was due and payable on August 20, 1940, on the ground that the insured was then disabled within the meaning of the policy. The court gave judgment for the plaintiff in the sum of $10,632.46, which included disability benefits for a period of nine months. Defendant appeals.

[1, 2] The finding that no premium was due and payable on August 20, 1940, cannot be sustained. Premiums are waived under the policy only if due after receipt of proof of total disability. Since no proof was received until February, 1941, defendant's contention that the policy lapsed for nonpayment of the August premium must be upheld. The question remains, however, whether the policy was restored under the provisions of section 1(4) thereof.

[3-5] Defendant contends that the trial court's finding that the insured was totally and presumably permanently disabled before August 20, 1940, is not supported by the evidence. The evidence shows without conflict that for some time before 1940 the insured had cancer; that at least since the beginning of July, 1940, he suffered severe pain and lost weight and strength rapidly; and that he was compelled to forego his usual business activities as real estate broker and appraiser. He came to his office irregularly and stayed only for short periods, avoiding customers. He performed no work after July of 1940 for which he or his firm received any remuneration. The policy provides that "Disability shall be deemed to be total whenever the Insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit." It is settled in this state that total disability within the meaning of this provision is a disability that prevents the insured from "working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity." Erreca v. Western States Life Ins. Co., 19 Cal.2d 388, 394, 395, 121 P.2d 689, 694, 141 A.L.R. 68; Hurwit v. Prudential Ins. Co. of America, 45 Cal.App.2d 74, 81, 113 P.2d 691. A finding that the insured is totally disabled is not precluded by the fact that he still goes to his office irregularly and engages sporadically in business matters. "According to over-

whelming authority, the term 'total disability' does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way. Recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business." 19 Cal.2d 388, 396, 121 P.2d 689, 695, 141 A.L.R. 68. The finding of the trial court must therefore be upheld, for the evidence clearly shows that the condition of the insured before August 20, 1940, prevented him from performing the duties of his occupation or any other occupation in which he might reasonably have been expected to engage.

[6] Defendant also contends that it did not receive due proof of the insured's disability within six months after his default in the payment of the premium. On February 15, 1941, a representative of the insured called at defendant's Los Angeles office. He showed the policy to two of defendant's employees, one of them defendant's supervisor of agencies, and told them that the insured was critically ill in the hospital with cancer; that he intended to rely on the restoration clause in the policy; that since the premium was in default since August 20th, the six months' period would expire on the 20th of February; and that it was therefore necessary to have immediately the forms on which to claim disability benefits. This conversation occurred on Saturday, February 15, 1941. Both employees replied that they had no forms at that time but that the forms would be mailed to the office of the insured "and would be there the first thing Monday morning, February 17th." The forms were not mailed as promised, but on the afternoon of February 20th an inspector sent by defendant to investigate the claim called at the office of the insured. He brought a form for proof of disability, which was filled out in his presence, and was signed at the hospital by plaintiff on behalf of her husband. The inspector inquired of the business partner of the insured with regard to the circumstances of the insured's disability and was told "substantially the facts with reference to Mr. Culley," to which the partner testified at the trial. This testimony described in detail the decline in the insured's health throughout 1940. The inspector was sent by defendant to investigate the claim, and the knowledge that he acquired in the course of his investigation is the knowledge of his principal. Vanciel v. Kumle, 26 Cal.2d 732, 160 P.2d 802.

[7-10] In view of this evidence, as to which there is no conflict, the trial court was justified in finding that due proof of the insured's disability was furnished on February 20th, although the claim form filled out in the presence of the inspector was not filed with defendant until the following day. The policy does not provide that proof of disability be given in writing. It is settled that the term "due proof" of disability, in the absence of a specific requirement in the policy, "does not require any particular form of proof which the insurer might arbitrarily demand, but only a statement of fact as, if established in court, would require payment of the claim." McAndrews v. Prudential Ins. Co., 132 Neb. 332, 335, 271 N.W. 857, 859, 109 A.L.R. 821; Aetna Life Ins. Co. v. Tipps, 132 Tex. 213, 121 S.W.2d 324; Zorger v. Prudential Ins. Co., 282 Ill.App. 444; Forman v. New York Life Ins. Co., 267 Mich. 426, 255 N.W. 222; Prudential Ins. Co. v. Litzke, 36 Del. 592, 179 A. 492; Wade v. Metropolitan Life Ins. Co., 179 S.C. 70, 183 S.E. 589; see 109 A.L.R. 825; Vol. 3 Appleman Insurance Law and Practice, § 1444; see, also, Kennedy v. Occidental Life Ins. Co., 18 Cal.2d 627, 631, 117 P.2d 3.

Due proof is required to enable the insurer to form an estimate of its rights and liabilities, O'Reilly v. Guardian Mutual Life Ins. Co., 60 N.Y. 169, 19 Am.Rep. 151; American Nat. Ins. Co. v. Lee Lim Shee, 9 Cir., 104 F.2d 688, certiorari denied 308 U.S. 592, 60 S.Ct. 122, 84 L.Ed. 495; Baba v. Mutual Ben. Health & Acc. Ass'n, 280 Mich. 531, 273 N.W. 795. What the reasonable requirements for that purpose are will depend upon the circumstances of the particular case. See Prudential Ins. Co. v. Litzke, supra. In the present case the insured's representative advised defendant of the insured's disability and of his intention to base thereon his claim that the policy had not lapsed and that he was entitled to disability benefits. He also advised defendant that the matter was urgent. Defendant did not explain at the trial why it did not keep the promise made to the insured's representative that the forms would be available to the insured on February 17th. Defendant, however, sent its inspector on the afternoon of the 20th, the last day of the six-month period, thus giving the insured an eleventh hour chance to comply with the requirements of the policy and to provide defendant with the necessary information. It is clear from the evidence that the meeting that took place under these circumstances was for the purpose of making proof of disability. Defendant contends, however, that since it was contemplated that a formal claim should be filed with the insurance company, the information given at the meeting on February 20th was regarded by the parties as merely preliminary to the presentation of written proof. The record discloses that the parties regarded the meeting "as a matter of making a proof of disability." The fact that they also contemplated the filing of the proof in written form does not render ineffective the proof previously given.

[11-13] Although the policy contains no express requirement that proof be given in writing, defendant contends that such a requirement should be implied from section 1(3) of the policy which provides: "3. Benefits.—Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally and presumably permanently disabled * * * the following benefits will be granted: (a) Income Payments * * * (b) Waiver of premiums. * * *" This provision is not concerned with how proof is to be given, but with when benefits are to begin. The policy does not require that proof of disability be received at the home office of the company before it can be restored. Section 1(4) of the policy provides that it will be restored "provided due proof that the Insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default." This provision requires merely that due proof be "received by the Company," not that it be received at its home office. In fact it is not contended that defendant's Los Angeles office had no authority to receive proof of disability. The specification of receipt at the home office in the provision relating to income payments and waiver of premiums and the omission of such a requirement in the provision relating to restoration plainly indicates that such a requirement was not intended in the case of restoration. In any event any doubt as to the meaning of the policy must be resolved in favor of the insured under well known rules of interpretation. Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 120 P.2d 31; Baine v. Continental Assur. Co., 21 Cal.2d 1, 129 P.2d 396, 142 A.L.R. 1253.

[14] Defendant contends that plaintiff did not prove that the insured was totally disabled on August 20, 1940, since the written claim shows on its face that total disability did not begin until nine days after the policy had lapsed. The written form contained the following question and answer: "From what date has your disability prevented you from engaging in any occupation whatsoever for renumeration or profit? August 29, 1940." This question called for a legal conclusion as to the meaning of total disability and the date of its commencement, see Erreca v. Western States Life Ins. Co., 19 Cal.2d 388, 394, 121 P.2d 689, 141 A.L.R. 68, and the answer given was subject to explanation and correction. August 29, 1940, was the date when Dr. Wilke, under whose care the insured remained until his death, first received an emergency call to see the insured, who was suffering from an extreme pain in his chest. The insured had been under other medical care before that time and his health had failed long before that particular night of suffering. The written form also referred to the insured's failing health before August 29, 1940, for the question as to when the illness leading to the insured's disability began was answered: "Pain began in March, 1940. Doctors state that cancer must have begun over 2 years ago. Spent part of time in bed since latter part of June, 1940." Defendant did not rely upon plaintiff's written statements but chose instead to make its own investigation and concluded that total disability did not begin until December 19, 1940, the date when the insured went to his office for the last time. Defendant was familiar with substantially the same facts as the trial court. That it appraised them differently is immaterial.

[15, 16] In the absence of estoppel, statements in proofs of loss are not conclusive. "A statement in a proof * * * that is not true does not estop the beneficiary as a matter of law where the insurer is not prejudiced thereby. It is merely evidence to be considered and given such weight as the jury think it entitled to in connection with all other evidence in the case." Ocean Accident & Guarantee Corporation v. Moore, 85 F.2d 369, 372, certiorari denied 299 U.S. 609, 57 S.Ct. 235, 81 L.Ed.

449; First Nat. Bank v. Glens Falls Ins. Co., 4 Cir., 27 F.2d 64; Supreme Tent Knights of Maccabees of the World v. Stensland, 206 Ill. 124, 68 N.E. 1098, 99 Am.St.Rep. 137; Harrington v. Southern Surety Co., 206 Iowa 925, 221 N.W. 577; Gass v. Commonwealth Casualty Co., 113 Kan. 510, 214 P. 1115; Prudential Ins. Co. v. Kendrick, 262 Ky. 297, 90 S.W.2d 52; Spencer v. Citizens' Mut. Life Ins. Ass'n, 142 N.Y. 505, 37 N.E. 617; Wade v. Metropolitan Life Ins. Co., supra; Clarke v. Travelers' Ins. Co., 94 Vt. 383, 111 A. 449; Armstrong v. Modern Woodmen of America, 93 Wash. 352, 160 P. 946, Ann.Cas. 1918E, 263; see Appleman op. cit., §§ 1471-1474 and 7 Couch, Cyclopedia of Insurance Law, § 1556.

Wachtel v. Equitable Life Assur. Soc., 266 N.Y. 345, 194 N.E. 850, 851, on which defendant relies, is clearly distinguishable. In that case the policy provided for double indemnity upon due proof that "death * * * resulted from bodily injuries caused * * * exclusively * * * by * * * accidental means." The proof submitted to the insurance company stated that the insured had died of coronary thrombosis. In fact death resulted from an accidental injury. Recovery of the double indemnity was denied on the ground that "a party, required by contract to submit proof of certain facts as a condition of liability, does not perform the condition by submitting through error proof that these facts do not exist." 266 N.Y. 345, 351, 194 N.E. 850, 852. In the Wachtel case the plaintiff failed to furnish any proof of accidental death, the risk insured against. In the present case ample proof of total disability was given together with an answer to a question that was at most an admission. The opinion in the Wachtel case declares, in conformity with the overwhelming weight of authority that "Admissions, in proofs of claims to insurance companies, like other admissions, are subject to explanation. They are not conclusive, and proof may be presented that they are erroneous." 266 N.Y. 345, 351, 194 N.E. 850, 852.

[17, 18] This action is not barred, as defendant contends, on the ground that the insured failed to pay the arrears in premium with interest or that the complaint was filed after his death. The restoration clause requires arrears in premium to be paid with 5 per cent interest but does not specify any period within which such payment must be made. When the insured filed his claim for disability benefits with defendant, he did not tender the November 20th premium but tendered a check for the August 20th premium and interest, which defendant refused to accept. Since defendant was not entitled to the arrears of premium unless the policy was restored, it was reasonable for the insured to wait until his claim was passed upon before tendering any payment. On March 10, 1941, defendant made its position known. It denied liability, not on the ground that no payment had yet been made, but on the ground that total disability had not begun until after default. Such unconditional denial of liability gave rise immediately to a cause of action and rendered any tender of premiums unnecessary. Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 P. 869, 17 Am.St.Rep. 233; McCollough v. Home Ins. Co., 155 Cal. 659, 102 P. 814, 18 Ann.Cas. 862; Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 180 P. 607; Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 49 P.2d 590; Grant v. Sun Indemnity Co., 11 Cal.2d 438, 80 P.2d 996; Paez v. Mutual Indem. etc., Ins. Co., 116 Cal.App. 654, 3 P.2d 69. Since the cause of action arose while the insured was alive, it is immaterial that the complaint was filed after his death. Anderson v. New York Life Insurance Co., 64 Cal.App.2d 798, 149 P.2d 462, and Johnson v. Mutual Life Insurance Co., 4 Cir., 70 F.2d 41, are distinguishable on the ground that in those cases the insured did not furnish proof of disability before his death.

[19-21] The trial court erroneously awarded disability benefits for a period of nine months preceding the death of the insured. Disability payments under the policy are to begin only upon receipt of proof of disability at the company's home office. Such proof was not received there until March 3, 1941. If, however, the trial court was correct in finding that the defendant denied liability on February 18, 1941, the obligation to pay disability benefits began that day, for the denial of liability amounted to a waiver of the requirement that proof be submitted. The letter, dated February 13, 1941, in which defendant notified the insured that the policy had no further insurance value was received on February 18, 1941. That letter, however, was written in answer to an inquiry from the insured without any knowledge on defendant's part that the insured was disabled. When it was written, the policy had no further insurance

value unless the insured had been totally disabled as far back as August 20, 1940. Disability was not mentioned in September, 1940, when the insured gave defendant his note for the August premium. Nor was it mentioned in October, 1940, when the insured gave defendant his check in payment of that note or in the same month when he paid a premium on another policy, although he could have avoided that payment by filing proof of disability. Finally, disability was not mentioned even in the inquiry as to the status of the policy, which defendant answered in its letter of February 13, 1941. While the insured was under no duty to furnish proof of total disability before February 20, 1941, defendant was under no duty to suggest to him that his policy might be restored under conditions that it had no reason to believe existed.

The judgment is modified to provide for deduction of an amount equal to the premiums due August 20th and November 20th, 1940, with interest at 5 per cent to date of judgment and for recovery of disability benefits from March 3d, 1941. As so modified, the judgment is affirmed; plaintiff to recover her costs on appeal.

GIBSON, C. J., CARTER, SCHAUER, and SPENCE, JJ., NOURSE and PETERS, JJ., pro tem., concurred.

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27 Cal.2d 232

GOSPEL ARMY v. CITY OF LOS ANGELES et al.

L. A. 18808.

Supreme Court of California, in Bank.

Nov. 20, 1945.

Rehearing Denied Dec. 17, 1945.

1. Licenses 🔑7(1)

Municipal corporations 🔑591, 625

Ordinances requiring permits from junk and secondhand dealers, payment of fees therefor, and regulating the conduct of such businesses are reasonable and the standards prescribed are adequate.

2. Constitutional law 🔑84

Municipal corporations 🔑616

That salvage was collected and put through salvage mill and products of mill were sold, and that secondhand store was operated by a religious organization which used proceeds to propagate its religious doctrines and to aid the poor, did not render unconstitutional ordinances regulating junk and secondhand dealers which were valid as to nonreligious organizations, or interfere with religious freedom of such religious organization. Const.Cal. art. 1, § 4; U.S.C.A.Const. Amend. 1.

3. Municipal corporations 🔑594(1), 625

Provisions of ordinances regulating solicitation of funds for charity designed to secure information that will assist the public in judging the nature and worthiness of the cause for which the solicitation is made and to insure the presentation of such information to prospective donors are not unduly burdensome or unreasonable.

4. Evidence 🔑83(2)

Where department of social services was given no authority to withhold permits to solicit funds for charity when requirements of ordinances were met, it could not be assumed that the department would abuse its authority in order to withhold them.

5. Evidence 🔑83(2)

Laws are not made upon the theory of the total depravity of those who are elected to administer them, and the presumption is that municipal officers will not use their powers villainously or for the purposes of oppression or mischief.

6. Municipal corporations 🔑591, 625

Ordinances regulating solicitation of funds for charity and classifying persons and agencies engaged therein, and giving social service commission power to investigate and indorse charitable corporations or associations, are reasonable and the standards provided are adequate.

7. Constitutional law 🔑84

"Religious liberty" includes absolute freedom to believe, but only limited power to act. Const.Cal. art. 1, § 4; U.S.C.A. Const. Amend. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Religious Liberty".

8. Constitutional law 🔑84

The constitutional guaranty of religious liberty protects the profession of a religious belief by word of mouth or in writing, the dissemination of the doctrines of a religious organization by preaching from the pulpits or other methods of evangelism, or the right to refuse to state beliefs against the dictates of one's conscience, but does not give religious organizations unlimited freedom in carrying on all activities relating to their religious programs. Const.Cal. art. 1, § 4; U.S.C.A. Const. Amend. 1.

9. Constitutional law 🔑84

Activities characteristic of the secular life of the community may properly be a concern of the community even though they are carried on by a religious organization. Const.Cal. art. 1, § 4; U.S.C.A. Const. Amend. 1.

10. Constitutional law 🔑81
Municipal corporations 🔑594(1)

The occupation of soliciting contributions to charitable purposes is so far subject to the police power that it may be regulated by laws or ordinances providing for a reasonable supervision over the persons engaged therein and for the application and use of the contributions received to the purposes intended in order to prevent unscrupulous persons from obtaining money or other things under the pretense that they were to be applied to charity and to prevent the wrongful diversion of such funds to other uses or to secure them against waste, and measures reasonably tending to secure such ends are valid.

11. Constitutional law 🔑84
Licenses 🔑7(1)
Municipal corporations 🔑626

Provisions in ordinance regulating the solicitation of funds for charity that promoters and solicitors working under them submit proof of their good character and reputation does not discriminate against religious organizations or censor their religious beliefs or vest arbitrary power in the administrative board in authorizing it to withhold a license if it is not satisfied that the applicant is of good character and reputation. Const.Cal. art. 1, § 4; U.S.C.A.Const. Amend. 1.

12. Licenses 🔑7(9)

License fees exacted by ordinances regulating solicitation of funds for charity in order to cover expenses of investigations and administration were reasonable.

13. Licenses 🔑22

Where ordinances regulating solicitation of funds for charity required that promoters and solicitors working under them submit proof of their good character and reputation and authorized board to withhold license if not satisfied that applicant was of good character and reputation, board had no discretion to withhold a license if applicant's good character and reputation and financial responsibility were established and the bond required by ordinances was filed, and board must act reasonably in the light of the evidence presented.

14. Constitutional law 🔑84
Municipal corporations 🔑594(2)

The provisions in ordinances regulating solicitation of funds for charity that board might revoke a license in case of unfair, unjust, inequitable, or fraudulent practices of solicitation was neither vague nor uncertain and afforded no possibility for the censorship of religious beliefs. Const.Cal. art. 1, § 4; U.S.C.A.Const. Amend. 1.

15. Municipal corporations 🔑594(1)

Where ordinance provided that no person should solicit any contribution for any charitable purpose without complying therewith but excepted solicitation for evangelical missionary or religious purposes, the solicitation of funds by a religious organization for charitable purposes as part of its religious program was subject to such ordinance. Const.Cal. art. 1, § 4; U.S.C.A.Const. Amend. 1.

CARTER, SCHAUER, and EDMONDS, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by the Gospel Army against City of Los Angeles and others to enjoin the enforcement of certain ordinances regulating transactions in secondhand goods and solicitations for charitable purposes on ground that as applied to plaintiff the ordinances abridged religious liberty in violation of the Constitutions of the United States and of the State of California. From a judgment for plaintiff, the defendants appeal.

Judgment reversed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Wilbur Bassett, Deputy City Atty., all of Los Angeles, for appellants.

Robert H. Wallis, of Los Angeles, for respondent.

TRAYNOR, Justice.

Certain ordinances of the City of Los Angeles regulate transactions in secondhand goods and solicitations for charitable purposes. Plaintiff, an incorporated religious organization, brought this suit to enjoin the enforcement of these ordinances as applied to it on the ground they abridged its religious liberty in violation of the Constitution of the United States and the Constitution of California. The trial court found that plaintiff is "engaged exclusively in the promulgation, by literature and word of mouth, of its religious beliefs, by and through its auxiliaries, and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities." It enjoined defendants from "further interference and threatened acts, which would in any way prevent the free exercise of the religious liberty and freedom of worship of the said Plaintiff." Defendants appeal.

The finding of the trial court must be viewed in the light of the evidence, which is undisputed. Religious services at plaintiff's mission are conducted by a minister ordained by it whose compensation depends entirely on solicited contributions. Plaintiff engages in missionary work, distributes the New Testament and religious tracts free to the public, and gives assistance to those in need. It collects salvage from the public to obtain funds to propagate its religious doctrines and to provide aid to the poor. Some of the salvage is sold in a secondhand goods store operated by plaintiff; some, such as clothing, is distributed to the poor; goods not suitable for further use go directly to a salvage mill. The salvage is collected by plaintiff's "industrial solicitors" in four of plaintiff's trucks. The money received from the sale of secondhand goods in plaintiff's store is used to meet the cost of operating the store, including the compensation paid to the manager and the solicitors. Whatever remains is paid into plaintiff's treasury. Ninety per cent of the money received for the mill material goes to the drivers of the trucks; the remainder is turned over to the manager of the store for plaintiff's treasury.

Other employees of plaintiff solicit money from the public. Solicitors make the object of their mission known by showing to prospective donors a printed card stating that "the bearer whose signature is hereon attached for identification is duly authorized to solicit money, food, clothing or any other useful articles that will help the Gospel Army to carry on their religious home missionary and evangelical work among the poor and underprivileged." About fifty per cent of the funds raised is absorbed by the cost of soliciting, including the compensation of the solicitors, which is paid on a percentage basis. The funds remaining are used to pay the cost of furnishing tracts and religious literature free to the public and to supply food, lodging, clothing and car fare to the poor.

[1] Section 24.01 of the Los Angeles Municipal Code defines a "junk dealer" as "a person having a fixed place of business in this City who goes from house to house or from place to place, gathering, collecting, buying, selling or otherwise dealing in any old rags, sacks, bottles, cans, paper, metal or other articles commonly known as junk." A "secondhand dealer" is "a person engaging in, conducting, managing, or carrying on the business of buying, selling or otherwise dealing in secondhand goods, wares or merchandise." Junk dealers and secondhand dealers must obtain a permit to engage in business from defendant city's Board of Police Commissioners. The following "Requisites of Permits" are set forth in subsection (c) of Section 24.01: "(1) Persons desiring to obtain a permit to conduct, manage or deal in any business mentioned in subsection 'a' of this Section shall file an application in writing with the Board specifying by street and number the place where such business is proposed to be conducted or carried on; junk collectors having no fixed place of business shall specify in such application their residence by street number. The application shall be signed by the applicant and shall contain his residence address. (2) Before receiving an application for any permit the Board shall require the payment of such fees as are hereafter specified. (3) Upon receipt of such application the Board shall cause to be investigated the business of the applicant and location at which applicant proposes to engage in business as specified in said application. Thereafter the Board may issue a permit to the applicant which shall be effective for the remaining portion of the current year. (4) Persons operating under the provisions of this Section shall be required to secure an annual renewal of such permit commencing January 1st of the succeeding year in which such permit was

granted. (5) No person holding a permit to conduct, manage, carry on or deal in any business mentioned in subsection 'a' of this Section shall buy, sell or otherwise deal in secondhand jewelry, precious stones, precious metals (including old gold), watches or other similar secondhand merchandise without first applying for and receiving a special permit therefor from the Board in the manner provided in this Section for securing ordinary permits." The fees prescribed are set forth in subsection (d): "(1) Applications for permits other than provided for in this subsection shall pay the sum provided in Section 22.10; (2) Applications for special permits, the sum of $50.00; (3) Applications for annual permit renewal, the sum of $25.00; (4) Applications for changing location of place of business for which a permit has been granted, the sum of $10.00; (5) Change of ownership, the sum of $10.00, to be applicable only in cases where the new owner is already operating under a permit issued pursuant to provisions of this Section." Subsection (e) provides: "(1) The Board shall not grant any permit provided for in this Section to persons who fail, refuse or neglect to comply with the laws and ordinances relating to and regulating the business for which such permit is sought. (2) Persons applying for or obtaining permits under the provisions of this Section shall comply with the provisions of this Section." Subsection (f) provides for the revocation of permits: "Any permit issued under the provisions of this Section may be revoked or suspended upon the grounds provided for in this Section: (1) * * * If persons holding permits under the provisions of this Section shall violate any of the provisions of this Section or any provisions of any other ordinance, or any law relating to or regulating any such business, or shall conduct or carry on such business in an unlawful manner, the Board, in addition to any other penalties provided by this Code, shall revoke such permit issued to such person; (2) * * * Permits granted pursuant to this Section shall be revoked only in the manner provided in Section 22.02 of this Code; (3) * * * No permit shall be granted to any person to conduct, manage, carry on or deal in any business mentioned in subsection 'a' of this Section whose permit has been revoked by the Board until six (6) months have elapsed after such revocation." Holders of permits must keep a complete record of all goods purchased or received by them, which is open to inspection by any member of the police department. They must also file with the Chief of Police daily reports on prescribed forms of the goods purchased or received during the preceding day, describing the article and specifying the hour of the day when it was acquired, the name and address of the party from whom it was acquired, the height, age, sex, complexion, and other characteristics of that person. The hours of business are prescribed. Secondhand dealers must keep the articles received by them 21 days before selling them. The period prescribed for junk dealers is three days. With respect to certain articles classed as scrap, junk dealers are exempted from the provisions requiring the keeping of records, the filing of reports, and the keeping of articles for three days. There are comparable exemptions for secondhand dealers. If a claim is made that property in the hands of the holder of a permit is stolen, the board, in the event no court action is pending, may determine whether or not the property was stolen from the claimant and order its return if it was. If such an order is disobeyed, the board may revoke the permit. The foregoing provisions are reasonable, and the standards prescribed are adequate. In re Holmes, 187 Cal. 640, 646, 203 P. 398; Co-operative Junk Co. v. Board of Police Commissioners, 38 Cal.App. 676, 679, 177 P. 308; Zemansky v. Board of Police Commissioners, 61 Cal.App.2d 450, 453–455, 143 P.2d 361; see 30 A.L.R. 1427; 88 A.L.R. 970, 972; 7 Cal.Jur. 10-yr. Supp. 366; 33 Am.Jur. 336–339, 355; 47 Am.Jur. 555.

[2] Regulation of the business of junk dealers and secondhand dealers is designed to protect the public interest by preventing such dealers from becoming outlets for stolen goods. No question arises as to the constitutionality of such regulation when the business regulated is not carried on by a religious organization. Lewis v. Quinn, 217 Cal. 410, 413, 19 P.2d 236; In re Holmes, supra; Co-operative Junk Co. v. Board of Police Commissioners, supra; Zemansky v. Board of Police Commissioners, supra; see 30 A.L.R. 1427; 88 A.L.R. 970, 972; 7 Cal.Jur. 10-yr. Supp. 366; 33 Am.Jur. 336–339, 355; 47 Am.Jur. 554. Business carried on by a religious organization cannot be differentiated, for the reasons set forth below with respect to the validity of the regulation of plaintiff's solicitation of funds for charity.

[3-5] Sections 44.01 to 44.19 of the Los Angeles Municipal Code regulation solicitations of funds for charity. The term "charitable" includes "Philanthropic, social service, benevolent, patriotic, either actual or purported." The term "contribution" includes "alms, food, clothing, money, property or donations under the guise of a loan of money or property." § 44.01. Certain provisions, applicable to solicitors of charitable contributions in general, are designed primarily to secure information that will assist the public in judging the nature and worthiness of the cause for which the solicitation is made and to insure the presentation of such information to prospective donors. We find nothing unduly burdensome or unreasonable in any of these provisions. Section 44.05, which is quoted in the margin,[1] requires any person who solicits for any charitable purpose to file with the Department of Social Service a notice of intention to solicit ten days before the solicitation. This notice must contain, among other things, information regarding the purpose, character, method, and estimated expenses of the solicitation, the need for the contribution to be solicited, the proposed use of the solicited funds, the amount that will remain available for charitable purposes over expenses, the amount received from solicitations in the preceding calendar year, the expenses of such solicitations, and the amount that remained available for charitable purposes. The department may investigate the statements in the notice of intention. § 44.03(a). Information cards setting forth the facts in the notice of intention and such other facts as in the opinion of the Board of Social Service Commissioners will be of assistance to the public in determining the nature and worthiness of the solicitation (Section 44.06 quoted in the margin[2]) are issued

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[1] "No person shall solicit, nor shall any officers or member of any association authorize any person to solicit, any contribution for any charitable purpose unless, within the fiscal year of the City in which such solicitation is made and at least within ten (10) days prior to the beginning of such solicitation, there shall have been filed with the Department, on a form furnished by said Department, by such person or association upon whose behalf the solicitation is made, written Notice of Intention to solicit such contribution, which notice shall contain complete information as follows:

"(a) The purpose of the solicitation and use of the contribution to be solicited;

"(b) A specific statement, supported by reasons and, if available, figures, showing the need for the contribution proposed to be solicited;

"(c) The character of such solicitation and how it will be made or conducted;

"(d) The expenses of the solicitation, including salaries and other items, if any, regardless of from what funds such expenses are payable;

"(e) What portion of the contributions collected as a result of the solicitation will remain available for application to the specific purposes declared in the Notice of Intention as the object of the solicitation;

"(f) A specific statement of all contributions collected or received by such person or association within the calendar year immediately preceding the filing of such Notice of Intention. The expenditure or use made of such contributions, together with the names and addresses of all persons or associations receiving salaries, wages, compensation, commissions or emoluments from such contributions, and the respective amounts thereof;

"(g) The names and addresses of the officers and directors of any such association for which the solicitation is proposed to be made;

"(h) A copy of the resolution, if any, of any such association authorizing such solicitation, certified to as a true and correct copy of the original of such resolution by the officer of such association having charge of the records thereof;

"(i) A statement that the signers of such Notice have read and are familiar with the provisions of this Article and will require all solicitors engaged in such solicitation to read and be familiar with all sections of this Article prior to making any such solicitation."

[2] "There shall be filed with the Department with such Notice of Intention a statement of any agreement made with any agent, solicitor, promoter, manager or conductor of such solicitation, together with a copy of each agreement which may be in writing. Within twenty-four hours after any change in any such agreement or the making of any new or further agreement, a true copy of such change or agreement, if in writing, or if not, written details thereof shall be filed within the Department. Whenever, in the opinion of the Board, the Notice of Intention filed with the Department does not disclose sufficient information for the public concerning the facts hereinabove required to be stated in such Notice or concerning the person or association

by the Department of Social Services for four cents per card. § 44.03(e). The information cards, which are in effect permits to solicit, are issued automatically upon the filing of the required information and the payment of the four cents for each card. The department is given no authority to withhold such cards when these requirements are met, and we cannot assume that it will abuse its authority in order to withhold them. As this court said in Re Holmes, 187 Cal. 640, 647, 203 P. 398, 400, quoting from In re Flaherty, 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529, and Gaylord v. City of Pasadena, 175 Cal. 433, 437, 166 P. 348: "'Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously or for purposes of oppression or mischief.' If this petitioner had applied for a permit under the requirement of the section of the charter above quoted, and been either whimsically or arbitrarily refused such permit, he might then, as is shown in Gaylord v. City of Pasadena, supra, have had recourse to the courts for relief from such unjust and arbitrary action."

Each solicitor must exhibit an information card to the prospective donor and must not make any misstatements. A solicitor must also carry written authorization from the association that he represents. The board may recall the cards and amend them if it receives additional information showing that any statements thereon are incorrect. The board may not disallow a proposed solicitation but it may investigate the statements in the notice of intention and the methods of making or conducting the solicitation; it may inspect the records of the person in charge of the solicitation and the association for whom it is made, and it may give such publicity to its findings as it deems best to reach the general public and persons interested. The association for whom the solicitation is made must maintain an accounting system recording the entry of all donations and disbursements. § 44.08.

[6] More restrictive provisions are applicable to promoters. A promoter is "any person who for pecuniary compensation or consideration received, or to be received, solicits or is engaged in the business of or holds himself out to the public as engaged in the business of soliciting contributions for or on behalf of any other person or any charitable association, corporation or institution, or conducts, manages or carries on * * * any drive or campaign for any such purpose; provided, however, that pecuniary compensation or consideration as used herein, shall include, but shall not be limited to, participation on a percentage basis in any fund solicited, or raised, for or on behalf of any other person, firm, acsociation or corporation; provided, further, that no person who is a bona fide paid officer or employee of a social service agency endorsed by the Board of Social Service Commissioners, shall be considered a promoter within the meaning of this article." § 44.01. The conditions that a social agency must meet to be endorsed by the Social Service Commission and the standards that govern the commission are set forth in a separate ordinance, the relevant part of which is quoted in the margin.[3] In our

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making such solicitation or on whose behalf such solicitation is made, then, upon the request of said Department, there shall be filed, in writing, within forty-eight (48) hours after such request, such additional information as may be required by said Board upon the foregoing subjects. Provided, however, that the Board, for good cause, may extend the time for filing such additional information. The Notice of Intention and such additional information, if requested, shall be signed by such person intending to make such solicitation, or if by or on any association, by at least two officers of such association and shall be open to the inspection of the public."

[3] "Sec. 2. Said Commission shall have power:

"1. To investigate, when requested or permitted, by the officers or persons in charge thereof all charitable or philanthropic corporations or associations dependent upon public appeal or general solicitations for support, and submit quarterly, in writing, the result of such investigation to the Council.

"2. To endorse such of said charitable corporations or associations as shall apply to said Commission for endorsement and prove to the Commission that they have complied with the following provisions, namely:

"(a) That the title to any real property in the City of Los Angeles owned by such charitable corporation or association is vested in the name of said charity, if it be a corporation, or else in the name or names of a responsible trustee, or trustees under a declaration of trust or other written instrument, setting forth the rights of such charitable opinion the classification effected by this ordinance is reasonable and the standards provided are adequate.

A promoter must apply for a promoter's license. The application must set forth the applicant's qualifications and show that he is of good character and reputation. Persons working as solicitors for compensation under the promoter must be registered as solicitors. The board grants a promoter's license if it is satisfied that the applicant is of good character and reputation, is equal to the financial responsibility incident to the proposed solicitation and intends to conduct his business as promoter fairly and honestly. Similarly, before registering a solicitor, the board must be satisfied of his good character and reputation. A license fee of $25 is required for a promoter's license. A promoter must also file a $2,000 bond with the board to insure contributors against loss through theft. Solicitors must file a $500 bond and pay a registration fee of $1. The board may revoke a promoter's license, after a hearing, for any "unfair, unjust, inequitable or fraudulent" act of a promoter or his employees, or agents in making a solicitation or conducting the

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corporation or association therein, and recorded in the records of the County Recorder of Los Angeles County.

"(b) That the declared purpose for which such a corporation or association is organized are charitable or philanthropic, and not for the pecuniary profit of the members or associates thereof or any of them.

"(c) That for three months prior to its endorsement said charitable corporation or association has faithfully complied with the following provisions with reference to its accounts, namely: All funds received by it and all disbursements made by it, have been entered upon the books of its treasurer or other financial officer, receipts have been given or tendered for all money or other property donated to it, whenever required by law or ordinance; all expenditures other than petty cash to a reasonable amount have been made by checks signed by at least two officers of such corporation or association; that the bank book of such association or corporation has been balanced and reconciled with the books of account at reasonable intervals.

"(d) That no moneys of said corporation or association are on loan directly or indirectly to any officer, director, trustee or employee thereof, and that the corporation or association for a period of three months prior to its endorsement has not invested any moneys constituting part of its permanent endowment funds except in securities legal as investments for savings banks within the State of California, and has not paid out more than 15% of any amounts collected by solicitation within the City of Los Angeles for expenses of solicitation, and has not diverted funds donated to it from any source to purposes other than those for which they were donated.

"Provided, however, that the provisions of this paragraph shall not apply to any loan or investment that has been made prior to the passage of this ordinance.

"(e) That the work for which such corporation or association has been organized has been faithfully performed.

"(f) That the by-laws and other written rules and regulations of such corporation or association define the powers and duties of the officers of such corporation or association, and that a copy of the Articles of Incorporation of said charity, if it be a corporation, and a copy of the By-Laws and other written rules and regulations of such corporation or association have been filed with the Social Service Commission.

"(g) That within three months prior to its endorsement such a corporation or association has not violated any law or ordinance applicable to it.

"(h) That the officers and employees of such corporation or association are persons of good moral character and reputation and that the corporation or association has exercised reasonable care in selecting persons of good moral character and reasonable experience as solicitors for its funds.

"Said Commission shall issue said endorsement to any such corporation or association as shall comply with the aforesaid requirements. Said endorsement shall be valid for such time as shall be fixed by the Commission but not exceeding one year from date of its issuance.

"Said Commission shall report to the Council upon request by it the name of any corporation or association which is endorsed or has been refused endorsement by it, with a general statement of the reasons for its refusal.

"Said Commission shall also have power to request any endorsed corporation or association to make application for a new endorsement at or after the end of each fiscal year or at an earlier period if the Commission shall deem such requirement advisable, and if said corporation or association shall not so do its endorsement shall be withdrawn."

business of promoter. Any ground that would have led to denial of the license is also ground for its revocation.

Solicitations upon premises owned or occupied by the association upon whose behalf the solicitation is made, and the soliciting of funds solely from members of the soliciting association are not subject to the provisions concerning promoters and solicitors or to certain other regulatory provisions of the ordinance. "Solicitations made solely for evangelical missionary or religious purposes" are also exempted. If, however, they are conducted in such a manner as in the opinion of the board may give the persons solicited or the public the impression that the purpose of the solicitation is in whole or in part charitable, the board may investigate the matter and give such publicity to its findings as it may deem best to advise the public of the facts. § 44.16.

Plaintiff contends that since the practice of charity and the solicitation of funds for that purpose are part of its religious duties, the ordinances regulating the solicitation of charitable contributions cannot apply to plaintiff's solicitations without abridging its religious liberty in violation of the Constitution of the United States and the Constitution of California. Const.U.S. Amend. 1; Const.Cal. art. 1, § 4.

[7, 8] Religious liberty "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. State of Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. The constitutional guarantee protects the profession of a religious belief by word of mouth or in writing, the dissemination of the doctrines of a religious organization by preaching from the pulpits or other methods of evangelism, or the right to refuse to state beliefs against the dictates of one's conscience. Murdock v. Pennsylvania, 319 U.S. 105, 109, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word [of mouth] or act their faith therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L.Ed. 1628, 147 A.L.R. 674. It does not follow, however, that religious organizations enjoy unlimited freedom in carrying on all activities related to their religious program. As the United States Supreme Court declared in Murdock v. Pennsylvania, 319 U.S. 105, 109, 110, 63 S.Ct. 870, 873, 891, 87 L.Ed. 1292, 146 A.L.R. 81: "we do not intimate or suggest * * * that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds v. United States, 98 U.S. 145, 161, 167, 25 L.Ed. 244, and Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types."

Many activities prompted by religious motives can hardly be differentiated from secular activities. If the applicability of government regulation turned on the religious motivation of activities, plausible motivations would multiply and in the end vitiate any regulation. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. * * * Where a restriction of the use of highways * * * is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions." Cox v. New Hampshire, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049, 133 A.L.R. 1396. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 441, 88 L.Ed. 645, it was contended that religious liberty was abridged by the application of a statute regulating child labor to a guardian who permitted her minor ward to distribute religious literature on the streets at night. In vindicating the state's power to regulate in this way the dissemination of religious beliefs, the court declared: "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on * * * the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. And neither rights of religion nor rights of parenthood are beyond limitations. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. * * * It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."

[9] Activities characteristic of the secular life of the community may properly be a concern of the community even though they are carried on by a religious organization. See, Prince v. Massachusetts, 321 U.S. 158, 165, 64 S.Ct. 438, 88 L.Ed. 645; United States v. Ballard, 322 U.S. 78, 87, 64 S.Ct. 882, 88 L.Ed. 1148; Murdock v. Pennsylvania, 319 U.S. 105, 109, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81; Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031; Cox v. New Hampshire, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396; Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637; In re Dart, 172 Cal. 47, 56, 155 P. 63, L.R.A.1916D, 905, Ann.Cas. 1917D, 1127; Chrisman v. Culinary Workers', etc., Union, 46 Cal.App.2d 129, 132, 115 P.2d 553; People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am.St.Rep. 666; City of St. Louis v. Hellscher, 295 Mo. 293, 242 S.W. 652; Commonwealth v. Childs, 299 Mass. 367, 12 N.E.2d 814; Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101; Commonwealth v. Plaisted, 148 Mass. 375, 19 N.E. 224, 2 L.R.A. 142, 12 Am.St.Rep. 566; State v. White, 64 N.H. 48, 5 A. 828; Stull v. Reber, 215 Pa. 156, 64 A. 419, 7 Ann.Cas. 415; Matter of Frazee, 63 Mich. 396, 405, 30 N.W. 72, 6 Am.St.Rep. 310; State v. Chenoweth, 163 Ind. 94, 99, 71 N.E. 197; see, also, Zollman, Religious Liberty in the American Law, 17 Mich.L.Rev. 355, 456. Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, hospitals, farms, industrial and other commercial enterprises. Conceivably they may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty. See Evans v. Selma Union High School Dist., 193 Cal. 54, 222 P. 801, 31 A.L.R. 1121; Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841; People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251, 29 L.R.A.N.S. 442, 19 Ann.Cas. 220; Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am.Rep. 233; Donahoe v. Richards, 38 Me. 379, 61 Am.Dec. 256.

[10] There is no doubt that plaintiff, like many religious organizations, regards the practice of charity as a religious duty. It is not exclusively a religious activity, however; many charitable activities spring from sources in the everyday life of the community unrelated to religion. The state itself has an active responsibility for the welfare of the poor, the aged, the sick, the unemployed, and the orphaned. There is a public interest in regulating the solicitation of funds for these purposes. The very worthiness of such purposes creates a risk that the charitable impulses of people may be taken advantage of by solicitors who

would collect funds under false pretenses or retain for themselves an undue percentage of what they collected. Fraud in the solicitation of charitable contributions can be most effectively controlled by measures such as the regulation in question requiring the presentation of information to enable the public to determine the nature and worthiness of the purpose for which the solicitation is made, and requiring proof of the good character and reputation of paid solicitors. In the words of Mr. Justice Shaw, speaking for a majority of the court in Re Dart, 172 Cal. 47, 56, 155 P. 63, 66, L.R.A.1916D, 905, Ann.Cas.1917D, 1127: "The occupation of soliciting contributions to charitable purposes is clearly so far subject to the police power that it may be regulated by laws or ordinances providing for a reasonable supervision over the persons engaged therein and for the application and use of the contributions received to the purposes intended, in order to prevent unscrupulous persons from obtaining money or other things under the pretense that they were to be applied to charity, and to prevent the wrongful diversion of such funds to other uses, or to secure them against waste. Measures reasonably tending to secure these ends are unquestionably valid." See cases collected in 57 A.L.R. 516, 128 A.L.R. 1361.

The religious organization in Cantwell v. Connecticut, supra, on which plaintiff relies, solicited funds, not for charitable purposes but for its own support. Under the statute there involved it was allowed to engage in such solicitation only if the licensing officer determined that its cause was a religious one and issued a certificate to that effect. It was held that the vesting of this power in an administrative official amounted to "censorship of religion as the means of determining its right to survive" since under the statute the official's judgment was decisive as to what constituted a religious cause. The ordinance involved in the present case specifically exempts solicitations for religious purposes only; its object is to regulate all solicitations for charitable purposes. The Board of Social Service Commissioners has no authority to appraise the nature or worthiness of a religious cause. In the Cantwell case the court recognized that even the solicitation of funds for the support of a religious organization is subject to reasonable regulation: "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352.

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, cited in support of plaintiff's contentions, "does not involve the solicitation of funds or property." 323 U.S. 516, 65 S.Ct. 315, 324. The court there held that a state could not constitutionally require a paid union organizer to register with the Secretary of State before making a public speech inviting a nonunion worker specifically and nonunion workers in the audience generally to join the union. "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." 323 U.S. 516, 65 S.Ct. 315, 327. The court was careful, however, to distinguish cases in which the speaker solicits funds from the public: "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the State might regulate in Schneider v. State [of New Jersey, Town of Irvington], supra [308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155], and Cantwell v. Connecticut [310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352], supra. That however must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case the separation was not maintained." In his concurring opinion in Thomas v. Collins Mr. Justice Jackson gives the following reasons for these variations in state power:

"This wider range of power over pursuit of a calling than over speech-making is due to the different effects which the two have on interests which the state is empowered to protect. The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.

"But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 [147 A.L.R. 674]. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom."

[11, 12] The requirement that promoters and the solicitors working under them submit proof of their good character and reputation does not discriminate against plaintiff or other religious organizations or censor their religious beliefs, nor does the regulation vest arbitrary power in the administrative board in authorizing it to withhold a license if it is not satisfied that the applicant is of good character and reputation. Such a requirement is common in statutes regulating admission to professions and occupations involving duties of a fiduciary character. In re Stepsay, 15 Cal. 2d 71, 98 P.2d 489; Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923; Leach v. Daugherty, 73 Cal.App. 83, 238 P. 160; Riley v. Chambers, 181 Cal. 589, 593, 185 P. 855, 8 A.L.R. 418; Ex parte McManus, 151 Cal. 331, 90 P. 702; Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; Gundling v. Chicago, 177 U.S. 183, 187, 20 S.Ct. 633, 44 L.Ed. 725; Graves v. Minnesota, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 26 S.Ct. 144, 50 L.Ed. 305; Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590; see, also, 12 A.L.R. 1435, 1450; 54 A.L.R. 1104, 1112; 92 A.L.R. 400, 415; Rottschaefer, Constitutional Law, pp. 466-482. The filing of a bond is also a common requirement in the regulation of occupations or activities involving the handling of entrusted funds. Palmer v. Continental Casualty Co., 205 Cal. 34, 35, 269 P. 638; Clark v. Patterson, 213 Cal. 4, 300 P. 967, 75 A.L.R. 1124; Gundling v. Chicago, supra; People of the State of New York v. Perretta, 253 N.Y. 305, 171 N.E. 72, 84 A.L.R. 636; see 33 Am.Jur., Licenses, sec. 54; 87 A.L.R. 145; 95 A.L.R. 1224; 103 A.L.R. 405; 120 A.L.R. 950. The license fee is a reasonable one, covering the expenses of investigations and administration.

[13] The board has no discretion to withhold a license if the applicant's good character and reputation and his financial responsibility are established and the required bond is filed. The board is not free to deny licenses, but must act reasonably in the light of the evidence presented. Riley v. Chambers, 181 Cal. 589, 595, 185 P. 855, 8 A.L.R. 418; In re Holmes, 187 Cal. 640, 647, 203 P. 398; Tarpey v. McClure, 190 Cal. 593, 600, 213 P. 983; Bank of Italy v. Johnson, 200 Cal. 1, 32, 251 P. 784; People v. Globe Grain & Mill Co., 211 Cal. 121, 125, 294 P. 3; Cranford v. Jordan, 7 Cal.2d 465, 467, 61 P.2d 45; Leach v. Daugherty, 73 Cal.App. 83, 238 P. 160; Hall v. Geiger-Jones Co., 242 U.S. 539, 554, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann.Cas.1917C, 643; Graves v. Minnesota, supra, 272 U.S. page 428, 47 S.Ct. 122, 71 L.Ed. 331; Douglas v. Noble, supra, 261 U.S. page 170, 43 S.Ct. 303, 67 L.Ed. 590; People of State of New York ex rel. Lieberman v. Van De Carr, supra; Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U.S. 531, 545, 34 S.Ct. 359, 58 L.Ed. 713; State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 277, 60 S.Ct. 523, 84 L.Ed. 744, 126 A.L.R. 530; Yakus v. United States, 321 U.S. 414, 434, 435, 64 S.Ct. 660, 88 L.Ed. 834.

[14] The provision empowering the board to revoke a license in case of unfair, unjust, inequitable or fraudulent practices of solicitation is neither vague nor uncertain and affords no possibility for the censorship of religious beliefs. In Agnew v. Daugherty, 189 Cal. 446, 448, 449, 209 P. 34, 35, this court upheld a similar provision in the Corporate Securities Act mak-

ing the granting of a permit dependent on the commissioner's finding that the "proposed plan of business * * * is not unfair, unjust or inequitable" and that the methods to be used to dispose of securities "are not such as, in his opinion, will work a fraud upon the purchaser thereof." See, also, People v. Kuder, 93 Cal.App. 42, 269 P. 198, 630; People v. Stewart, 115 Cal.App. 681, 689, 2 P.2d 195; Yakus v. United States, supra, 321 U.S. pages 426, 427, 64 S.Ct. 660, 88 L.Ed. 834, and cases there cited.

[15] It is contended that since the trial court found that plaintiff is engaged exclusively in religious activities, the Charities and Relief Ordinance is rendered inapplicable to plaintiff's solicitations because of its provision that it "shall not be applicable to solicitations made solely for evangelical, missionary or religious purposes." There is no conflict in the evidence, however, as to what plaintiff's activities are. The issue presented is one of law, namely, whether the charitable purposes for which plaintiff solicits funds are exclusively religious purposes within the meaning of the ordinance. The trial court erroneously concluded that because plaintiff solicits funds for charitable purposes as part of its religious program its solicitations are solely for religious purposes within the meaning of the ordinance. The ordinance specifically differentiates charitable from religious purposes. No person may solicit "any contribution for any charitable purpose" without complying with the requirements of the ordinance. The ordinance does not exempt solicitations for charitable purposes undertaken by religious organizations. Solicitations for charitable purposes, namely, for "philanthropic, social service, benevolent, patriotic" purposes, are subject to regulation whether or not they are undertaken by a religious organization. The intention to maintain a sharp differentiation between charitable and religious purposes is apparent in the provision that if a solicitation for religious purposes is likely to give the public the impression that funds are sought for charity, the board shall "investigate the matter of such solicitation and give publicity to its findings thereon in such manner as it may deem best to advise the public of the facts of the case." The solicitation of funds to provide food, shelter, and clothing for those in distress is clearly for a charitable purpose and is therefore regulated by the ordinance. Plaintiff admittedly solicits funds for the purpose of giving relief to persons in distress. Since this purpose is charitable within the meaning of the ordinance, plaintiff's solicitations for that purpose are subject to the ordinance.

The judgment is reversed.

GIBSON, C. J. and SHENK and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. The majority opinion places the stamp of validity in toto upon a regulatory ordinance containing requirements so stringent that with their enforcement humble charities and good works must inevitably bow to.

> "The organized charity scrimped and iced
> "In the name of a cautious statistical Christ."

Admittedly the intrusion into community existence of religious activities characteristic of the secular life brings into sharp focus the conflicting loyalties to church and state, the clash of religious freedom with social legislation. See Conscience v. The State, by Prof. C. C. McCown, 32 Cal.L. Rev. 1; Liberty under the Fourteenth Amendment by John Raeburn Green, 43 Mich.L.Rev. 437; Bill of Rights Review of Am.Bar Ass'n., vol. 1, no. 2.

Since 1940 the subject has been brought frequently before the United States Supreme Court by the sect known as Jehovah's Witnesses, and that court has been alert to protect the free exercise of religion against abridgement. Its recent decisions, rendered at a time when the currents of world thought have been against democracy and toleration, have, as Professor McCown comments, made a substantial contribution to the defense of the liberties guaranteed by the Constitution, and the emphasis in several of the opinions upon the rights of "little people," of causes that are humble, needy, and without financial resources, is particularly notable. Quoting from the cited article, "The justices of the Supreme Court echo the language of social and religious protest from almost the beginning of history (2500 B. C.) in Mesopotamia, Egypt, and later in Palestine, down to the present day. Such language is familiar in the Hebrew prophets, the Psalms, and the Gospels. The obligation of government to protect the rights of the weak against those who possess political and economic power has been repeatedly proclaimed by prophets, but all too seldom recognized by the powers that be. Both democracy and religion demand the protection of the advocate of unpopular causes, for practically every reform, whether political, social, or religious, begins as a protest against vested interests and majority opinions. * * * In dealing with Jehovah's Witnesses the Supreme Court has shown a sanity and a consideration for the ultimate issues involved which cannot but have some effect upon the cowardice of politicians and the impatience of crowds." 32 Cal.L.Rev. pp. 14, 30. See also Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81; Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Id., 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1313; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674. In these decisions state legislation impinging upon a claimed religious freedom has been held valid only where there has been a strong showing of an essential need for regulation in the interest of the public safety, health, and welfare, or for the maintenance of morals, peace, and order, protection against a clear and present danger, or the like.

During the world war, as also pointed out by Professor McCown, the rise of nationalism to the status of a religious cult and the contemporary sharpening of the Christian conscience revitalized and realigned issues that were supposedly settled. Social problems have arisen which are ancient, but also very modern, and they are made the more difficult of solution by the traditions and social, political, religious, and legal philosophies with which they are surrounded. This country, having just emerged from a great conflict in which a guarantee of religious liberty to all peoples was a major aim, should be on guard against the subtle undermining, in the guise of municipal regulation, of those very rights which it has gone to such lengths to secure for others. For this reason the majority holding in the present case, with its reactionary trend, is particularly deplorable.

Obviously the commission of crime in the name of religion cannot be tolerated and the state must be safeguarded. The public are entitled to reasonable protection in community life, and fanaticism or misguided earnestness cannot be allowed to hold rein over the goodwill of the people. But beyond situations of emergency and present danger, the field of regulation should be extremely narrow. Thus in Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155, the United States Supreme Court, after stressing the importance of preventing the restriction of enjoyment of the constitutional liberties, said: "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Using this formula to test the legislation here under review, it appears that one of the main reasons advanced in support of the regulation is its asserted necessity to protect the public from fraud. Resort to the penal statutes and unusual methods of dealing with this evil is said to afford insufficient protection, in that warm hearted and generous citizens are especially vulnerable to solicitations made in the name of a religion or charity because of the nature of the appeal and their reluctance to turn a deaf ear to any cry of the poor and needy. Thus a delicate social problem is posed. Which is the more important, to give the public added protection, over that of the penal statutes, against annoyance, inconvenience, and possible fraud, or to preserve intact the cherished right of religious liberty? Should the state essay, at the expense of invasion of a constitutional right, to protect a citizen from his own inclination, or perchance his weakness, in responding to charitable solicitation without due inquiry into the worth of the sponsored cause? Is it not more in keeping with the American tradition to instill in youth and preserve in the thought of the people that individual independence, strength of character, moral stamina, and perception which will enable them to judge personally the good or bad faith of a colporteur or solicitor and the merit of the cause he espouses?

That some fraud may escape detection is to be anticipated. This is more or less true in all walks of life despite volumes of protective legislation. But the diversion to wrongful channels of some part of the public contribution to charity is not a major catastrophe when weighed against the cost of protection effected only by carving a large slice from the bill of rights. Indeed it may be asked whether any community can afford to undertake a regulatory program which may largely deprive the public of the opportunity to hear and respond to pleas of other than organized and municipally approved charities, thus stifling the growth and character development gained by the exercise of pity, compassion, and generosity. Small are the sums contributed by the average community to charity when compared with the large amounts customarily spent for luxuries and entertainment. In one sense the benefit of the opportunity to give where the right hand knows not what the left hand is doing is of more intrinsic value than the actual raising of the money, for all are in need of the spiritual enrichment which comes of free will offering. There are few housewives who will not cheerfully give from their larder to ten itinerant mendicants rather than run the risk of turning away hungry one man worthy of alms. And by the same reasoning there is less danger from solicitation for unworthy causes than from regulations so stringent that they may crush the humble workers, the "little people," destroy their good deeds, impinge upon their practice of religion, and form a breeding ground for intolerance, totalitarianism, or narrow nationalism.

All of this has been given recognition in the decisions of the United States Supreme Court. In the Cantwell case it is said at pages 308 and 310 of 310 U.S.. at pages 905, 906 of 60 S.Ct., 84 L.Ed. 1213, 128 A.L.R. 1352, "But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish. * * * *Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.* Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." (Italics ours.)

Again it is said in the Schneider case at page 164 of 308 U.S., at page 152 of 60 S.Ct., 84 L.Ed. 155: "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." The same is true with respect to abridgment of the right of religious freedom. Many recent pronouncements of similar tenor might be added to those above cited.

Before proceeding to a more detailed review of the legislation here involved, it may be stated that plaintiff is an incorporated religious organization and that it operates a mission and store, the latter being called its industrial department.

Among its religious activities are the holding of religious services at its mission by a minister ordained by it, church services and missionary work, giving away the New Testament and religious tracts. It conducts its operations in substantially the following manner: Financial solicitors, working from its headquarters, endeavor to obtain money contributions. These contributions are delivered to the treasurer of the organization and are used for carrying on its religious activities. The present treasurer has been a solicitor for plaintiff for many years and retains 30 per cent of the funds collected. About 50 per cent of the funds are used for salaries and expenses. The minister's sole compensation is derived from contributions and it is said to cover no more than his expenses. Plaintiff also gives assistance in property and money to those in need. In operating its store or industrial department it acquires second hand property, most of which is called salvage, and sold to the public. The remainder is disposed of as junk. The truck drivers who collect the property receive a percentage of the salvage, but they do not participate in the proceeds derived from operation of the store. They also retain all but 10 per cent of the proceeds of the sale of the junk. Solicitors of salvage work from trucks and receive an average of 50 cents an hour. The store uses its funds for expenses of operation and occasionally does charity work. The balance is delivered to plaintiff's treasurer. None of the salvage solicitors distribute plaintiff's religious literature.

Defendant department claims that plaintiff, in operating its store, is a "promoter" as defined in the city ordinance, and demands that it obtain a license authorizing solicitations for the store. No demand is made in regard to religious activities, but a religious organization is required to file a notice of intention and obtain a permit to solicit funds for charitable purposes. Apparently defendant department determines whether an organization is soliciting for charity or for religion and has adopted a rule that 50 per cent of the amount collected must go for charitable purposes.

The trial court found on substantial evidence that plaintiff is a "duly constituted and functioning religious organization, engaged exclusively in the promulgation, by literature and word of mouth, of its religious beliefs, by and through its auxiliaries, and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities," and that if plaintiff is required to obtain a permit and pay a license fee as a condition of solicitation and receipt of donations "to be used in the furtherance of said religious activities," this "will amount to a prior restraint on the exercise of [its] religious activities within the meaning of the Constitution of the United States * * * an infringement upon the free exercise of * * * religious liberty as protected by the Constitution."

These findings require a consideration first of the question whether plaintiff's operations come in whole or in part within the exemption provision of the ordinance. Solicitations upon premises owned or occupied by the association in whose behalf the solicitation is made, and the soliciting of funds from members of the association are not subject to the promoter, solicitor, and certain other regulatory provisions of the ordinance. Exemption is also extended to "solicitations made *solely* for evangelical, missionary or religious purposes," but with the proviso that if such solicitations are conducted in a manner which, in the opinion of the board, may give those solicited the impression that the purpose of the solicitation is in whole or in part charitable, the board may investigate the matter and give such publicity to its findings as it deems best to advise the public of the facts.

In considering the applicability of the exemption to plaintiff's activities it would at first blush appear, and the trial court concluded, that inasmuch as all of plaintiff's operations, including its charitable work, are conducted for and as part and parcel of and incident to its religious purpose, all must come within the exemption. However, a review of the ordinance in its entirety indicates that by use of the word "solely" in the exemption clause, it was intended to differentiate between solicitations for promulgation and support of the religion or church itself, and solicitations for charitable work performed as part of the religious purpose, with exemption accorded to the former but not to the latter. If the exemption is thus unavailable where the religious organization solicits for charity in connection with the promulgation and exercise of its doctrines of religion (and this seems to be the interpretation placed upon the ordinance by the rules and regulations of the board and by the officers in enforcing it), then the validity of the regulatory provisions must be tested by the limitations, if any, which may be imposed upon the exercise of the right of religious liberty.

To a degree the majority opinion recognizes this fact but it implies, without straightway so declaring, that charitable undertakings are separable from the religious purpose inducing them, and that by severance they may be removed to the realm of secular affairs and there be subjected to governmental regulation without intrusion of the bothersome problem of preservation of the constitutional right of religious liberty. This implication is inherent in the discussion which starts with the declaration (163 P.2d page 711): "Many activities prompted by religious motives can hardly be differentiated from secular activities. If the applicability of government regulation turned on the religious motivation of activities, plausible motivations would multiply and in the end vitiate any regulation," and proceeds to state (163 P.2d page 712): "Activities characteristic of the secular life of the community may properly be a concern of the community even though they are carried on by a religious organization. * * * Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, hospitals, farms, industrial and other commercial enterprises. Conceivably they may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. * * * There is no doubt that plaintiff, like many religious organizations, regards the practice of charity as a religious duty. It is not exclusively a religious activity, however; many charitable activities spring from sources in the everyday life of the community unrelated to religion. The state itself has an active responsibility for the welfare of the poor, the aged, the sick, the unemployed, and the orphaned. There is a public interest in regulating the solicitation of funds for these purposes. * * *"

In the above discussion the majority opinion quotes copiously from Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, a case which has been criticized as being out of line with other recent United States Supreme Court decisions. See Liberty Under the Fourteenth Amendment, supra, at p. 446.

It is true that religious liberty "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be" (Cantwell v. Connecticut, supra, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352), and that where the religious organization conducts activities characteristic of the secular life of the community, they may be subject to proper regulation under the police power. But, as already pointed out, this power of regulation is not unrestricted and it can only be enforced with due regard to preservation of constitutional rights. Both freedom of religious thought and freedom of religious action come within the protection of the bill of rights. This freedom cannot be whittled away by carving out segments of religious activities and relegating them to the realm of secular affairs. If that were permitted, the right of action for a religious purpose could eventually be destroyed by the gradual severance and classification as secular of every activity undertaken to promote the religious purpose.

Aside from the pronouncements found in the late federal decisions, it has long been the law of this state that a charity conducted as part of a religious practice is inseparable from the religion itself. The utter impossibility of any severance is made plain in the case of Application of Dart, 1916, 172 Cal. 47, pages 55, 56, 155 P. 63, 66, L.R.A.1916D, 905, Ann.Cas. 1917D, 1127, where in speaking of the Jewish and Christian religions it is said: "In both of these religions charity is the central word. It is enjoined, not as a good thing, or a wise thing, or as a kindly thing only, *but as a fundamental part of the religion itself.* Says the Jewish faith: 'On three things the world is stayed; on the Thorah (the law) and on worship and on the bestowal of kindness.' 'Now the end of the commandment is charity out of a pure heart,' says Paul to Timothy. 'Charity is the scope of all God's commands,' preaches Chrysostom. 'All perfection of the Christian life is to be attained according to charity,' declares Thomas Aquinas. Does it need more, does it need so much, to show that in these religions *the bestowal of charity, the devotion of life to charity, are a part of the religion itself?* And does it demand discussion to establish so plain a truth as that touching religion there is a doubtful zone which legislation should be most reluctant to enter? The founders of the nation recognized it when they placed the great guaranty of religious liberty in the Constitution of a free people, and it is for every court to see that that liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant. So when legislation does enter that uncertain domain, the fact that it is there must bring it to condemnation. In accordance with the dictate of the Constitution itself, the doubt will be resolved in favor of religious liberty. And it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself which owes so much to religion, even if the efficiency of religious charities be not up to the standard of perfection set by the Municipal Charities Commission. If under that standard 75 cents of every dollar would go to the objects of charity, while under the less efficient methods in vogue but 50 cents of each dollar actually reaches the beneficiaries, it is not to be forgotten that there will be many millions fewer of these dollars to be distributed in charity if the activities of the religious are hampered, thwarted, and stayed." (Italics ours.)

The above comment is extremely apropos. If, under defendants' interpretation and enforcement of the ordinance, plaintiff is to be denied the benefit of the exemption clause insofar as its charitable activities are concerned, then the regulatory provisions of the ordinance must be subjected to close scrutiny in order to determine whether they infringe the guarantee of religious liberty. Although concededly acts of charity, apart from religious motivation, might be performed by the state, or by a professed atheist or nonreligionist, nevertheless the evidence here establishes beyond contradiction that plaintiff's charities are an integral part of and inseparable from its religious purpose. From common knowledge, and in challenge to the severance theory of the majority opinion, it must be said that acts of charity which do not stem, consciously or unconsciously, from early religious training or Christian inheritance are sparse. It is a matter of common historical knowledge that public charities and benevolent associations for the gratuitous relief of every species of distress, are peculiair to Christianity; no other system of civil or religious policy has originated them; they form its highest praise and characteristic feature. The Apostle Paul in Chapter XIII of his first Epistle to the Corinthians epitomized his concept of the essential intangibles of Christianity and concluded with the immortal verse: "And now abideth faith, hope, charity, these three; *but the greatest of these is charity.*" Thus charity is the heart and basic principle of plaintiff's religion. To destroy that heart leaves the body lifeless. Yet the majority opinion does just that. It declares charity to be a secular affair in spite of the above showing to the contrary and thus subjects the exercise by plaintiff of its religion to unrestricted regulation and ultimate destruction.

Moreover, the anomalous result of the majority opinion is that a religious organization may use its own funds for a charitable purpose without hindrance, but if it solicits directly for the charity, the solicitation is subject to the cumbersome ordinance provisions hereinafter discussed. This makes the matter merely one of the form of the solicitation. To avoid regulation and gain the protection of the exemption, the solicitor only needs to make his plea for funds in the name of his church. The church then receives the donations and uses them for any purpose it may choose, good or bad, charitable or uncharitable, and it is not reached by the ordinance provisions.

Proceeding now to test the regulatory provisions of the ordinance as against the claimed infringement of the constitutional guarantee of religious liberty, it will be noted that the majority opinion incorporates the provisions by marginal reference and then, upon a discussion replete with generalizations, none of which standing alone can be said to contain an incorrect statement of the law, it announces the broad conclusion that, "We find nothing unduly burdensome or unreasonable in any of these provisions" (163 P.2d page 708); "In our opinion the classification effected by this ordinance is reasonable and the standards provided are adequate" (163 P.2d page 710).

Were each regulation discussed in detail and given separate consideration, it is doubtful that even the author of the opinion would say that none is unduly onerous. Section 44.05 imposes upon any person who wishes to solicit "any contribution for any charitable purpose," a duty of filing with the department at least ten days prior to the commencement of the work, a written notice of intention containing "complete information" upon eleven comprehensive phases of the undertaking. But a glance at this section shows that the much maligned income tax forms issued by the federal government are no more complex and demanding than is this notice of intention in its requirements of itemized data. One wonders where the average almsman or solicitor is to acquire the educational background to enable him to supply such statistics. Must the opportunity for exercising one's religion by doing charitable work be limited to those who are apt in reading, writing, and arithmetic?

The solicitor must show (a) "The purpose of the solicitation and use of the contribution to be solicited"; he must make (b) "A specific statement, supported by reasons and, if available, figures, showing the need for the contribution proposed to be solicited"; he must show (c) "the character of such solicitation and how it will be made or conducted." How can these requirements be fitted into the program of the itinerant religionist who solicits as he wanders, taking with the one hand to give freely with the other, reserving for himself only bare necessities? What freedom is left for the missionary and walking preacher who play so colorful a part on the American scene, soliciting their charities, spreading their doctrines, without preconceived plan and as each feels himself daily to be guided, and without compiling statistics or publishing abroad the good works.

Further requirements of the notice indicate that its enforcement will doubtless effect the disappearance of all but organized institutions, for the applicant must also show the following: "(d) The expenses of the solicitation, including salaries and other items, if any, regardless of from what funds such expenses are payable; (e) What portion of the contributions collected as a result of the solicitation will remain available for application to the specific purposes declared in the Notice of Intention as the object of the solicitation; (f) A specific statement of all contributions collected or received by such person or association within the calendar year immediately preceding the filing of such Notice of Intention. The expenditure or use made of such contributions, together with the names and addresses of all persons or associations receiving salaries, wages, compensation, commissions or emoluments from such contributions, and the respective amounts thereof; (g) the names and addresses of the officers and directors of any such association for which the solicitation is proposed to be made; (h) A copy of the resolution, if any, of any such association authorizing such solicitation, certified to as a true and correct copy of the original of such resolution by the officer of such association having charge of the records thereof; (i) A statement that the signers of such Notice have read and are familiar with the provisions of this Article and will require all solicitors engaged in such solicitation to read and be familiar with all sections of this Article prior to making any such solicitation." This last quoted provision expressly bars all who have not attained a sufficient degree of learning to abide by its terms.

As a whole the involved demands are a far cry from the simple regulation indorsed in the Cantwell case, to wit: that "Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." 310 U.S. at page 306, 60 S.Ct. at page 904, 84 L.Ed. 1213, 128 A.L.R. 1352. A regulation such as that described is not unreasonable and affords a sufficient basis for the opening of an investigation in the event charges of fraud should be lodged against a solicitor. Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81. Probably no sincere solicitor would protest having to register, carry an identification card, and conduct his activities in a seemly manner and at reasonable hours. But he should be immune from any more onerous legislative interference, even though to some, his efforts might appear to be misguided.

The ordinance contains further requirements even more burdensome than those above set forth. With the notice of intention there must be filed a statement of any agreement between solicitors and the organization for which they are soliciting. § 44.06. Whenever in the opinion of the Board of Social Service Commissioners the notice of intention does not contain sufficient information for the public concerning the facts required to be therein stated, there must be filed within 48 hours such additional information as the board requests. § 44.06. The department has power to investigate the statements in the notice of intention and the methods and manner of solicitation, to inspect records of the association for which the solicitation is made, and to issue to solicitors information cards at four cents a card. These information cards are in effect permits to solicit and they must set forth the facts stated in the notice of intention and such additional information as in the opinion of the board will be of assistance to the public in determining the nature and worthiness of the purpose for which the solicitation is made. § 44.03. The board may recall information cards when they receive additional information which renders incorrect any statement thereon and amend them. § 44.02. No person shall employ any misstatement, deception, or fraud in connection with the solicitation (§ 44.04), or use a fictitious name (§ 44.07). A person may not solicit for a charitable association unless it maintains records of receipts and disbursements. § 44.08. Solicitors must have the written authorization of the organizations they represent. §§ 44.10, 44.11. They must exhibit their information card to the prospective donee when soliciting (§ 44.12), and file a complete report of their activities with the board (§ 44.14). They must give receipts to donees stating various facts. § 44.15. Violation of the ordinance is made punishable as a crime.

In support of its declaration of the validity of these provisions, the majority opinion states that they confer upon the department no authority to withhold information cards when the requirements are met, and it cannot be assumed that the department will abuse its authority in order to withhold them. This is true, but it is also apparent that a procedure so complex and so costly in time and effort will, so far as many solicitors are concerned, be prohibitive. It is said in the Cantwell case, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L. Ed. 1213, 128 A.L.R. 1352, that "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose." Assuming that the provisions above quoted do not involve any religious test, nevertheless they are so demanding as not only to open the door to unreasonable delay and abuse of discretion, but also as possibly to bar certain classes of solicitors found among the "little people." Obviously, they do unreasonably obstruct and delay the collection of funds.

Still more restrictive provisions of the ordinance apply to so-called "promoters," who are defined as "any person who for pecuniary compensation or consideration received, or to be received, solicits or is engaged in the business of or holds himself out to the public as engaged in the business of soliciting contributions for or on behalf of any other person or any charitable association, corporation or institution, or conducts, manages or carries on * * * or is engaged in the business of or holds himself out as engaged in the business of conducting, managing or carrying on any drive or compaign for any such purpose; provided, however, that pecuniary compensation or consideration as used herein, shall include, but shall not be limited to, participation or a percentage basis in any fund solicited, or raised, for or on behalf of any other person, firm, association or corporation; provided, further, that no person who is a bona fide paid officer or employee of a social service agency endorsed by the Board of Social Service Commissioners, shall be considered a promoter within the meaning of this article." § 44.01.

Section 44.19, subdivision 1, provides that "No promoter shall in any manner whatsoever, solicit within the City of Los Angeles any contribution for any actual or purported charitable use, purpose, association, corporation or institution without license from the Board so to do."

Subdivision 2, entitled "Application," states that: "To obtain such license, such promoter shall make and file with the Board an application therefor in writing. In such application, the applicant shall set forth, in addition to such information as may be required by the Board: (a) The name and address of the applicant. * * * (b) A succinct statement of facts showing that the applicant * * * is of good character and reputation. * * * (c) The general plan, character and method in or by which the applicant proposes to conduct its or his business as a promoter."

Subdivision 3 is entitled "Bond," and states: "At the time of so filing with the Board an application for such license the applicant shall file and thereafter maintain with the Board a good and sufficient bond in the aggregate sum of * * * $2,000 running to the City of Los Angeles for the use and benefit of interested persons and parties. * * * Said bond shall be conditioned upon the strict compliance, by the Principal, with the provisions of this Article and the payment of any direct pecuniary loss sustained, through any act of grand or petty theft on the part of the Principal, by any donor or by any person on whose behalf the funds or personal property were solicited or received by the Principal. * * *"

Subdivision 5, entitled "Investigation," provides that: "The Board shall examine such application and shall make such further investigation of the applicant and its or his affairs as the Board shall deem advisable. If from such examination the Board shall be satisfied: (a) That the applicant is of good character and reputation. * * * (b) That applicant has sufficient financial responsibility to carry out the obligations incident to any solicitation such applicant may make within the City of Los Angeles as such promoter and that all of the statements made in such application are and each of them is true and that * * * applicant * * * has (not) violated any of the provisions of this Article or has (not) engaged in any fraudulent transaction or enterprise, and that the applicant intends to conduct its business fairly and honestly, the Board shall issue to the applicant a license to solicit as a promoter within the City of Los Angeles, contributions. Otherwise, the Board shall deny the application and refuse to issue a license, and shall notify the applicant of the decision of the Board. * * *"

Under the heading "Revocation," subdivision 6 states that: "All licenses issued hereunder shall be subject to the condition that the applicant thereafter shall cease and desist from acting as a promoter within said City of Los Angeles when ordered so to do by the Board if the Board finds after a hearing * * * that any act or omission of such promoter * * * in making any solicitation or in the conduct of the business of promoter within the City of Los Angeles is unfair, unjust, inequitable or fraudulent. The Board must suspend or revoke any such license if, after hearing upon notice, the Board shall find the existence of any of the grounds hereinabove enumerated for the denial of an application for a promoter's license; provided, however, that such suspension or revocation shall be discretionary with the Board if the only ground for such revocation is such that it does not affect the licensee's honesty and integrity, or his ability properly to perform his duties as a promoter."

Subdivision 7 deals with "Termination" of licenses at the close of each fiscal year, and subdivision 8 with "Funds." The latter subdivision provides that: "No promoter shall commingle any contribution with the promoter's own funds or property, or fail at any time to maintain and keep all contributions separate and apart from the promoter's own funds or property. * * * (a) It shall be unlawful for any promoter to cause or permit any person for pecuniary compensation or consideration received or to be received by such person to solicit or receive on his behalf or at his instigation, under his direction or control or in his employment, any contribution unless such person shall be registered as a solicitor by the Board. (b) No person shall be so registered as a solicitor unless he shall first appear personally before the Board and furnish satisfactory proof that he is a person of good moral character, that his reputation for honesty is good, and unless he first file with the Board and thereafter maintain a bond satisfactory to the Board in the sum of * * * $500.00, conditioned for the payment of any direct pecuniary loss which may be sustained by the promoter, by any donee, or by any person on whose behalf any contribution was solicited or received, through any act of grand or petty theft, committed by such person. (c) The provisions of paragraphs b, c, d, and e of subsection 3, above, shall apply to bonds filed pursuant to this subsection. (d) The Board shall collect a fee of * * * $1.00 for each such registration. * * *"

The comment which has been made concerning the unreasonablness of the ordinance provisions relating to solicitors applies with double force to these "promoter" provisions, and they are also subject to additional criticism.

From the definition of a "promoter," as heretofore quoted (§ 44.01, supra), it appears that the term is not confined to business solicitors, such as employees of a promotion agency handling fund raising campaigns, but includes any person who for pecuniary compensation solicits for another. Many solicitors for charity are indigent religionists. As an integral part of the exercise of their religious right they solicit funds in support of their cause and the charitable activities incident to it, and of necessity they retain some portion of the money collected in order that they themselves may be clothed and fed. To impose upon this class the burden of posting a $2,000 bond, of paying a license fee, and of showing sufficient financial responsibility to carry out the obligations incident to their solicitation is to seriously impede, if not prohibit, their undertakings at the outset. A required qualification of financial standing sufficient to enable such an applicant to post a $2,000 bond will neither insure honesty nor create a deterrent against fraud. In many cults and religions it is traditional that poverty and saintliness shall walk hand in hand. Many creeds view the possession of property and assets, or of more money than necessary for bare essentials, as a manifestation of sins of worldliness. Yet history shows that some of the finest deeds of charity and most unselfed works known to man have been accomplished by adherents of these views. It is thus a dangerous legislation which would impede the charitable impulses and hamper the undertakings of all but the financially able—which would give to men of property but deny to the poor the right equally possessed by both to develop and carry out the tenets of their creed.

The fee of $25 may not seem large but when it is combined with the expense and difficulty of obtaining a bond (if indeed such could be obtained by an indigent religionist even if the premium were paid for him), and establishing the vague condition of "financial responsibility," it involves cumulative burdens too heavy to be borne. In seeking to justify its declaration of the reasonableness of these provisions, the majority opinion states that the filing of a bond is "a common requirement in the regulation of occupations or activities involving the handling of entrusted funds," and that "The license fee is a reasonable one, covering the expenses of investigations and administration" (163 P.2d page 714). This latter statement may have been inspired by the fact that the late federal decisions speak of the distinction between a license fee solely to defray the costs of enforcement of a regulatory statute and one for revenue purposes, condemning only the latter. But here, even if the regulatory provisions of the ordinance were otherwise reasonable as applied to religionists and justified the imposition of a fee sufficient to meet the costs of administration, there is no indication whatsoever that those costs would amount to $25 for the handling of each application or that that sum was fixed in contemplation of reimbursement for expenses.

The following excerpt from Murdock v. Pennsylvania, 319 U.S. 105, pages 111-113, 63 S.Ct. 870, 874, 875, 876, 891, 87 L.Ed. 1292, 146 A.L.R. 81, is perinent: "It is plain that a religious organization needs funds to remain a going concern. * * * Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. * * * Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation. * * * In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities who enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. * * * So it may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment. * * * Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the supression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped."

It will further be noted that the provision defining "promoters," as heretofore quoted (§ 44.01, supra), includes a special exemption running in favor of bona fide paid officers and employees of social service agencies endorsed by the board. The conditions which a social service agency must meet to secure endorsement are set forth in a detailed separate ordinance, the relevant portions of which are incorporated in the majority opinion by marginal reference. One condition is: "(h) That the officers and employees of such corporation or association are persons of good moral character and reputation and that the corporation or association has exercised reasonable care in selecting persons of good moral character and reasonable experience as solicitors for its funds."

Apparently no bonding or license requirement is imposed upon these solicitor-employees, or in their behalf upon the organization they represent. Thus the solicitors for the organized charity hold a great primary advantage over the unorganized worker, with no sound reason for the discrimination. Graft and corruption can flouish, and fraud can emanate from high places as well as low, and through organization these evils are sometimes hidden and the more securely entrenched. Also the percentage of contribution retained to meet the expenses and recompense the employees of charitable institutions is apt to be higher than that retained by unorganized workers or sincere and humble religionists who sacrifice all in the practice of their religion. Abuses and breaches of trust do occur but who can say that the hazard is greater in unorganized classes of workers, whose illicit gains are probably small, compared with what is lost when a large institution becomes permeated with corruption.

Vital need exists for the individual as well as for the organized worker in both charitable undertakings and general benefits derived from the spreading of religious doctrines. There are many dark places where the light of organized charity does not penetrate—many needy whom it does not reach. To these people the tender ministrations of sincere and unfettered religionists bring succor and salvation. The unreasonable curtailment of this activity merely because some are addicted to fraudulent and deceitful practices in the name of charity, is as unthinkable as would be the dissolution of established institutions merely because dishonesty and corruption have at times been uncovered in their administration. The public as a whole cannot be freed from the entire power of decision as to the worth of the cause for which they are solicited or their inclination to contribute. If the constitutional guarantees are to be upheld, then the public must expect to bear some portion of the burden of seeing that their gifts are made only to worthy and honestly administered causes.

Another objectionable provision of the ordinance is that which requires the promotor to furnish "a succinct statement of facts showing that the applicant * * * is of good character and reputation." Those who contribute to charity are not so much concerned with the "reputation" of the solicitor as they are with the intended use to which the donations are to be put. A most wicked man of public ill repute may espouse a very worthy cause or do a very good deed. Religionists and reformers are often called from the gutter whence they return to make expiation for their wrong doings by trying to save others from a like fate and to aid the redemption of those who may already have strayed. Forceful and effective work has been done by the reformed, turned reformer, and many of these people labor on without affiliation with any recognized institution and without financial help other than that gleaned through solicitation.

Hence, it would seem that if any statement is to be demanded in connection with a reasonable requirement for registration and identification it should embrace no more than an averment of present honesty and sincerity in the disbursement of money and property for the purpose for which they are solicited. Reputation is not an issue.

The requirement of section 44.19 that the officials may make an investigation and if "satisfied" that the applicant is of "good character and reputation" they may issue a license, places upon the applicant the burden of establishing this requirement as a condition precedent to the exercise of his right of religious liberty. Such a requirement is not a sufficiently fixed and definite standard to safeguard the free exercise of the constitutional right here involved. In the exercise of their power the officials might conclude that an applicant does not qualify merely because of their opinion concerning his particular religious belief and creed. The way of the dissenter is usually hard and by reason of his views his reputation in the eyes of a large group, or a majority, may be far from good and his character at least questionable if not downright immoral. What fair qualification to the right of religious liberty can be conceived which limits its exercise to those who have good reputation and character, and denies it to those who have not?

It is said in Murdock v. Pennsylvania, supra, 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292, 146 A.L.R. 81: "Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation * * * of the Bill of Rights." And again in Cantwell v. Connecticut, supra, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Subdivision 6 of section 44.19 of the ordinance is also subject to criticism. It authorizes the revocation of the license where the licensee, in making the solicitation, is unfair, unjust, inequitable, or fraudulent. These grounds, except the one last stated, are vague and uncertain and may well result in the same religious censorship arising from a determination of good character and reputation.

Subdivision 8 of the section, dealing with the qualifications of solicitors for promoters, is subject to the same objections as the rest of the section. The only difference is the amount of the fee and the size of the bond. It requires a "good moral character," and a reputation for honesty that is good.

It is not an obstacle to plaintiff's attack on section 44.19 that it has not sought a license or that if the public officials act arbitrarily their action is subject to jurisdictional review. The section on its face operates as a prior censorship on the free exercise of religious liberty. Cantwell v. Connecticut, supra.

There is another ordinance which concerns the regulation of pawnbrokers, secondhand dealers, and junk dealers (Los Angeles Municipal Code, § 24.01). Although its provisions must be considered in relation to the operation of the store or so-called industrial department of plaintiff, the subject need not be developed here, for from the evidence it is clear that the store partakes of enough of the character of a commercial enterprise to justify the restrictions imposed. In the main I can concur in the conclusions (although not the reasoning upon which they are based), expressed in the majority opinion with respect to this phase of the case. The store is not conducted as a profit making institution but it is in the business of selling used property. The operations of junk dealers and pawnbrokers have long been recognized as a distinct class of business subject to regulation under the police power in order to facilitate the recovery of stolen property and the preservation of health. See 43 C.J. pp. 389, 390; 43 C.J. 410–411; 16 C.J.S., Constitutional Law, § 189.

It is not contended that the regulatory provisions of section 24.01 are invalid if considered apart from the question of the guarantee of religious liberty. Even assuming that the section must be viewed in the light of the right of free exercise of religion, there seems to be nothing arbitrary or unreasonable in its regulatory requirements. The measure is patently a police regulation and the specified fee is not a tax for revenue. That fee does not have combined with it the other financial burdens imposed under the ordinance dealing with promoters and hence it is distinguishable. Moreover, the operation of the store has most of the aspects of an ordinary commercial enterprise.

Such ordinance (Los Angeles Municipal Code, § 24.01) provides that persons who are to engage in the regulated business must annually apply for and receive a written permit. Under subsection (c), entitled "Requisites of Permits," it specifies the following requirements or "standards": (1) The original application must state "by street and number the place where such business is proposed to be conducted" or, in the case of junk collectors having no fixed place of business, "their residence by street number." The application "shall be signed by the applicant and shall contain his residence address." (2) The payment in advance of an annual fee of $25 ($50, if jewelry, watches "or similar secondhand merchandise" is to be dealt in). (3) Upon receipt of the application "the Board shall cause to be investigated the business of the applicant and location at which applicant proposes to engage in business as specified in said application. Thereafter the Board may issue a permit * * * for the remaining portion of the current year." (4) Persons operating under the ordinance must "secure an annual renewal of such permit commencing January 1st of the succeeding year." (5) Persons holding "an ordinary" permit must apply for and secure a "special permit," "in the manner provided * * * for securing ordinary permits," before dealing in "secondhand jewelry, precious stones, precious metals, * * * watches or other similar secondhand merchandise."

Further regulations or "standards" set by the ordinance include the following: "The Board shall not grant any permit * * * to persons who fail, refuse or neglect to comply with the laws and ordinances relating to and regulating the business for which such permit is sought"; "If persons holding permits * * * shall violate any of the provisions of this Section [the Municipal Code section setting forth the ordinance in question] or any provision of any other ordinance, or any law relating to or regulating any such business, or shall conduct or carry on such business in an unlawful manner, the Board * * * shall revoke such permit," but only upon following the procedure "in the manner provided in Section 22.02 of this Code" (which procedure is not questioned); permit holders "shall file daily reports, on forms provided by the Chief of Police, listing the merchandise received or purchased on the preceding day, the hour of such receipt or purchase," the "true name and address of the party making the sale, delivery or pledge as nearly as the same is known to or can be ascertained by such person together with a description of such party," the number of the pawn ticket issued, if a pledge is involved, and the amount loaned, and a description of each article pledged, received or purchased. The permit holder is also required to keep "a complete record of all goods * * * pledged to or purchased or received by him" which record "shall be open at all times during business hours to the inspection of any member of the Police Department."

The mentioned provisions (and the same is true of the further provisions not herein epitomized) are not unreasonable or uncertain. Substantially nothing more is required for an original permit than the payment of the moderate fee and the filing of the written and signed application giving the data as to the location of the proposed business and the applicant's name and residence address. The requirements for compliance with law and the keeping and filing of reports, etc., after commencing business, are reasonably related to the nature of the business and the purposes of the regulations. These latter provisions furnish a proper and exclusive standard for guidance of the board in passing on applications for renewals of permits or proceedings to revoke permits. The very moderate requirements for original issuance of permits, hereinabove set forth, leave little if anything, beyond the suitability of the proposed location, to the discretion of the board. This ordinance fully meets the constitutional requirements that regulatory laws of this type establish reasonable standards for the guidance of the permit-issuing board.

Defendants contend that injunctive relief is not available to plaintiff and that there is no showing of irreparable injury. Generally, public officers may be enjoined from enforcing an unconstitutional statute, and section 526(4) of the Code of Civil Procedure and section 3423(4) of the Civil Code have no application to such situations. Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805; Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895. Where a criminal statute or ordinance causes irreparable damage to property rights, the injured party may attack its constitutionality in an action to enjoin its enforcement. See Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Sullivan v. San Francisco Gas, etc., Co., 148 Cal. 368, 83 P. 156, 3 L.R.A.,N.S., 401, 7 Ann.Cas. 574; Los Angeles T. Ins. Co. v. Los Angeles, 52 Cal.App. 152, 156, 198 P. 1001; San Diego T. Ass'n v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A.L.R. 513; and Abbey Land, etc., Co. v. San Mateo, 167 Cal. 434, 438, 139 P. 1068, 52 L.R.A.,N.S., 408, Ann.Cas.1915C, 804.

An interference with the solicitation by plaintiff of contributions is an interference with its property rights in the sense that its right to collect and then use the funds will be impeded. Even if it be assumed that no injury to property rights is threatened, it seems that injunctive relief would be appropriate to restrain the enforcement of a criminal statute where the attack thereon consists of a bona fide claim that the statute violates one of the personal liberties guaranteed by the Constitution, and that claim is not wholly lacking in merit on its face. In such case the injury consists of the consequences of the enforcement of the law to the person, viewed in the light of the exalted standing of the constitutional guarantees. These consequences under the procedure in this state are serious.

A violation of the ordinance being a misdemeanor, the case would be cognizable only in an inferior court. From that court the only appeal available is to the superior court, or to its appellate department. If that court denied relief plaintiff would have no recourse to this court or the district court of appeal by appeal or certiorari, although in the event of being imprisoned he would have the remedy of habeas corpus. Portnoy v. Superior Court, 20 Cal.2d 375, 125 P.2d 487. The cases heretofore cited are not determinative of the point. They merely state the rule that injunctive relief will be given if injury to property rights is threatened. That does not exclude such relief where the injury is to personal rights.

It has been recognized that personal rights may be protected by equity, and they obviously should be, as they are more sacred than property rights. It is said in 28 American Jurisprudence, Injunctions, section 71: "However, there have always been some clearly defined exceptions to the general rule, and there is a progressive tendency on the part of the courts to remedy by injunction, injuries to personal rights. This is, perhaps, as it should be, because the personal rights of citizens are more sacred and, by every test, of more value than things that may be measured by a purely monetary standard, and the courts have expresed difficulty in understanding why injunctive protection of the one class of rights should be placed above similar protection of the other. It may be added that the courts with great uniformity base their jurisdiction to protect purely personal rights by injunction nominally on an alleged property right, where in fact no property rights are invaded, so that the rule seems to be one of those known chiefly by its breach rather than its observance." See, also, 14 A.L.R. 295. Section 526 of the Code of Civil Procedure does not limit the injury to property rights. On the contrary it authorizes an injunction where the acts would produce great or irreparable injury "to a *party* to the action." (Italics ours.) See Nation v. Chism, 154 Okl. 50, 6 P.2d 766.

For the reasons above stated, I am of the opinion that the judgment of the trial court should be modified by restricting the injunctive relief to alleged violations of all provisions of the Municipal Code here involved except section 24.01 which I believe to be valid.

SCHAUER, J., concurred.

EDMONDS, Justice (dissenting).

In this case, the trial court, upon undisputed evidence, found that the Gospel Army was procuring donations for the purpose of furthering its religious activities. Because these funds are used in part for the purpose of giving relief to persons in distress, Mr. Justice TRAYNOR declares, as a matter of law its activities are charitable and not religious. I cannot concur in that conclusion, nor in the construction of the Los Angeles Municipal Code as requiring the issuance of permits to either organizations or promoters without an appraisal of "the nature or worthiness of a religious cause." And if, contrary to the evidence and findings of the trial court, the Gospel Army, as a matter of law, is a charitable institution, then, by the challenged ordinance it is arbitrarily denied the right to exist unless it complies with undisclosed standards of the commissioners and carries on its operations in accordance with arbitrary and unreasonable regulations.

As Mr. Justice Henshaw pointedly stated in considering an earlier ordinance of the city of Los Angeles, which, like the one now before the court, gave municipal authorities broad and arbitrary power over every institution ministering to human suffering and spiritual need, charity is a fundamental part of religion. Speaking of the work of the Salvation Army, he said: "Profoundly impressed with the Founder's sympathy for the poor and afflicted and with His teachings that, 'Now abideth faith, hope and charity, these three, but the greatest of these is charity,' and 'Now the end of the commandment is charity out of a pure heart,' it has made its special field of religious work the relief of the destitute and the rescue of society's outcasts. It has found that it cannot lead the spirit of the weary and heavy burdened without first ministering to his physical necessities. While 'man does not live by bread only,' he cannot live at all without bread. Therefore the charitable organizations of the Salvation Army are vital, integral parts of its religious life and work." In re Dart, 172 Cal. 47, 49, L.R.A.1916D, 905, 155 P. 63, 64, Ann.Cas.1917D, 1127.

The Gospel Army also endeavors to gain converts for its religious doctrines and carries on activities which minister to material need. The expense of conducting its work is largely met by donations of money and secondhand goods solicited from the public. The net proceeds from each of these main sources of income go into the Army's treasury from which is paid the cost of religious services, free distribution of tracts and religious literature, as well as food, lodging, clothing and other necessaries for those in need. The record discloses no segregation of such funds on the books of the Army as being for a religious or for a charitable purpose. Upon this evidence the trial court found that if the Gospel Army is required to comply with the provisions of the ordinance, such enforcement "will amount to a prior restraint on the exercise of their religious activities within the meaning of the Constitution of the United States. * * *" Mr. Justice TRAYNOR sweeps aside the evidence and the trial court's findings upon the ground that, as a matter of law, charity has no place in religion, and whenever an organization carrying on religious activities steps aside from the promulgation of its spiritual doctrines to extend a helping hand by the alleviation of human suffering, it becomes subject to onerous and restrictive regulations. So narrow a view of the practice of religion runs counter to all of the fine principles of human conduct which, more and more, are leading men of good will to help those less fortunate along the daily path. A religious man, it has been said, is one "whose light shines in the dark places of the earth through righteous acts and helpful deeds."

Large groups of citizens of every faith and creed are regularly devoting much time and effort, at great personal sacrifice, to the cause of those who are in need. If the work in behalf of the less fortunate among us is done in the name of or in connection with the promulgation of a religious doctrine, then the Los Angeles ordinance authorizes the Department of Social Service to add to the indifference, inertia and self-interest which solicitation must always overcome, either the condemnation or damnation by faint praise of an official bureau which is authorized to reach a conclusion without regard to anything but the personal opinion of some administrative officer as to the worthiness of the purpose. Whatever is done in the name of religion for a charitable purpose, the ordinance declares in effect, is to be viewed with suspicion and distrust. There can be preaching without official intervention but any practice of Christian virtues is to be carried on only under the watchful eye of the Department of Social Service according to its notions of "the public interest." And yet my associates say that such legislation lays no restraint upon religious freedom.

It is, of course, true that reasonable regulations may be imposed upon an organization carrying on religious activities. The rule, as stated by the Supreme Court of the United States, is that "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose."

More specifically, the court declared that: "A state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." Cantwell v. Connecticut, 310 U.S. 296, at pages 304, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352. But the ordinance here challenged goes far beyond these limits.

As the statute reads, its provisions shall not be applicable "to solicitations made solely for evangelical, missionary, or religious purposes." These terms are not defined, yet the lawmakers provided "that in any case where it shall come to the attention of the Board that any solicitation has been or is being or intended to be made for evangelical, missionary or religious purposes but in such manner as in the opinion of the Board is calculated to give or may give the impression to the person or persons solicited in any such solicitation or to the public that the purpose of such solicitation is either in whole or in part charitable, then the Board, if in its opinion the public interest will be subserved thereby, shall investigate the matter of such solicitation and give publicity to its findings thereon in such manner as it may deem best to advise the public of the facts of the case." (§ 44.16.) If this curious language means anything, it extends the exemption to any solicitation in behalf of a religious organization for a purpose in whole or in part charitable but allows the Board of Social Commissioners to state to the public, "in such manner as it may deem best," its official disapproval of any such practical application of the Master's teachings to human need or of the methods by which help is being extended. Under that construction of the exemption provision, no license for the appellant's solicitations may be required. But it probably would be more disastrous to the work of a religious organization to arbitrarily and publicly condemn its activites than to require it to obtain a license, and equally violative of constitutional guarantees.

But considering the provisions of the ordinance from the standpoint that, under its express terms, only solicitation for contributions to meet the expense of doctrinal church activities is exempt from regulation, although the good works done by an organization such as the Gospel Army are, to borrow Mr. Justice Henshaw's words, "vital, integral parts of its religious life and work", no person may solicit a contribution for its support who has not obtained an "information card." Such a card is issued by the Department of Social Service only following the filing of a "notice of intention" to solicit, which shall include the detailed information specified by section 44.05 of the code. (ante, p. 708) This information is not limited to facts relating to the identity of the proposed solicitor and his authority to act for a particular organization. Also there must be submitted detailed information relating to the organization's purpose and business affairs and those who are supporting it financially or employed in its activities. In short, all of the data demanded concern the merits of the cause which is asking the public for assistance and the scope of the work it is carrying on.

Moreover, the information card which allows one to solicit, providing he presents it to the person who is approached for a donation, "allowing him sufficient opportunity to read the same, before accepting any contribution. * * *" (§ 44.12), is not issued as of course upon the filing of the notice of intention. There is neither requirement nor even suggestion in the ordinance to support Mr. Justice Traynor's assertion that these cards, "which are in effect permits to solicit, are issued automatically upon the filing of the required information and the payment of the four cents for each card." On the contrary, the Department of Social Service shall have the power: "(a) To investigate the allegations of the Notice of Intention, or any statement or reports; (b) To have access to and inspect and make copies of all books, records and papers of such person, by or on whose behalf any solicitation is made; (c) To investigate at any time the methods of making or conducting any such solicitation. * * *" (§ 44.03.)

A majority of the court sanction the indefinite terms of the ordinance relating to the issuance of a permit upon the presumption that the Board of Social Service Commissioners will fairly investigate the facts in connection with each application and promptly make a determination upon them. It may not be assumed, say my associates, that the board will whimsically or capriciously deny an application, and the courts will relieve from unjust and arbitrary action. The same argument was advanced by the state in Cantwell v. Connecticut, supra, and summarily rejected. The opportunity to obtain judicial correction, said Mr. Justice Roberts, speaking for the court, does not justify interference with constitutional rights. "* * * The availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." (p. 306 of 310 U.S., page 904 of 60 S.Ct., 84 L.Ed. 1213, 128 A.L.R. 1352.)

Moreover, the inquisitorial authority of the department is a continuing one. "Whenever, in the opinion of the Board of Social Service Commissioners the Notice of Intention does not disclose sufficient information for the public concerning the facts * * * required to be stated in such Notice or concerning the person or association making such solicitation or on whose behalf such solicitation is made, then, upon the request of said Department, there shall be be filed, in writing, within forty-eight (48) hours after such request, such additional information as may be required by said Board upon the foregoing subjects." (§ 44.06.) This right may be exercised after the Board has made an investigation, and there is no limitation upon the time within which inquiries must be concluded. Also, there is no restriction upon the number of additional requests the board may make for information, or any time fixed in the ordinance to prevent the board from taking months to look into the purpose and scope of an organization's activities; designed delay is invited by the censorious terms of the legislation, and the widest discretion is given to harass, condemn, delay and obstruct. And if perchance the applicant represents an unpopular cause, then the authority of the Board of Social Service Commissioners to publish the results of its investigations "by such means as may be deemed best to reach the general public and persons interested" (§ 44.02) gives opportunity for the undermining of public confidence and provides a vehicle for official propaganda which may do irreparable damage.

Occasion for discrimination is also afforded by section 44.03 which allows the Department of Social Service to issue an information card in a form stating either that the authorization given does or does not constitute an endorsement of the charitable association for which solicitation is to be made. Moreover, the information card may show the pertinent facts set forth in the notice of intention and any additional information "as shall in the opinion of the Board be of assistance to the public to determine the nature and worthiness of the purpose for which the solicitation is made. * * *" The information card which the solicitor must carry with him, and either read to each prospective contributor or present to such person for his perusal, allowing him sufficient time to read it before accepting any donation, may therefore be a sizable volume of data which in practice, if not in purpose, will effectively block public support of an organization which has a legitimate purpose and against which no criticism justly may be made.

To meet the demands of the city, the receipt required for each donation must be signed by the solicitor and contain "in addition to a description of the amount and kind of the contribution, substantially the following matters: (a) The name of the association, if any, in whose name or upon whose behalf the solicitation is made. (b) A statement as to whether the contribution solicited is to be applied for the general purposes of such association, if any, or for specific purposes, and if for specific purposes the nature thereof shall be clearly stated. (c) A statement that the Information Card, issued by the Department, was presented to the person making the contribution for his perusal prior to receipt by the solicitor of the contribution receipted for. * * *" (§ 44.15.) Only by means of a traveling office could a solicitor comply with all of these requirements.

As justification for his position, Mr. Justice Traynor asserts that "activities characteristic of the secular life of the community may properly be a concern of the community even though they are carried on by a religious organization." A host of decisions is cited in support of that statement. But the cases relied upon are authority only for the proposition that certain activities such as the sale of religious periodicals by minors, beating a drum on the traveled portions of the city streets, and parades, although carried on by a church, are subject to reasonable regulation by the state under its police power; they do not purport to declare what may be done in the field of reasonable regulation of solicitation for religious purposes. Indeed, excluding In re Dart, supra, only two of them concerned the constitutionality of a statute regulating the solicitation of funds. One of these two, Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, upheld a statute restricting the activity of minors. The other decision, Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81, expressly excluded consideration of the question now in controversy, for the court declared that there was no issue before it in regard to a registration system for solicitors.

As in Re Dart, supra, the statement from it which is quoted in the majority opinion has no application to solicitation for religious work; it concerns the regulation of organizations which seek contributions for charitable purposes. The declaration that, under the police power, there may be reasonable supervision over persons engaged in the occupation of obtaining money from the public for the maintenance of an organization carrying on charitable work is followed by the pronouncement: "Every person has the right, under our Constitution, and perhaps without its guaranty, to solicit contributions for a worthy charitable purpose, provided he acts in good faith and honestly applies them to that purpose. The ordinances give the commission power to deprive persons of that right without cause or reason. To the extent that they give this arbitrary power they are contrary to the Constitution and void." In re Dart, supra, 172 Cal. page 57, 155 P. page 67, L.R.A.1916D, 905, Ann.Cas.1917D, 1127. Certainly the constitutional guarantee gives as much, if not greater, protection to religious endeavors which include ministration to relieve human suffering. For as James wrote concerning faith without works, "If a brother or sister be naked, and destitute of daily food, And one of you say unto them, Depart in peace, be ye warmed and filled; notwithstanding ye give them not those things which are needful to the body; what doth it profit?" Jas. 2:5, 16.

But if the practice of religion may be legally isolated beyond the contaminating reach of charity, then, in my opinion, the legislation is vulnerable to attack as unlawfully circumscribing the activities of every organization which carries on its work without the profession of religious doctrine. Unquestionably the occupation of the solicitation of contributions for charitable purposes may be subjected to regulation, but legislatures or municipalities may not, under the guise of the police power, impose unnecessary and unreasonable restrictions upon the use of private property or the pursuit of useful activities. McKay Jewelers, Inc. v. Bowron, 19 Cal. 2d 595, 122 P.2d 543, 139 A.L.R. 1188; In re Fuller, 15 Cal.2d 425, 102 P.2d 321; Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93; In re Monrovia Evening Post, 199 Cal. 263, 248 P. 1017; Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am. St.Rep. 82, 1 Ann.Cas. 428; Larson v. Bush, 29 Cal.App.2d 43, 83 P.2d 955. Also the general and indefinite terms used in the ordinance wholly fail to meet the constitutional requirement that a regulatory statute must specify a standard for official action. In re Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann.Cas.1917D, 1127; Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 593, 84 P. 39, 3 L.R.A. N.S. 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750; Schaezlein v. Cabaniss, 135 Cal. 466, 469, 67 P. 755, 56 L.R.A. 733, 87 Am.St. Rep. 122; County of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 349, 57 P. 153, 71 Am.St.Rep. 75; Ex parte Sing Lee, 96 Cal. 354, 359, 31 P. 245, 24 L.R.A. 195, 31 Am.St.Rep. 218; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Hoyt Bros., Inc. v. Grand Rapids, 260 Mich. 447, 245 N.W. 509.

The provisions of the Municipal Code which have been summarized in connection with the discussion concerning their application to the charitable work of a religious organization effectively hamper and restrict any endeavor to better the lot of those in need of material aid and comfort if that effort does not conform to an undisclosed standard. The work of every organization must meet the approval of the department; such as do not, are unfit to live. Moreover, in its practical aspects the ordinance is particularly burdensome upon organizations such as the Gospel Army, which continually solicits donations. "Every person soliciting any contribution for any charitable purpose must file with the Department within 30 days after the close of any such solicitation or within 30 days after a demand therefor by the Department a report to the Department, stating the contributions secured from or as a result of any such solicitation, and in detail all expenses of or connected with such solicitation, and showing exactly for what uses and in what manner all such contributions were or are to be disbursed or distributed" (§ 44.14). What constitutes "the close of any such solicitation?" And to what extent must the organization show "exactly for what uses and in what manner all such contributions were or are to be disbursed or distributed?" Is every person who is a beneficiary of the organization's helpfulness to be named? Is the value of that aid to be stated in terms of money or spiritual comfort? Must a substantial part of the effort intended for human betterment be devoted to making reports to a governmental agency set upon the minute and continuing supervision of all charitable activities?

Very obviously, the purpose of these reports is to provide a basis for keeping each organization within the range of a policy which is not stated in the ordinance and may be as variable as differing views upon permissible bounds of social service. For an information card may be recalled by the board upon receipt of data which, in its opinion, shall render incorrect any statement set forth in that document. Under such circumstances, the board shall amend or correct the card, or issue a new one in accordance with the additional data obtained. But impliedly each card is to be issued for a period which need not be uniform as to all applicants, and is valid only during that time (§ 44.02). Under those provisions, only by carrying on its work in accordance with the views of the Board of Social Service Commissioners, and making reports in such detail as to satisfy demands which cannot be measured against any standards set by law, may an organization continue.

Also, there is no standard or limitation provided in regard to the data printed upon the information card. As a solicitor must show this card to each prospective donor, allowing him sufficient opportunity to read it before accepting any contribution, the board may arbitrarily express disapproval of a worthy charity or make the information so voluminous that solicitation would be effectively blocked. And the unlimited power given to the board to publish the results of its investigations is broad enough to authorize presentation to the public of confidential data concerning policies and details of management having no relation to reasonable licensing requirements.

If an organization runs the gauntlet of these provisions and is able to carry on its work to the satisfaction of the official censors of charitable purposes, every person whom it employs for "pecuniary compensation or consideration" to obtain subscriptions from the public must also secure a license. The way of an applicant for such a license is a hard one. In his application he must set forth, in addition to facts showing that he "is of good character and reputation," "such information as may be required by the board." Thereupon, the board shall make such investigation of the applicant and his affairs as it deems advisable. No limitation as to the extent of such an investigation is imposed and no time is fixed within which it must be concluded. Any ground that would have led to a denial of the license is also ground for its revocation.

If, contrary to the narrow interpretation of religion laid down by my associates, human kindness is included in its practice, then these provisions governing the licensing of individuals to solicit contributions are clearly invalid, for they go much further than to lay down a reasonable requirement for registration and identification. Indeed, there is no statutory statement of the data which an applicant must submit, for the specified information is "in addition" to that which may be required by the board. The majority allows the regulation of solicitation for religious purposes to go far beyond the limitation specified by the United States Supreme Court in the Cantwell case, supra, by approving the requirements that a promoter or a solicitor be granted a license only if the board is satisfied that he is of good character and reputation and equal to the financial responsibility incident to the proposed solicitation; that he file a bond and pay a license fee; and that he give a complicated form of receipt to each contributor. The provision authorizing the revocation of a license after a hearing, for any "unfair, unjust, inequitable or fraudulent" act or for any ground that would have led to a denial of the license also goes far beyond the permissible bounds fixed for regulation of solicitation for a religious purpose.

And construing any organized plan for taking care of those in need of material aid as beyond the reach of religious duty or concern, the licensing provisions which have been mentioned in the next to the last paragraph unreasonably restrict the right of an individual to engage in the business of solicitation for charitable purposes and also fail to set up a definite standard which the applicant for a license must meet. The cases cited by the majority as authority for the proposition that a promoter or solicitor may be required to submit proof of his good character and reputation stand only for the rule that a state may do so in connection with regulation of the practice of a profession which requires the possession of special knowledge, skill and training, or the sale of merchandise of a particular character. Leach v. Daugherty, 73 Cal. App. 83, 238 P. 160 [broker's certificate under the Corporate Securities Act]; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418 [license of real estate broker]; Gundling v. Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725 [license for sale of cigarettes]. These decisions, in my judgment, have no application to legislation laying down licensing requirements for the business of soliciting funds for charitable purposes.

A recent controversy in Michigan presented substantially the same question as is now before this court. An ordinance which prohibited the solicitation of contributions or the sale of goods "the proceeds from which, or any part thereof, are to be used for any so-called charitable purpose" without a written permit to be granted by the city manager, when it appeared, after investigation and report by a police officer, "that the charity is a worthy one" and that the applicants for a permit "are fit and responsible parties," was held to violate the provisions of a state constitution prohibiting deprivation of life, liberty, or property without due process of law. "It is requisite to the validity of the ordinance," said the court, "that it should state 'a standard for the guidance' of the official who passes upon the application for the permit. * * * The general and indefinite terms used in this ordinance wholly fail to comply with this requisite." Hoyt Bros., Inc. v. Grand Rapids, supra [260 Mich. 447, 245 N.W. 511]; 128 A.L.R. 1363.

Turning to the other provision of the Los Angeles Municipal Code which is in controversy, although, generally speaking, the business activities of a religious organization come within the scope of regulations tending to protect the morals, safety or general welfare of the public, section 24.01 relating to dealers in secondhand goods is also unconstitutional for the reason that it sets no standard to which an applicant for a license must conform. To carry on the business of a "secondhand dealer," one must "file an application in writing with the Board [of Police Commissioners] specifying by street and number the place where such proposed business is proposed to be conducted or carried on; * * * The application shall be signed by the applicant and shall contain his residence address. Upon receipt of such application the board shall cause to be investigated the business of the applicant and location at which applicant proposes to engage in business as specified in said application. Thereafter the board may issue a permit to the applicant which shall be effective for the remaining portion of the current year."

This enactment states no grounds justifying a denial of the application, specifies no time within which an investigation must be made, makes no provision for a hearing upon the application, and by the use of the word "may," impliedly allows the board to grant or withhold official favor for any reason which whim or fancy may dictate. No standard of character or business responsibility is set for the guidance of the board nor are there any qualifications specified for one desiring to deal in secondhand goods. Such legislation has uniformly been held not to measure up to the requirements of constitutional guarantees. In re Dart, supra; Hewitt v. State Board of Medical Examiners, supra; Schaezlein v. Cabaniss, supra; County of Los Angeles v. Hollywood Cemetery Assn., supra; Ex parte Sing Lee, supra; Yick Wo v. Hopkins, supra; Hoyt Bros. Inc. v. Grand Rapids, supra.

Under these circumstances, in my opinion, as the right of the Gospel Army and those acting in its behalf to solicit contributions for either religious or charitable purposes is a property right, the unlawful interference with which will cause irreparable injury, the trial court properly enjoined the enforcement of the ordinances here challenged (Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805; Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895), and the judgment should be affirmed.

Rehearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.

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27 Cal.2d 288

KROGER v. TRUITT.

L. A. 19242.

Supreme Court of California, in Bank.

Nov. 27, 1945.

Rehearing Denied Dec. 27, 1945.

1. Limitation of actions ⇨103(2)

An action against administratrix of estate of deceased trustee by beneficiary to enforce trust in corporate stock was not barred by limitation because not instituted within four years from date of death of trustee, where administratrix acknowledged validity of beneficial interest in stock and of trust, so that administratrix was not a constructive or involuntary trustee, but an express trustee. Civ.Code, § 2221.

2. Executors and administrators ⇨431(2)

In action to impress a trust on stock held by estate, filing of claim was unnecessary.

3. Limitation of actions ⇨175

An action against administratrix of estate of deceased trustee commenced more than four years after trustee's death by beneficiary to enforce trust in corporate stock was not barred by limitation on theory that administratrix could not waive limitation, where if facts raised doubt as to applicability of limitation statute which could not be settled without litigation, administratrix could enter into compromise with creditor and court could approve it.

4. Limitation of actions ⇨175

Administratrix of estate of deceased trustee was precluded from relying on statute of limitations in action against administratrix by beneficiary to enforce trust in corporate stock whether administratrix' agreement and compromise be called an express trust or waiver of the statute, where administratrix was exclusive owner of entire estate, and plaintiff and other beneficiaries of administratrix' agreement and approved compromise were the only claimants to assets of estate.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Fred W. Kroger against Rae Truitt, as administratrix of the estate of Charles C. Truitt, deceased, and as an individual to impress a trust on property of the estate of deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 159 P.2d 429.

Haight, Trippet & Syvertson and Lyle C. Newcomer, Jr., all of Los Angeles, for appellant.

Frank M. Gunter and Oscar C. Sattinger, both of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action to impress a trust on certain property of the estate of Charles C. Truitt, deceased.

In his lifetime Charles C. Truitt was president of Dried Food Products Company which specialized in manufacturing dried eggs. The company issued both preferred and common stock. A portion of the stock was transferable without restrictions imposed by the Commissioner of Corporations, and a portion was in escrow and could not be sold without his permission. The unrestricted stock is herein called "free" stock and the restricted stock, "escrow" stock. The company occasionally encountered financial difficulties and Truitt met them by "borrowing" from various stockholders free stock which could be sold, on his promise to replace it by a transfer of escrow stock. Wm. H. Fisher was an employee of the company and owned some of its preferred stock. On January 9, 1936, Fisher delivered 75 shares of his preferred stock to Truitt for which he received the latter's personal receipt and promise to return a like amount within ninety days. Concurrently Truitt signed a request to the Commissioner of Corporations for the transfer of 75 shares of common stock if preferred stock was not returned within the stated time. Walter W.

Kroger, an officer of the company, signed the receipt as guarantor. Subsequently the par value of the stock was reduced from $10 to $1 per share, and Fisher became entitled to the return of 750 shares of the stock. Fisher and Truitt were not in harmony and Truitt requested Walter W. Kroger to buy out Fisher's interest in the company. On August 27, 1937, Fisher assigned to Kroger his title and interest in the stock, and on March 23, 1940, Kroger assigned it to his brother, Fred W. Kroger, the plaintiff herein. The obligation was never fulfilled.

On April 9, 1938, Truitt died. F. C. Hendrix, father of his widow, was appointed administrator of his estate, and publication of notice to creditors commenced on May 27, 1938. Hendrix died on July 16, 1939, and on the following November 21st Rae Truitt, the widow of the deceased Truitt, and sole heir and distributee of his estate, herein referred to as the defendant, was appointed administratrix.

While Hendrix was administering the estate he prepared a claim for Walter W. Kroger's signature, which was signed and acknowledged by Kroger before a notary on November 25, 1938, and was thereupon received by Hendrix with the statement to Kroger that his stock would be returned to him in due time.

The estate held 17,145 shares of the escrow stock. The defendant's efforts as administratrix were devoted principally to an attempt to liquidate her claims against the Dried Food Products Company. She advised Kroger (Walter) that he would receive his 750 shares of stock. In an open stockholders' meeting held October 27, 1941, at which the defendant was present, the question was raised concerning the return of escrow stock for the free stock loaned to decedent, the records of which "got lost in the shuffle some place." Mr. Parr, attorney at that time for the defendant, stated to the stockholders at that meeting that Mrs. Truitt held in the estate 17,145 shares of stock issued in decedent's name. He said: "We are quite aware of that fact, that stock shown in the settlement of the estate must be delivered to various persons who traded with Mr. Truitt, gave him free stock in exchange for his promise to transfer from the escrow. We will have to keep those promises and will keep them. * * * If there is any evidence that it is authentic * * * they will receive the stock upon the closing of the estate." At a meeting of stockholders on November 3, 1941, Mr. Parr repeated his assurances saying: "I stated the other night that those people about whom we knew would most definitely receive stock * * * and I assured them, upon closing of this estate, they would receive stock. And I now wish to assure everyone else here who has claims for stock in that estate that without their being really able to prove their claim, but on reasonable showing that they have stock coming, they will receive it. You are quite true when you say the 'hand of death intervened,' and Mr. Truitt couldn't carry out all promises and my executors will try to carry them out. Those promises will be settled * * * and since Mrs. Truitt is the sole legatee, if she states to the court she wants that distributed to this person or that person I think you will agree it will be so distributed."

February 4, 1942, the board of directors of Dried Food Products Company adopted a resolution authorizing an offer of settlement to the defendant in liquidation of her claims against that company. The resolution provided for an offer of payment to the administratrix of a sum to be agreed upon in full settlement of all claims and demands, provided the Truitt estate caused to be transferred to parties entitled thereto the stock owing on account of written memoranda issued by Charles C. Truitt in his lifetime and which constituted the evidence of loans to him by various persons of free or escrow stock of Dried Food Products Company, "it being the intention hereby to provide that as part of the settlement * * * said estate likewise fulfill its obligations for the delivery of such stock or money under the outstanding written obligations of said Charles C. Truitt * * *," but limiting the maximum settlement including shares claimed by former employees to $20,000. Defendant was informed of the contents of the resolution. Settlement was finally reached at a figure of $43,500. A contract of settlement was dated August 12, 1942. It contained the provision that the defendant as administratrix, named as First Party, "will pay all claims now or hereafter filed or presented against the Estate of Charles C. Truitt for stock of Dried Food Products Co. agreed to be delivered by said Charles C. Truitt to any such claimant excepting as to any such to which she, as such Administratrix, shall have a bona fide defense. Said claims which have been disclosed by First Party to Second Party are the following:" The names of fifteen former stockholders were listed, including Walter W. Kroger (representing Fisher's 750 shares) with the number of shares claimed by each, aggregating 11,802 shares. The evidence discloses that it was contemplated by the parties that since the company had waived the statute of limitations as to the defendant's claim against it, it was not considered that any defense she might have to the discharge of those listed obligations included the defense of the statute of limitations. The agreement was submitted to the Commissioner of Corporations who released the stock for transfer. About September 25, 1942, the probate court on defendant's petition approved the compromise agreement for the discharge of the obligations listed, finding that the discharge thereof was for the advantage, benefit and best interests of the estate. The court ordered the administratrix to do and perform all matters and things provided by the compromise agreement. Upon such approval and order the company paid the sum of $43,500 to the defendant. Later in the fall of 1942 the defendant wrote to Walter Kroger asking what we would take in settlement of his claim. No objection was made by her as to the time element. On February 10, 1943, after she was informed of Walter Kroger's assignment to the plaintiff, the defendant rejected his claim. Subsequent to the date of the agreement and the approval thereof she transferred stock to and settled the claims of some of the other stockholders. In July, 1943, by decree of partial distribution the defendant received 5,000 of the original 17,145 shares, on her representation to the probate court that sufficient shares remained to discharge the agreement of August 12, 1942.

On May 3, 1943, which was three months after the rejection of his demand for the stock, and less than nine months from the date of the agreement, the plaintiff filed the present action against Rae Truitt in both her representative and individual capacities. The defendant interposed the defenses of the statute of limitations and of laches. The trial court found that there existed between Walter Kroger and the deceased a relationship of trust and confidence; that the decedent occupied a trust relationship in regard to the stock loaned to him, and that at the time of his death he held a sufficient number of shares of stock to meet the obligations of the trust. The court also found that the defendant signed the agreement of August 12, 1942, fixing the total so held in trust at 11,802 shares, and in accordance with which she received a consideration of $43,500 in exchange in part for her promise to carry out the trust; that her agreement was made for the express benefit of the persons who were the beneficial owners of the shares held in trust by Truitt; that the stock was released by the Commissioner of Corporations for transfer to the persons so entitled; that the agreement was approved by the probate court for the purpose of permitting the defendant to carry out its terms and that by reason of the acts of the defendant the plaintiff and his assignor at all times and until February 10, 1943, believed that the claim for stock had been fully approved, acknowledged and assumed by the defendant. It was concluded that no claim was necessary to be filed in the estate in order to impress a trust; that the action was not barred by the statute of limitations or by laches; that the result of the retention of the trust shares by the defendant would be to permit her by her own conduct to obtain an unjust enrichment. Judgment for the plaintiff followed.

[1] The statement of the foregoing facts and supported findings alone would appear to be a sufficient answer to any possible contention of the defendant on this appeal. They are sufficient to establish the creation of the trust in the decedent's lifetime and to identify the stock held for the purpose of discharging the obligations. But, says the defendant, if the trust continued after the death of Truitt, its nature from that time was that of an involuntary trust, that is, one arising by operation of law, and that the defendant therefore was an involuntary or constructive trustee; that since no repudiation was required to start the statute in operation, the time within which the plaintiff could bring an action commenced at the date of Truitt's death, and the action, having been brought more than four years thereafter, was barred.

Norton v. Bassett, 154 Cal. 411, 97 P. 894, 129 Am.St.Rep. 162, relied on by the defendant, involved an effort to impress an alleged resulting trust on real property created in the lifetime of the elder Bassett, and to hold the defendant Bassett, his minor son and distributee, as trustee. The son promised orally to make an accounting when he became of age but repudiated his promise and when suit was filed interposed the defense of the statute of limitations. The court followed the rule relied on by the defendant here, that since the trust did not arise by reason of any agreement of the defendant, since there were no contractual relations between the litigating parties, since there was no written recognition of the trust by the defendant, he was but an involuntary trustee, the cause of action accrued at the date of the elder Bassett's death, and the statute commenced to run at that time.

Norton v. Bassett undoubtedly states the general rule in the absence of the specific factors therein mentioned. But, without distinguishing cases involving real from cases involving personal property, those facts are not absent from the present case. Here the defendant both orally and in writing acknowledged the validity of the Kroger beneficial interest in the stock. She recognized the validity of the trust by entering into a written agreement whereby she promised to transfer a certain number of shares to each of the persons named therein. She represented in writing to the Commissioner of Corporations that a release of the stock was sought for the purpose of carrying out that agreement. She petitioned the probate court for approval of the agreement to consummate the transfer which she represented was for the best interests of the estate, that is, that the estate could acquire an advantageous liquidation of its claim against the company only on the administratrix's promise to transfer the shares to the recognized beneficiaries of the trust. The factors which in the Norton case would have given rise to an exception to the rule there applied operate here to change the defendant's relation as a constructive trustee to that of an express trustee. By word and act she indicated with reasonable certainty her intention to hold the specified shares of stock for the purpose of transferring them to designated beneficiaries. Civ.Code, § 2221. The written agreement approved by the probate court and given in part for the $43,500 received by the administratrix was effective to create an express trust to hold the shares released for the benefit of the former owners of stock loaned to the decedent. There is no contention that the action was filed too late if the agreement of August 12, 1942, created an express trust.

[2, 3] It is also the contention of the defendant, with reliance on Estate of Lucas, 23 Cal.2d 454, 144 P.2d 340; Estate of Cates, 195 Cal. 319, 232 P. 972; and similar cases, that an administratrix cannot waive the statute of limitations. There are at least two answers to the contention. The cases relied on involved actions on claims against an estate. The present action is not on the claim, but to impress a trust on the stock held by the estate, and the filing of a claim is unnecessary. Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987; Porter v. Van Denburgh, 15 Cal.2d 173, 99 P.2d 265. Secondly, in view of the facts establishing an express trust as to the administratrix, and the timely filing of an action to enforce it, there can arise no question of waiver of the statute. Furthermore, pursuant to the decision in Estate of Lucas, if the facts raised a doubt as to the applicability of the statute which could not be settled without litigation, the representative might enter into a compromise with the creditor and the court had power to approve it. Appropriate disposition of the present case may be said also to rest on that state of the facts.

[4] Also it should be noted that the defendant is the exclusive owner of the entire estate, and that the plaintiff and the other beneficiaries of her express agreement and approved compromise are the only claimants to any of the assets of the estate. Whether the agreement and compromise be called an express trust or a waiver of the statute, its effect was not inimical to the interests of the estate. On the contrary the facts demonstrate that it was of benefit to the estate and to the defendant personally. In Holland Bank v. Brockman, 52 Idaho 324, 14 P.2d 621, under somewhat similar circumstances, it was held that payments of mortgage interest beyond the statutory period constituted an acknowledgment by the administratrix which was sufficient to preclude reliance on the statute of limitations. The court said: "Here, the administratrix is the exclusive owner of the entire estate, respondent being the only apparent creditor. And while it is true, that, although one and the same person, Hulda Brockman, the individual, was in contemplation of law distinguished from Hulda Brockman, the official whose duty it was to administer the estate according to law and who could have been without authority to favor one creditor's

claim to the detriment of another's, manifestly, there is no one who can charge injury and demand relief therefor. In the absence of creditors, where the personal representative is the sole owner and beneficiary of the estate, such representative can handle the estate as he pleases, for only to himself is he accountable, there being no one to say him Nay! * * * (Citing cases.) * * * Nor can Hulda Brockman, the individual, take refuge behind the skirts of Hulda Brockman, the administratrix."

So here, as concluded by the trial court, all of the elements are present which would make it inequitable for the defendant to repudiate her agreement of compromise and settlement. By her own conduct she indicated that it would be fulfilled without regard to the possible effect of the statute of limitations on the original trust relationship between the decedent and the stockholders.

Other points do not require discussion.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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27 Cal.2d 889

George J. BUSCH, Respondent, v. Rae TRUITT, as Administratrix, etc., Appellant.

L. A. 19256.

Supreme Court of California, in Bank.

Nov. 27, 1945.

Rehearing Denied Dec. 27, 1945.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action to impress a trust on corporate stock. Judgment for plaintiff affirmed.

Prior opinion, 160 P.2d 925.

Haight, Trippet & Syvertson, and Lyle C. Newcomer, Jr., all of Los Angeles, for appellant.

MacDonald, Wallace, Cashin & Arrington and Woodson Wallace, all of Los Angeles, for respondent.

PER CURIAM.

This case involves the same facts presented in Kroger v. Truitt, Cal.Sup., 163 P.2d 735, with the exception that the plaintiff, George J. Busch, one of the stockholders listed in the defendant's agreement of August 12, 1942, loaned to the decedent Truitt a total of 1,380 shares of stock in the Dried Food Products Company under a similar arrangement for return of stock. In the present case repudiation by the administratrix occurred on November 16, 1942, and the action to impress a trust on the shares held by the administratrix for the benefit of the stockholders was commenced a month later. As in the Kroger case, the trial court found the existence of the trust and that the action was not barred by the statute of limitations or by laches, and rendered judgment for the plaintiff. On the appeal similar contentions were made by the defendant as were advanced in the Kroger case. The same considerations and authorities which furnished support for our conclusions in that case are applicable here to dispose of the defendant's contentions. No additional points require comment.

The judgment is affirmed.

TRUBOWITCH et al. v. RIVERBANK CANNING CO. *

Civ. 7179. Sac. 5725.

District Court of Appeal, Third District, California.

Dec. 1, 1945.

Hearing Granted Jan. 28, 1946.

1. Appeal and error ⚷347(1)

A petition to enforce arbitration under an agreement therefor is a special proceeding and trial of facts which require the adoption of findings, and appeal from judgment on findings within 60 days was timely and written order directing that petition be dismissed filed some months previously would be treated as a mere memorandum. Code Civ.Proc. §§ 939, 1282.

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* Subsequent opinion 182 P.2d 182.

2. Contracts 🔑292½

Where nonassignable sales contract providing for arbitration was with corporation which was subsequently dissolved and corporate assets were transferred to sole stockholders who organized a copartnership, such copartnership could not enforce arbitration clause. Code Civ.Proc. § 1282; Civ.Code, §§ 399, 399a, 400.

3. Contracts 🔑186(1)

An action for breach of contract with a corporation to which a copartnership is not a party may not ordinarily be maintained by the copartnership or its members in the absence of privity of contract.

4. Assignments 🔑82

A provision that contract shall not be assignable will be enforced by the courts.

5. Appeal and error 🔑1010(1)

Findings of trial judge cannot be disturbed on appeal if supported by substantial evidence.

6. Contracts 🔑292½

In action to enforce an agreement to arbitrate, evidence sustained finding that defendant did not acknowledge legal obligation to plaintiffs who were attempting to enforce agreement made by the defendant with a dissolved corporation.

7. Appeal and error 🔑616(2)

Where affidavits included in transcript were not authenticated as received in evidence and there was no certificate of the judge attached thereto, appellate court was unable to determine what evidence was adduced at the hearing to enforce provisions of arbitration agreement. Code Civ.Proc. §§ 953a, 1282.

8. Appeal and error 🔑907(3)

In absence of bill of exceptions or authentication of affidavits appearing in abstract, it would be presumed in support of findings and order of trial judge denying petition for arbitration that evidence was adduced adequately supporting the findings and judgment. Code Civ.Proc. §§ 953a, 1282.

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Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Application by Victor Trubowitch and T. Kedros, copartners, doing business under the name and style of Pan American Food Company, against Riverbank Canning Company to enforce an agreement to arbitrate alleged controversy growing out of a written contract between the defendant and Pan American Food Corporation for delivery of canned tomato paste. From a judgment dismissing the application, the plaintiffs appeal.

Judgment affirmed.

Norman A. Eisner, of San Francisco, for appellants.

F. M. Brack, of Modesto, for respondent.

THOMPSON, Justice.

The plaintiffs, as members of a copartnership, have appealed from a judgment denying their application under Section 1282 of the Code of Civil Procedure, to enforce an agreement to arbitrate alleged controversies growing out of a written contract between the defendant and Pan American Food Corporation for delivery of canned tomato paste and granting defendant's motion to dismiss said proceeding. The appellants claim to own the contract as successors and assignees of the last-mentioned corporation. The contract specifically provides that it is nonassignable.

The verified petition alleges that petitioners are copartners doing business under the name of Pan American Food Company; that the Pan American Food *Corporation* was organized as a corporation under the laws of New York; that the defendant, Riverside Canning Company, a corporation, of San Joaquin County, California, on August 20, 1942, executed a written contract with Pan American Food Corporation, a copy of which is attached to the petition, marked Exhibit A, to sell and deliver to the corporation tomato paste at specified prices; that the last-mentioned corporation was voluntarily dissolved December 29, 1942, and it transferred all of its assets and property to "Victor Trubowitch and T. Kedros as sole stockholders of said corporation"; that the last-mentioned individuals thereupon organized a copartnership which thereafter carried on the business of the corporation; that the defendant failed to make any delivery of tomato paste under the contract; that since the dissolution of the Pan American Food Corporation the defendant recognized the Pan American Food Company as the assignee and owner of the contract; that the contract provides for a submission by the parties thereto to an arbitration in case of any controversy growing out of the agreement;

that a controversy exists over defendant's failure to deliver tomato paste as agreed; that on November 12, 1943, the "Pan American Food Company, successor and assignee of Pan American Food Corporation," demanded in writing that the defendant comply with the arbitration clause of the contract, which was refused. The petition refers by serial exhibit numbers to numerous letters included in the correspondence which ensued between the parties to this proceeding. The inference may be intended that the correspondence is evidence that the defendant recognized the partnership's ownership of the contract and its right to enforce the arbitration provision, but the petition fails to so state.

The defendant answered the petition admitting the incorporation of the Pan American Food Corporation as alleged; that the defendant made no delivery of tomato paste under the contract; that the contract was executed August 20, 1942, and that the correspondence between the parties to this proceeding included the letters attached to the petition, but it denied that they constitute an acknowledgment or recognition of plaintiffs' ownership of the contract or of their right to maintain this action. All the other material allegations of the petition were denied. The answer affirmatively alleges that the defendant has not, and never had, any contract with or obligation to the petitioners to sell or furnish them tomato paste or any other commodity; that no controversy exists between these parties growing out of the contract with Pan American Food Corporation, or otherwise; that the contract with the last-mentioned corporation contains the specific covenant that *"this contract is not assignable* and goods sold hereunder are not to be shipped or diverted to any destination other than that herein specified, without consent of seller." Finally it is asserted the defendant never made or agreed to make any shipment of tomato paste to the plaintiffs, or to either of them, under the contract, or otherwise; that plaintiffs have no right or authority to maintain this proceeding, and that it never recognized, by the correspondence attached to the petition, or otherwise, plaintiffs' alleged ownership of the contract or their right to maintain this action. On information and belief the answer alleges that the Pan American Food Corporation neither assigned nor transferred the contract or any of its property or assets to plaintiffs.

The petition was heard by the court sitting without a jury. At the close of the evidence defendants moved to dismiss the action. The cause was submitted October 18, 1944. Three days later the court filed a written order directing "that said petition be and the same is hereby denied and the Defendant's motion for dismissal is granted." Subsequently the court adopted findings favorable to the defendant in every essential respect. It was determined that Pan American Food Corporation was duly incorporated and that the defendant entered into the contract attached to the petition, with that corporation, on August 20, 1942; that the contract contains an agreement between the parties thereto to arbitrate their differences in the event of a controversy, but specifically covenants that the contract "is not assignable"; that the defendant never made any shipment of tomato paste under the contract, nor recognized an obligation to petitioners, under the contract or otherwise, nor consented to the alleged assignment form Pan American Food Corporation to plaintiffs. It is affirmatively found that no actual controversy has arisen or exists between the defendant and the plaintiffs, and that plaintiffs have no interest in the fulfillment of the contract since it was nonassignable. The court further found: "For the purpose of ruling upon the petition, and * * * the motion to dismiss, and for these purposes only, the Court further finds that on or about December 29, 1942, said Pan American Food Corporation was voluntarily dissolved, at which time all of the assets of said corporation were transferred to plaintiffs. That said plaintiffs were the sole stockholders of said corporation; that plaintiffs did thereupon form a copartnership under the name of Pan American Food Company."

Upon those findings, the court rendered judgment January 10, 1945, denying plaintiffs' petition for arbitration and granting defendant's motion to dismiss the proceeding. From that judgment the plaintiffs have appealed.

[1] The respondent contends that the appeal is ineffectual since it was not perfected within sixty days (Sec. 939, C.C.P.) from the rendering of the written decision on October 21, 1944, denying the petition and dismissing the proceeding. The notice of appeal from the judgment, based on subsequent adopted findings, was filed within sixty days from January 10, 1945, upon

which date that judgment was rendered. The respondent asserts that since the proceeding presents a mere question of law, findings are not required, Wheeler v. Board of Medical Examiners, 98 Cal.App. 267, 276 P. 1119; Lynch v. Watson, 69 Cal.App.2d 51, 158 P.2d 250, and that the first order constitutes the real judgment in this case. We assume that a petition to enforce arbitration under an agreement therefor contained in a contract is a special proceeding and trial of facts which require the adoption of findings. Sec. 1282, C.C.P. Indeed the section last cited contemplates the privilege of the trial of such issues by a jury. We assume the order dated October 21, 1944, may be considered as a mere memorandum of the judge declaring what his decision on the issues would be, and that findings and judgment in accordance therewith were properly thereafter adopted and rendered. We conclude that the appeal from the judgment in this proceeding was taken within the time allowed by law.

[2] The Pan American Food Company, a copartnership, is without authority to maintain this proceeding under Section 1282 of the Code of Civil Procedure to enforce an agreement for arbitration between the defendant and Pan American Food Corporation, since the copartnership is an entirely different party and entity from the corporation with which the contract was made, and there is no showing of privity of contract with the copartnership. The contract for purchase of tomato paste was made by the corporation August 20, 1942. It remained in force only about six months. It contains the specific provision that "This contract *ends* February 28, 1943." There was no controversy between the parties to that contract during that six months' period of time. Moreover, the corporation voluntarily dissolved and abandoned its business December 29, 1942, four months after the execution of the contract. During that four-month period, before dissolution of the contract, no shipment of tomato paste was made. The corporation did not complain of that failure to ship tomato paste. Evidently it contemplated abandoning its business. The defendant had a right to assume, after its dissolution, that it did not desire shipments of canned tomato paste, for it did not intend to continue its business.

The right to continue the business of the corporation after its dissolution was limited to "the purpose of winding up its affairs." Sec. 399, Civil Code. The authority to wind up the business of a corporation is confined to "*directors* or other persons *as trustees.*" Sec. 399a. Civil Code. This must be done by resolution of the directors, or by written consent of fifty per cent of the shareholders, and evidenced by the filing of a certificate to that effect with the Secretary of State, and by filing a copy thereof with the clerk of the county in which the office of the corporation is located. Sec. 400, Civil Code. No such procedure was followed in this case. The petitioners in this proceeding do not pretend to be acting as directors or trustees of the corporation. They organized a partnership to which, it is alleged, the property of the corporation was assigned. That copartnership is an entirely different entity from that of the corporation, which was the party to the contract. There was no privity of contract extending to the copartnership.

[3] An action for breach of a contract with a corporation, to which a copartnership is not a party, may not ordinarily be maintained by the copartnership or its members, in the absence of a showing that there is a privity of contract between the plaintiff and the defendant. Werlin v. Equitable Surety Co., 227 Mass. 157, 116 N.E. 484; Houston Nat. Exch. Bank v. Osceola Irr. Co., Tex.Civ.App., 261 S.W. 561; Gause v. Pacific Gas & Elec. Co., 60 Cal.App. 360, 212 P. 922; New York Bank Note Co. v. Hamilton Bank Note Eng. and Pr. Co., 180 N.Y. 280, 73 N.E. 48, 52; Dos Pueblos Ranch & Imp. Co. v. Ellis, 8 Cal.2d 617, 67 P.2d 340.

In the Case of Werlin, supra, the plaintiff, Werlin, who was doing business in the name of New Boston Biscuit Company, a corporation, brought suit on a $2,000 bond, executed by the defendant, Equitable Surety Company. The bond was given as security for performance under a contract between the corporation and the Equitable Company, to sell and deliver ice cream cones. The court held that the action on the bond could not be maintained by Werlin as an individual since the contract was made with the corporation, New Boston Biscuit Company. The court said:

"Plainly this plaintiff could not sue as obligee if the corporation was an existing one. [Citing authorities] * * * In these circumstances it does not appear that there was any contract between the individual plaintiff and the defendant. * * *

Indeed it is difficult to see why the plaintiff is not estopped as against this defendant from now claiming that the New Boston Biscuit Company was not an existing corporation. * * *

"The defendant was liable only to the obligee therein named and not to this individual plaintiff."

In the Gause case, supra, a judgment in favor of the defendant was affirmed on appeal. That was a suit for damages for breach of contract instituted by W. S. Gause, a sublessee of a man by the name of Levisee, who had a written contract with the Pacific Gas & Electric Company to sell and deliver to him water for irrigation of rice land. The contract provided that it was not assignable, except by consent of the company. The court said [60 Cal.App. 360, 212 P. 924]:

"The obligation undertaken by respondent was to furnish water under certain conditions *to said Levisee.* Plaintiff was not a party to said contract and was not referred to in any manner. * * * We must be guided, therefore, by the intention of the parties as expressed in said written instrument *and conclude that said obligation was created in favor of Levisee and him alone,* or one in privity with said contract. * * * It is plain that at least his [appellant's] first count reveals no cause of action for the reason that Levisee is the only person who could demand the performance of any duty under said contract. * * *

"It is not necessary to consider any further the proposition that the duty and obligation arising out of a contract are due only to those with whom or for whom it is made, and that *the application of this rule makes it plain that the covenants of respondent were in favor of Levisee and not of plaintiff.*" (Italics added.)

In that case appellant contended that the agreement to furnish water to Levisee was a covenant running with the land, and that the obligation, therefore, extended to his lessee. The court determined otherwise. One of the reasons stated for that conclusion was that the contract prohibited an assignment or a sublease without consent of the company. The land was sublet to the appellant without the consent of the company, contrary to the terms of the contract.

The plaintiff copartnership in this case is an entirely different entity from that of the corporation which executed the contract involved in this proceeding. California Linoleum and Shades Supplies, Inc. v. Schultz, 105 Cal.App. 471, 287 P. 980; Triest & Co. v. Goldstone, 173 Cal. 240, 159 P. 715. There was no privity of contract between the defendant and the copartnership. The copartnership may not be held to be the alter ego of the corporation under the circumstances of this case. No facts are alleged in the petition and no proof was adduced to justify the court in disregarding the undisputed change of identity from a corporation to that of a copartnership. To warrant the assumption that the copartnership is the alter ego of the corporation, it must appear, not only that the copartnership holds all of the stock of the corporation, but also that circumstances exist which require the assumption, in accordance with the general rule, that the recognition of separate entities would result in the sanctioning of fraud or the promotion of injustice. Marr v. Postal Union Life Ins. Co., 40 Cal.App.2d 673, 681, 105 P.2d 649; Erkenbrecher v. Grant, 187 Cal. 7, 11, 200 P. 641, 642. No fraud was alleged or proved. In the Erkenbrecher case, last cited, it is said in that regard: "In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must further appear that they are the 'business conduits and alter ego of one another,' *and that to recognize their separate entities would aid the consummation of a wrong.* Divested of the essentials which we have enumerated, *the mere circumstance that all the capital stock of a corporation is owned and controlled by one or more persons does not, and should not, destroy its separate existence;* were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization." (Italics added).

In the present case the petition merely alleges that when the corporation was voluntarily dissolved on December 29, 1942, "all of the assets of said corporation were transferred and succeeded to by Victor Trubowitch and T. Kedros *as* sole stockholders," and that said stockholders thereafter formed a copartnership and continued "to carry on the business theretofore conducted by said corporation." The petition does not alleged that the two individuals in fact were the only stockholders of the corporation. Authorization by the directors for them to carry on the business, as required by law, was neither alleged nor proved. Neither the individual stockholders nor the copartnership was authorized to carry on the business in the manner required by statute, or at all. Under such circumstances, according to the authorities last cited, the court would not have been justified in assuming that the copartnership was the alter ego of the corporation or that the plaintiffs were authorized as sole stockholders or otherwise, to carry on the business. In effect, the court determined just the contrary. Certainly plaintiffs were not entitled to maintain this proceeding, based on an alleged breach of contract occurring before the dissolution of the corporation, of which alleged breach the corporation failed to complain during the term of the contract, or during the existence of the corporation, or at all. We conclude that plaintiffs were without legal authority to maintain this proceeding to enforce the agreement for arbitration.

Moreover, the executory provisions of the contract may not be enforced by the petitioners, as assignees of the Pan American Food Corporation, either as individuals or as a copartnership, for the further conclusive reason that the written agreement specifically declares "This contract is not assignable." The defendant did not consent to the alleged assignment. It is conceded no tomato paste was delivered. This is not a mere suit to recover a debt due to a corporation. It is a proceeding based on alleged unliquidated damages for breach of an unperformed covenant of a contract after its termination. Clearly the intention of the parties to the contract was to prohibit its assignment, at least without the consent of the seller.

[4] Where the contract expressly covenants that it shall be nonassignable, that provision will be enforced by the courts. La Rue v. Groezinger, 84 Cal. 281, 24 P. 42, 43, 18 Am.St.Rep. 179; 3 Cal.Jur. 239, sec. 4; 6 C.J.S., Assignments, § 24b p. 1073; 4 Am.Jur. 238, sec. 12; 76 A.L.R. 1307, note. In the La Rue case, supra, it is said: "If the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it otherwise might be so."

In the text of 4 American Jurisprudence, at page 238, supported by numerous authorities, it is said: "As a general rule, the parties to a contract may expressly prohibit its assignment, and such stipulation will be recognized and enforced by the courts."

The seller of canned products has the right to determine, by the provisions of its written contract, the party to whom it is willing to extend its credit.

[5] The questions to be decided upon this petition to enforce the agreement for arbitration under the contract with Pan American Food Corporation involve the ascertainment of the intention of the parties to the contract with relation to the right of assignment, and whether the defendant waived the stipulation against assignment by recognizing the partnership's alleged ownership and right to enforce the terms of the contract, by means of the correspondence or otherswise. Those are problems for the determination of the trial judge, with whose conclusions we may not interfere on appeal since there is substantial evidence to support the findings in that regard. The court determined that the contract was not assignable; that plaintiffs are not and never were owners of the contract or entitled to enforce its terms; that the defendant did not recognize plaintiffs' right to enforce the provisions of that contract since they were not parties thereto, and that no controversy exists between them and the defendant with relation thereto.

From the letters attached to the petition, it appears that plaintiffs, as a copartnership, demanded of the defendant on June 2, 1943, for the first time, long after the termination of the contract and after dissolution of the corporation, the submission of alleged controversies to arbitration. The contract ended February 28, 1943, as specifically provided therein. The corporation had been dissolved more than five months before the demand was made. It is reasonable to assume, as the court found, from the defendant's reply letters, that it did not acknowledge plaintiffs' alleged ownership of the contract or their right to enforce the arbitration provision. Defendant's first letter in reply to plaintiffs' attorney stated that it had not been able to "assemble all the facts surrounding this matter." It did suggest defendant might be willing to make some "allotments" to "Pan American

Food *Corporation.*" Later the defendant stated that after investigation of the facts and consultation with its attorney it had concluded plaintiffs had no standing to complain of an alleged breach of contract with the corporation. That letter reads in part: "After a discussion of the facts, we are forced to the conclusion that your client has no cause of action." As a matter of compromise of their dispute the defendant even suggested the making of a "new contract" with plaintiffs, which they finally agreed to do. That new contract was, however, not made. It is true that the defendant made certain tentative proposals to ship to the plaintiffs some tomato paste. But we may assume, in support of the findings, that such offers were made with the sole object of avoiding threatened litigation. As evidence that the defendant did not recognize any legal obligation to supply plaintiffs with tomato paste, the defendant wired plaintiffs: "We have been trying to ship you tomato paste *as per friendly settlement* but the government is taking every can of paste we can pack. * * *" (Italics added.)

[6] From the foregoing message and from the correspondence as a whole it may be inferred that the defendant was attempting to make a "friendly settlement" with plaintiffs to avoid threatened litigation, and that it did not intend thereby to acknowledge any legal obligation to them. Certainly that is the inevitable conclusion enforced by the emphatic statement in defendant's last letter that "After a discussion of the facts, we are forced to the conclusion that *your client has no cause of action.*" The reason given in the last message for failure to deliver tomato paste was that "the government is taking every can of paste we can pack." It is common knowledge that the government was then securing all available food products for use of the armed forces in time of war. We conclude that there is adequate proof to support the finding of the court that the defendant did not, by means of the correspondence, or otherwise, acknowledge a legal obligation to plaintiffs.

[7] Since the affidavits included in the transcript are not authenticated as received in evidence and there is no certificate of the judge attached thereto, we are unable to determine what evidence was adduced at the hearing under Section 1282 of the Code of Civil Procedure to enforce the provisions of an arbitration agreement. The transcript on appeal was prepared upon notice under Section 953a of that code. No bill of exceptions was settled or filed. The transcript contains certain affidavits, but fails to indicate by endorsements or otherwise whether they were offered or read in evidence. The notice to the clerk to prepare the transcript in accordance with Rule 5 of Rules on Appeal fails to request the inclusion of such affidavits. It merely requests the inclusion of "the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the Court," etc. No oral evidence is included in the transcript. The clerk's certificate merely recites that the transcript contains a "full, true and correct copy of the original: Affidavit, Affidavit of Service by Mail, Affidavit of Victor Trubowitch," etc. Numerous letters are included in the transcript. It does not certify that evidence other than the designated documents was adduced. There is no certificate of the trial judge attached to the record.

[8] In the absence of proper authentication we may not presume that affidavits, which may be included in a transcript, were received in evidence. We must assume, upon the record in this case, in support of the findings and order denying the petition for arbitration, that evidence was adduced adequately supporting the findings and judgment.

It has been frequently held that affidavits are no part of the judgment roll. Bonfilio v. Ganger, 58 Cal.App.2d 315, 136 P.2d 632; Sutliff v. Dempsey, 5 Cal.App.2d 246, 42 P.2d 677; Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217; Wynecoop v. Coats, 51 Cal.App.2d 672, 125 P.2d 609; C.C.P., Sec. 670. The judge of the trial court is the only one authorized to authenticate the documents used upon a hearing before him, either in settling a bill of exceptions or in a transcript prepared under Section 953a of the Code of Civil Procedure. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 P. 1062; Drummond v. Drummond, supra. In the Muzzy case the appeal from an order granting a change of venue which was heard upon affidavits was dismissed for a lack of proper authentication. The transcript contained the complaint, notice of motion and affidavits, certified to by the clerk as "full and true copies of original papers on file." The certificate further asserted that the affidavits "were used upon the hearing of the motion." But the court said: "That this is not a proper method of authentication may not be doubted. The proper method, of course, is by a bill of exceptions, certified to by the judge. Moreover, waiving the question of the power of the clerk, the authentication is incomplete; for while it states that these papers were used upon the hearing of the motion, it is nowhere made to appear that they were *all* of the papers. * * * We are not advised by any authentication whether other affidavits were or were not before the trial court."

The transcript in the present case is similarly defective.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

71 Cal.App.2d 739

KOENIG v. JOHNSON, Treasurer, et al.

Civ. 7132; Sac. 5693.

District Court of Appeal, Third District, California.

Nov. 24, 1945.

1. Taxation ⇨59

Where mother, brother and sister vested title of their properties in brother as trustee with trustors as beneficiaries, and trustee engaged in extensive dealings over several years in securities, and also purchased a lemon grove, trustee's transactions constituted "doing business" within meaning of Franchise Tax Act. Gen. Laws 1937, Act 8488, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

2. Statutes ⇨199

The words "include" and "including" when used in statute are ordinarily used as words of enlargement, not limitation.

See Words and Phrases, Permanent Edition, for all other definitions of "Include" and "Including".

3. Taxation ⇨59

The section of Business Trust Tax Act providing that a business trust shall "include" every business organization whereby property is conveyed to trustees who are not restricted to mere collection of funds, etc., does not, because of quoted word, limit the kind of business trusts taxable under the Act to those having more than one trustee. St.1933, p. 708, § 3.

4. Taxation ⇨59

Where brother, sister and their mother vested title to their properties in brother as trustee with power to operate any business, with trustors as beneficiaries, and trustee engaged in extensive dealings in securities and purchased a lemon grove, the trust was a "business trust" within Business Trust Tax Act. St.1935, p. 1084, §§ 1, 2; St.1933, p. 708, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Trust".

5. Joint stock companies and business trusts ⇨1

The nature of a trust as a business organization is to be determined from terms of trust instrument.

6. Statutes ⇨190, 215, 217

If there is doubt as to intent of Legislature, court may resort to extrinsic aid to interpret statute, such as its contemporary history, circumstances under which it was passed and mischief at which it was aimed.

7. Taxation ⇨108

When evasion of tax statute is attempted, statute should be liberally construed to prevent such evasion.

8. Taxation ⇨204(2)

In case of claim of exemption from taxing statute, strict construction against such exemption should be adopted.

9. Taxation ⇨42(1)

A tax measure, to be valid, must lay its burdens uniformly upon all those who come within a proper classification of persons to be subjected to its burden, and such classification must have some reasonable basis for differentiation between those who are and those who are not to be taxed, and must be founded upon some natural intrinsic or constitutional distinction.

10. Statutes ⚷147

While generally, intention to change the law is to be inferred from material change in language of a statute, a change may indicate legislative intent to clarify its true meaning, and surrounding circumstances may be considered to determine intent with which change was made.

11. Statutes ⚷219

Administrative interpretations while not binding on courts are persuasive in construing a statute.

12. Statutes ⚷220

Under 1939 Amendment repealing Business Trust Act and providing that a business trust shall include every organization whereby property is conveyed to "one, or more than one trustee", substitution of such quoted words for word "trustees" in the prior act was for purpose of clarification and Legislature intended that, under prior act, a trust which would otherwise be taxable should not be exempt merely because it had only one trustee. St. 1935, p. 1084, §§ 1, 2; St.1933, p. 708, § 3; Gen.Laws Supp.1939, Act 8494a, § 2(b).

13. Action ⚷59
Appeal and error ⚷175

Where taxpayer sued in two actions to recover franchise taxes paid prior to 1939, and for tax paid for 1939, complaint in latter action was not made part of record on appeal and motion to consolidate the actions was supported by affidavit which alleged that in each action principal issue was whether trust was taxable as a business trust, taxpayer's right to credit upon 1939 corporation income tax for amount paid for franchise tax for that year was not an issue in trial nor on appeal. St.1935, p. 1084, §§ 1, 2; St.1933, p. 708, § 3; Gen.Laws Supp.1939, Act 8494a, § 2(b).

14. Taxation ⚷59

Where 1939 rentals from property of business trust were collected as were interest on notes and bonds and dividends on stocks, and between January 1 and July 1, 1939, trustee sold several securities at net gain of $493.50, trust was "doing business" during 1939 and was properly taxed under Business Trust Act which was not repealed until July 25, 1939. St.1935, p. 1084, §§ 1, 2; St.1933, p. 708, § 3; Gen. Laws 1937, Act 8488, § 5.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Actions by F. W. Koenig, as trustee of "The Koenig Trust," against Charles G. Johnson as Treasurer of the State of California and another to recover franchise taxes and interest paid for the taxable years of 1934 to 1939, and for such taxes and interest for the year 1939. From a judgment for plaintiff, defendants appeal.

Reversed.

Robt. W. Kenny, Atty. Gen., and John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for appellants.

Latham & Watkins, of Los Angeles, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought two actions, one to recover franchise taxes and interest paid for the taxable years 1934 to 1939, and the other for such taxes and interest paid for the year 1939. The actions were consolidated for trial. The taxes which were the subject of the controversy were imposed under the "Massachusetts or Business Trust Tax Act" of California, Stats.1933, ch. 211, p. 708, as amended Stats.1933, ch. 1049, p. 2694; Stats.1935, ch. 323, p. 1084, hereinafter called the Act, on the theory that the Koenig Trust, hereinafter referred to as the Trust, was a business trust doing business within this state, within the meaning of the aforesaid Act. These actions were based upon the contention that the said Trust was not such a business trust nor was it doing business within the meaning of the Act.

The actions were tried upon two stipulations of facts, the declaration of trust, the deposition of plaintiff Koenig, and certain schedules attached to the tax returns. The trial court filed a written opinion in which it stated that while the evidence supported the view that the trust was in fact doing business during the period for which the tax was imposed, it was not a Massachusetts or business trust within the meaning of the Act. From the judgment for plaintiff which followed, this appeal was taken.

From the stipulation of facts it appears that the Trust was established in 1931 when plaintiff, F. W. Koenig, Elsa Koenig, his mother, and Gertrude K. Guttman, his sister, entered into an agreement which provided that they should vest the title of their respective properties in F. W. Koenig, as trustee, with the trustors as beneficiaries. The trust was to continue until the death of the last beneficiary living at the time of its creation unless the trustors jointly should revoke it by written instrument. The whole title to the trust property, both legal and equitable, was vested in F. W. Koenig, and the declaration provided that the beneficiaries took no interest or estate therein, their only interest consisting of the right to enforce due performance. The trustee was empowered to collect the principal and interest, rents, issues and profits of the trust estate, and, after specified payments and deductions, to pay the entire net income available for distribution, quarterly or in other convenient installments, to the trustors in the proportions which the contributions of each bore to the whole trust estate. Provisions were made for disposition of the interest of any one of the trustors in the event of the death of such trustor. Additional powers vested in the trustee were as follows:

"At his option and as long as he may deem advisable, to retain any property and to continue and operate any business which he may receive hereunder, the profits and losses, if any, to inure or be chargeable respectively to the Trust Estate and not to the Trustee. To manage, control, sell, convey, partition, divide, subdivide, exchange, improve, repair, and to encumber by mortgage, trust deed or otherwise and in such manner and in accordance with such procedure as it may deem advisable, the trust estate or any part thereof. To lease the Trust Estate, or any part thereof, for terms, within or extending beyond the duration of this trust, and to grant for like terms, the right to mine or drill for and remove therefrom, gas, oil, and/or any other minerals or substances. * * * To invest the principal (and income if accumulated) in any property, whether or not permissible by law as investment for Trust funds. * * * To borrow money and as security therefor pledge or mortgage the whole or any part of the Trust Estate; to convey the fee title thereto to such person or corporation as it shall select for the purpose of creating such indebtedness and executing and delivering any and all instruments necessary to evidence and secure the debt and to reconvey said property to the Trustee subject thereto; * * * To have respecting bonds, shares of stock and other securities all the rights, powers and privileges of an owner, including, though without limiting the foregoing, holding securities in his own name or otherwise, voting, giving proxies, payment of calls, assessments and other sums deemed by the trustee expedient for the protection of the interests of the Trust Estate, exchanging securities, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, consolidations, mergers, liquidations, pooling agreements, voting trusts, assenting to corporate sales, leases and encumbrances; the Trustee, however, to assume or to be under no personal liability in respect of any securities at any time held hereunder. To reimburse himself from the income and/or principal of the Trust Estate for any loss, liability or expense incurred by reason of his ownership or holding of any property received or held in this trust. All discretions in this Trust conferred upon the Trustee shall, unless specifically limited, be absolute and uncontrolled and their exercise conclusive on all persons interested in this Trust or the Trust Estate. The powers and discretions of the Trustee enumerated herein are not to be construed as a limitation upon his general powers and discretions, but the Trustee in addition thereto is hereby vested with and shall have, for the full duration of this trust, as to the Trust Estate, the income therefrom, and in the execution of this trust, the same and all the powers and discretion that an absolute owner of property has or may have."

It was further provided that the trustee might, in the event of his absence from the state, illness or other incapacity, appoint First National Bank of Los Angeles, or any other duly qualified corporation, as custodian of the trust estate; that he might resign, in which event such bank or other corporation should succeed to the trusteeship with all the powers, duties, etc., provided for in the trust instrument.

The stipulations of the parties show that during the years 1934 to 1938 the average security holdings of the Trust consisted of from 100 to 125 blocks of securities. In those years the sales of securities averaged approximately 100 sales of blocks of securities per year. A large majority of these sales were of securities held for short periods. Thus during 1934 respondent sold 65 blocks of securities held less than one year at a net profit of $8,758.67, and 11 blocks of stock held more than one year but less than two, at a net gain of $6,929.50; in 1935 he sold 53 blocks of stock held less than one year for a profit of $10,281.57, and 22 over one year and less than two for a net profit of $2,680.71; in 1936 he sold 45 blocks of stock held less than one year, realizing a net gain of $8,514.50, and 29 sales of stock held one to two years for a $7,721.36 profit; in 1937 he sold 77 blocks of securities held less than one year, together with 44 held one to two years, 16 held two to five years, and 3 held over five years, these sales realizing a net gain of $5,463.93; and in 1938 he sold 56 blocks of stock held less than one year for a net gain of $5,728.11, and 13 blocks held one to two years for a net loss of $6,442.59. Of those securities sold during this period which had been held by the respondent for less than one year, a large percentage were held less than six months, 44 being in that class in 1934, 31 in 1935, 22 in 1936, and 45 in 1937 and 1938 respectively. In addition, there was an appreciable number of sales of securities held less than a month: 4 in 1934, 5 in 1935, 5 in 1936, 22 in 1937, and 15 in 1938.

Besides these extensive dealings in securities the respondent purchased a lemon grove for the Trust. He then leased the six-room house located on the property, and entered into a marketing contract with a fruit growers' cooperative association. Under this contract respondent agreed to harvest and deliver his fruit to the cooperative's packing house and the cooperative agreed to pack, ship and sell the lemons for respondent. Respondent operated the property through an independent contractor selected by him.

The Act provided:

"Section 1. Every Massachusetts or business trust doing business within the limits of this State shall annually pay to the State for the privilege of doing business within this State a tax according to or measured by its net income to be computed in the manner hereinafter provided at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year.

* * * * *

"Section 2. Sections 4 to 38 inclusive of chapter 13, Statutes of 1929, entitled 'An act to carry into effect the provisions of section 16 of Article XIII of the Constitution of the State of California, relating to bank and corporation taxes,' as amended, and any amendments thereto hereafter made shall apply, and shall be construed to apply to all Massachusetts or business trusts to the same extent and with the same force and effect as they are applicable to every corporation taxable under subdivision (3) of section 4 of said act.

"Section 3. The term Massachusetts or business trust as herein used shall include every business organization consisting essentially of an arrangement whereby property is conveyed to trustees where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise." St.1933, p. 708, § 3.

Section 5 of the Bank and Corporation Franchise Tax Act (Stats.1929, ch. 13, as amended; Deering's Gen.Laws, 1937, Act 8488) which was incorporated into the act under consideration by section 2, supra, provided: "The term 'doing business,' as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."

On this appeal it is contended by appellants that the Trust was a business trust within the meaning of the Act, and that it was doing business and therefore subject to be taxed for such privilege.

[1] That the transactions engaged in by the trustee constituted the doing of business seems to be settled beyond controversy by the decisions of our Supreme Court in Golden State Theatre & Realty Corporation v. Johnson, 21 Cal.2d 493, 133 P.2d 395; Carson Estate Co. v. McColgan, 21 Cal.2d 516, 133 P.2d 636; and Hise v. McColgan, 24 Cal.2d 147, 148 P.2d 616; and the decision of this court in People v. Alexander Goldstein Co., 66 Cal.App.2d 771, 152 P.2d 1016 (hearing by Supreme Court denied). Here the business transactions engaged in by the trustee, as hereinbefore set forth, were much more numerous and extensive than those shown to have been engaged in by the Golden State Theatre and Realty Corporation, the Carson Estate Company, and Hise as Commissioner; and they are similar to those engaged in by the Alexander Goldstein Company, though more extensive and numerous. We agree with the trial court that the evidence shows that respondent, as trustee, was doing business within the meaning of the Act.

Regarding appellants' contention that the Trust was a business trust, respondent argues that it was not a "business organization," that it was not created "for the purpose of carrying on some business enterprise," and, particularly, that as it had but one trustee and therefore did not have "trustees" "associated together with similar or greater powers than the directors in a corporation," it did not come within the meaning of the Act. Argument of respondent is based upon the assumption that section 3 of the Act limits the kind of business trust taxable under the Act to those having more than one trustee, and that no trust that does not fit into the pattern of that section can be held to be within the purview of the Act.

[2, 3] We do not so construe the measure. While it recites that the term Massachusetts or business trust as used therein shall "include" every business organization consisting essentially of an arrangement whereby property is conveyed to trustees, etc., trusts having but one trustee are not thereby excluded from its provisions. The words "include" and "including" when used in a statute are not ordinarily used as words of limitation but rather of enlargement.

In Fraser v. Bentel, 161 Cal. 390, 119 P. 509, Ann.Cas.1913B, 1062, one of the questions before the court was whether a covenant running with certain land forever prohibiting the use of firearms thereon, constituted an "encumbrance." Section 1114 of the Civil Code declared that "the term 'encumbrances' includes taxes, assessments, and all liens upon real property"; and it was contended that since the restriction against the use of firearms was not therein mentioned, it could not be considered an encumbrance. But the court held that the section did not exclude limitations of a perfect title other than those enumerated; that the word "includes" is not, ordinarily, a word of limitation, but rather of enlargement. That case is cited in American Surety Co. v. Marotta, 287 U.S. 513, 517, 53 S.Ct. 260, 262, 77 L.Ed. 466, 468, in which the words "shall include" in a tax act were held not the equivalent of "shall mean" or "shall include only."

In Peerless Carbon Black Co. v. Sheppard, Tex.Civ.App., 113 S.W.2d 996, a tax statute imposed an occupation tax upon every person manufacturing or producing carbon black, and provided: "The term 'carbon black' as herein used includes all black pigment produced in whole or in part from natural gas, casinghead gas or residue gas by the impinging of a flame upon a channel disk," etc. Vernon's Ann. Civ.St. art. 7047, subd. 45(f). And it was contended that carbon black produced by other methods was excluded. The opinion states, 113 S.W.2d at pages 997, 998:

"In thus defining the occupation or business taxed, appellant has substituted the term 'by which is meant' instead of the word 'includes' as used in the taxing act, and apparently contends that the term 'by which is meant' is identical with the word 'includes.' This contention is not sustained. The word 'includes' as used in the act is not identical with nor equivalent to the word 'meant,' or the clause 'by which is meant,' because the authorities hold that such a word or clause is less elastic than the word 'includes.' 97 A.L.R. 1382. 'The word "includes" is not, ordinarily, a word of limitation, but rather of enlargement.' Fraser v. Bentel, 161 Cal. 390, 119 P. 509, 511, Ann.Cas.1913B, 1062. The word 'includes' and 'including' are regarded by the authorities as being identical or equivalent to each other; and the authorities uniformly hold that unless the context in which such words are used requires, they are never regarded as being identical with or equivalent to 'mean and include,' nor with such less elastic words and terms as 'meant,' 'meaning,' or 'by which is meant.' Lederer v. Penn. Mut. L. Ins. Co., 3 Cir., 258 F. 81; United States v. The Betsey and Charlotte, 4 Cranch 443, 2 L.Ed. 673; 12 C.J. 528, and note 52. In 31 C.J. 395, § 3C, it is said that while the word 'including' is susceptible of different shades of meaning, 'it is generally employed as a term of enlargement and not a term of limitation, or of enumeration.' The cases cited from numerous jurisdictions sustain this text. In consequence, it follows that the use of the word 'includes,' as used in the taxing act under consideration, instead of some less elastic word or term, such as 'meaning,' 'meant,' or 'by which is meant,' would seem clearly to imply that the Legislature did not intend to use the word 'includes' as one of limitation or of enumeration, but rather of enlargement, or as illustrative of those intended to be included within the taxing act. See, also, 4 Words and Phrases, First Series, pp. 3499, 3500; 2 Words and Phrases, Second Series, pp. 1007, 1008."

In re Harper, D.C., 175 F. 412, 423, deals with the bankruptcy act which provided: "'Debt' shall include any debt, demand, or claim provable in bankruptcy."

11 U.S.C.A. § 1(14). The court said: "It was not intended that definitions of words used in the act which read 'shall include' should exclude other meanings or definitions of the word, or limit the ordinary and well-understood meanings. It was intended, as the words used plainly indicate, to make sure that they would be held to include what is expressed." Also see Helvering v. Morgan's Inc., 293 U.S. 121, 124, 125, 55 S.Ct. 60, 79 L.Ed. 232, 235; United States v. National City Bank of New York, D.C., 21 F.Supp. 791, 795; Jacksonville Terminal Co. v. Blanshard, 77 Fla. 855, 82 So. 300, 301; Lynch v. Gleaner Combine Harvester Corporation, 223 Mo. App. 196, 17 S.W.2d 554, 556; Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 531, 265 P. 195.

[4] The context of the act before us does not require that in order to be subject to the tax a trust must have trustees who shall be associated together, etc. All that is required, as stated in section 1 of the Act, is that it shall be a business trust doing business in this state. That the Koenig trust was a business trust, as distinguished from one whose purpose was the collection of funds and their payment to beneficiaries, and that it was doing business as that term is defined in the act and within the decisions of the courts of this state above cited, appears from the language of the trust instrument as well as from the evidence of the activities which were carried on by the trustee.

As to what constitutes a business trust as distinguished from an ordinary trust, there are numerous pertinent decisions of the Federal courts. In Morrissey v. Commissioner of Internal Revenue, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263, where business trusts were claimed to be taxable as "associations" under federal statutes imposing taxes upon "corporations, associations, joint-stock companies and insurance companies," the court said (296 U.S. at page 357, 56 S.Ct. at page 295, 80 L.Ed. at pages 270, 271): "In what are called 'business trusts' the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management, and sale of properties; or for dealings in securities or other personal property; or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested, either by joining in the plan at the outset, or by later participation according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise."

The distinction between business trusts and those of the traditional type, as stated in the Morrissey case, is also stated in other decisions. See Hecht v. Malley, 265 U.S. 144, 160, 161, 44 S.Ct. 462, 68 L.Ed. 949, 959, distinguishing the earlier case of Crocker v. Malley, 249 U.S. 223, 39 S.Ct. 270, 63 L.Ed. 573, 2 A.L.R. 1601, upon this ground; Ross Lewis Trust v. Commissioner of Internal Revenue, 10 Cir., 110 F.2d 937; Mertens, Law of Federal Income Taxation, Vol. 7A, § 43.12, pp. 805–807.

[5] Also, numerous decisions by United States Courts hold that the nature of a trust as a business organization is to be determined from the terms of the trust instrument. In Helvering v. Coleman-Gilbert Associates, 296 U.S. 369, 373, 374, 56 S.Ct. 285, 287, 80 L.Ed. 278, 281, the court said: "We agree with the Circuit Court of Appeals [1 Cir., 76 F.2d 191] that weight should be given to the purpose for which the trust was organized, but that purpose is found in the agreement of the parties. Not only were they actually engaged, as the Board of Tax Appeals determined, in carrying on an extensive business for profit, but the terms of the trust instrument authorized a wide range of activities in the purchase, improvement and sale of properties in the cities and towns of the state. The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

Also see Titus v. United States, 10 Cir., 150 F.2d 508; Commissioner of Internal Revenue v. Security-First National Bank of Los Angeles, 9 Cir., 148 F.2d 937, 938, 939; Fletcher v. Clark, 10 Cir., 150 F.2d 239; Mertens, Law of Federal Income Taxation, Vol. 7A, § 43.12, pp. 805–807.

The trust instrument before us plainly authorized a wide range of business activity in the purchase and sale of properties, such as was held to constitute the doing of business by the decisions aforesaid, and was not constituted merely for the purpose of holding and conserving the property of the trustors.

[6] The obvious purpose of the Act was to require trusts doing business within the state and enjoying profits therefrom to pay a tax for the privilege, and to bear their share of the tax burden along with the corporations, etc., which likewise were doing business and enjoying profits. But if there be doubt as to the intent of the Legislature we are authorized to resort to extrinsic aids to interpret it, such as its contemporary history, the circumstances under which it was passed, and the mischief at which it was aimed. Harrison v. Northern Trust Co., 317 U.S. 476, 479, 63 S.Ct. 29, 87 L.Ed. 407, 410; United States v. American Trucking Associations, 310 U.S. 534, 542–544, 60 S.Ct. 1059, 84 L.Ed. 1345, 1350, 1351; United States v. Dickerson, 310 U.S. 554, 561, 562, 60 S.Ct. 1034, 84 L.Ed. 1356, 1362; Los Angeles County v. Frisbie, 19 Cal.2d 634, 639, 122 P.2d 526; People v. Ventura Refining Co., 204 Cal. 286, 292, 268 P. 347, 283 P. 60; People v. Earl, 19 Cal.App. 69, 71, 72, 124 P. 887; In re Crutcher, 61 Cal.App. 481, 485, 215 P. 101; 2 Sutherland Statutory Construction, 3rd Ed., p. 481 et seq. Regarding the present Act, the California Tax Research Bureau, in a report made March 1, 1932, stated that business trusts were becoming common in the state, and that since they came directly into competition with and frequently took the place of business corporations which were required to pay a franchise tax, and enjoyed the same privileges and advantages as other business organizations required to pay the tax, equitable treatment required a tax for them also. On December 1, 1932, it submitted to the Legislature a report recommending the enactment of such a measure, and the act of 1933 followed.

We find nothing in either these reports or elsewhere indicating that in taxing business trusts those having only one trustee should be exempt. As was said by the Supreme Court of this state in Re Estate of Steehler, 195 Cal. 386, 402, 233 P. 972, 979, "* * * where two interpretations of the provisions of a statute imposing taxes are urged, that one should, if possible, be adopted which lays the burden of taxation uniformly upon those who bear that burden and who stand in the same degree with relation to the tax, * * *."

[7, 8] Respondent does not contend that the Act is invalid, and he concedes that it is applicable to trusts having more than on trustee; but, contending that it would be improper to make it applicable to trusts having but one trustee, invokes the rule that tax statutes are to be construed strictly in favor of the taxpayer and against the taxing power. However, when an evasion of the provisions of a statute is attempted, a liberal construction should be given in order to prevent such evasion. In re Estate of Reynolds, 169 Cal. 600, 603, 147 P. 268. But what respondent is claiming is, in effect, that having but one trustee the Koenig trust is exempt from the tax; and the rule is well established that in case of claims of exemption from the terms of a taxing statute, strict construction against such exemption should be adopted. See In re Estate of Bull, 153 Cal. 715, 718, 96 P. 366; In re Estate of Steehler, supra; Bay Cities Transportation Co. v. Johnson, 8 Cal.2d 706, 712, 68 P.2d 710; In re Estate of Morris, 56 Cal.App.2d 715, 727, 133 P.2d 452.

Furthermore, a distinction for tax purposes, of a trust having one trustee, from another similar in all other respects and carrying on similar activities, but having two or more trustees, would not only be inconsistent with the purposes of the Act, but would constitute an unjust discrimination against the latter, which we must assume the Legislature did not intend.

As stated in section 1, the tax is imposed for the privilege of doing business within this state; and when a business trust is doing business within the state it would seem to be immaterial whether, as a taxable entity, it had one trustee or ten. Had the Act specifically provided that business trusts having two or more trustees were subject to the tax and that those having but one trustee were exempt, a claim that such a distinction resulted in an unfair discrimination would doubtless have justification. And if the situation were reversed and the tax were imposed upon only those trusts having one trustee this plaintiff would doubtless claim that such a provision unfairly discriminated against them. The only interpretation of the Act which would result in a uniform imposition of the tax burden is that a trust constituting a business entity doing business within the state is taxable regardless of the number of its trustees.

[9] A tax measure, in order to be valid, must lay its burdens uniformly upon all

those who come within a proper classification of the persons to be subjected to its burden; and such a classification must have some reasonable basis for a differentiation between those who are and those who are not to be taxed; it must be founded upon some natural, intrinsic or constitutional distinction, and a purely adventitious condition can form no reasonable basis for a classification. People v. Yosemite Lumber Co., 191 Cal. 267, 276, 277, 216 P. 39; Barker Bros., Inc., v. Los Angeles, 10 Cal. 2d 603, 607, 76 P.2d 97; Soares v. City of Santa Maria, 38 Cal.App.2d 215, 217, 218, 100 P.2d 1108. We can find no reasonable basis for differentiation for tax purposes, between business trusts doing business within the state having one trustee, and similar trusts having two or more, and, therefore, must assume that the Legislature did not intend to make such distinction.

Respondent also urges, in support of his contention that the Legislature intended to exempt business trusts having but one trustee, that when, in 1939, the Legislature repealed the Massachusetts or Business Trust Act, and incorporated section 2(b) into the Corporation Income Tax Act, Stats.1939, ch. 1049, Deering's 1939 Supp.Act 8494a, it intended to change the meaning of section 3 of the repealed act, and that the new section may be looked to in construing the prior one. Said section 2(b) provides: "The term 'corporation' as herein used shall include every corporation, association, and Massachusetts or business trust, except a bank or banking association. For the purposes of this act a Massachusetts or business trust includes every business organization consisting essentially of an arrangement whereby property is conveyed to one, or more than one, trustee for purposes other than the mere conservation of assets, collection and disbursing of fixed and periodic income, or the securing of an obligation."

[10] While as a general rule an intention to change the law is to be inferred from a material change in the language of a statute, on the other hand a change may indicate a legislative intent to clarify its true meaning; and surrounding circumstances may be considered in order to determine the intent with which the change was made. Hise v. McColgan, supra, is persuasive in this connection. There the court had under consideration a 1943 amendment to the Bank and Corporation Franchise Tax Act defining the words "bank" and "corporation" to include "any 'corporation' operated by any receiver, liquidator, referee, trustee or other officers or agents appointed by any court." St.1943, p. 1405, § 5. The section had previously read: "The term 'corporation,' as herein used, shall include every corporation, other than a bank or banking association, and other than those expressly exempted from the tax by the provisions of this act or the Constitution of the State of California." Deering's Gen.Laws, Act 8488, sec. 5. The Supreme Court held that the amendment was for clarification purposes, citing: Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425; San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 125 P.2d 36; Martin v. California Mutual B. & L. Ass'n, 18 Cal.2d 478, 116 P.2d 71.

In the Union League Club case above cited the court, in holding that an amendment to a statute was intended to clarify rather than to change the existing law, said 18 Cal.2d at page 279, 115 P.2d at page 426: "But in view of the fact that at the time this amendment was made, social clubs were resisting the collection of sales taxes, a legislative intent to clarify rather than to change the law, may well be inferred."

In San Joaquin Ginning Co. v. McColgan, also cited above, where the Legislature enlarged the definition of the word "reorganization" as used in section 13(j) of the Bank and Corporation Franchise Tax Act to include a distribution in liquidation by a corporation of all or a substantial portion of its business or property to a corporate stockholder, the court said that in some cases similar liquidation transactions had been held to be reorganizations, and that the inclusion of the added phrase in the amended section did not necessarily amount to a declaration of the Legislature that something was added which was not within the language of the definition as theretofore in force; and it added, 20 Cal.2d at pages 263, 264, 125 P.2d at page 41: "The foregoing observations are a sufficient basis from which to draw the conclusion that such a transaction was within the meaning of reorganization as theretofore defined by the legislature. The addition in 1939 of the specific type of transaction as constituting a reorganization was intended to clarify rather than to expand the definition of 'reorganization.' It has been held that if a certain class of taxpayers is resisting payment of taxes pursuant to a claimed construction of the taxing statute, the Legislature in enacting an addition to the statute may very well be deemed to intend a clarification of its previous language rather than a change in the existing law."

In Martin v. California Mutual B. & L. Association it was said that a consideration of the surrounding circumstances may indicate that an amendment was merely the result of a legislative attempt to clarify the true meaning of a statute. To the same effect see W. R. Grace & Co. v. California Employment Commission, 24 Cal.2d 720, 729, 151 P.2d 215; Standard Oil Co. v. Johnson, 24 Cal.2d 40, 48, 147 P.2d 577. Also see School District No. 18 v. Pondera County, 89 Mont. 342, 297 P. 498, 502; Hugo v. Miller, 50 Minn. 105, 52 N.W. 381, 383; In re Lis' Estate, 120 Minn. 122, 139 N.W. 300, 302; Rural Independent School District, etc., v. New Independent School District, 120 Iowa 119, 94 N.W. 284, 286, 287; Kennedy v. Truss, 1 Terry, Del, 424, 13 A.2d 431, 434; United States v. Perkins, D.C., 17 F.Supp. 177, 180, 181.

[11] Prior to 1939 the Franchise Tax Commissioner had construed the Act as including trusts with but one trustee, had determined that the Koenig trust was taxable thereunder, and demanded that it make returns; also certain federal decisions had considered whether under certain federal statutes trusts with but one trustee were taxable as "associations" within the meaning of such statutes; and, furthermore, appellant states that the records of the Commissioner, prior to the introduction of the amendatory act in 1939, show that the Koenig trust had made returns in which it claimed it was not subject to the tax. Also, regulations issued by the Commissioner in November, 1937, had already indicated, by the use therein of the words "trustee or trustees" in reference to business trusts, that he was construing the act to apply to trusts having only one trustee; and while administrative interpretations are not binding on courts, they are persuasive in determining the construction to be put upon the language of a statute (23 Cal.Jur., sec. 152, p. 776); and the construction put upon the earlier act tends to show that the language of the 1939 statute was intended merely to clarify the earlier act to conform to the administrative construction put upon it.

[12] In view of the foregoing we conclude that the substitution in the 1939 amendment, of the words "one, or more than one, trustee" for the word "trustees" in the prior act, was for the purpose of clarification, and that it was the intention of the Legislature that, under the prior act, a trust which would otherwise be taxable should not be exempt merely because it had only one trustee.

Both appellant and respondent rely upon Federal decisions holding Massachusetts or business trusts to be "associations" within the meaning of United States statutes taxing corporations, associations, etc.; and respondent relies upon language used in decisions of the Federal courts emphasizing the similarity of the trusts under consideration to corporations in order to bring them within the application of the word associations used in the various acts, arguing that there is no such similarity here. But in this respondent overlooks the fact that this California statute is not one taxing corporations, associations, joint stock companies and insurance companies as were the federal statutes which were under construction, and in which no reference was made to Massachusetts or business trusts, but is an independent act applying only to Massachusetts or business trusts; and unless the language of section 3 compels a conclusion that in order to be taxable a business trust must be comparable to a corporation—which we have held it does not—the decisions relied upon by him are not pertinent on this point. However, if it were necessary to find that the Act was intended to apply only to trusts which are comparable to corporations, only "resemblance and not identity" would be requisite. Morrissey v. Commissioner of Internal Revenue, supra; Titus v. United States, 10 Cir., 150 F.2d 508.

In the Morrissey case, 296 U. S. at page 359, 56 S.Ct. at page 296, 80 L.Ed. at pages 271, 272, the features of the trusts held to furnish sufficient resemblance to corporations were said to be continuity of succession, centralized management, security from termination by the death of owners of beneficial interests, and the opportunity for limitation of personal liability of participants to the property embarked in the undertaking. In the Titus case the trust—which was a family affair similar to the Koenig trust—was held to be an association within the meaning of the federal statutes, the court saying that it resembled a corporation in that it had centralized management, continuity of existence during the period of the term uninterrupted by the death of any of the members, limitation of liability, and means of transfer of beneficial interests, and that there were "associates"—the wife and sister—who held one share each while Titus, the sole trustee, held the remainder of the shares.

In Hamilton Depositors Corporation v. Nicholas, 10 Cir., 111 F.2d 385, the court in holding a trust taxable as an association said that it had all of the attributes of an association held sufficient in the Morrissey case to justify classifying the trust as an association, to wit: continuing entity throughout the trust period, centralized management, continuity of the trust uninterrupted by death among the beneficial owners, means for transfer of beneficial interests, and limitation of personal liability of the participants to property embarked in the undertaking. Also see Ross Lewis Trust v. Commissioner of Internal Revenue, 10 Cir., 110 F.2d 937.

Respondent in his brief sets forth numerous factors which he contends are essential to a finding of a resemblance to a corporation and which he asserts are lacking here; but as was said in the Morrissey case, 296 U.S. at page 358, 56 S.Ct. at page 295, 80 L.Ed. at page 271, "* * * definitions, while helpful, are not to be pressed so far as to make mere formal procedure a controlling test," and that "the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive."

The Koenig trust instrument provides for all or substantially all of the features mentioned in the foregoing cases; and as to respondent's contention that the Act applies only to trusts having more than one trustee, even the federal courts have held that more than one trustee is not essential to a finding that a business trust is taxable under the federal statutes as an association. In Titus v. United States, supra, there was but one trustee, yet the trust was held taxable since under the trust agreement it had attributes of a corporation. Also see Hamilton Depositors Corporation v. Nicholas, supra: Ross Lewis Trust v. Commissioner of Internal Revenue, supra; Commissioner of Internal Revenue v. Security-First National Bank, 9 Cir., 148 F.2d 937; Brooklyn Trust Co. v. Commissioner of Internal Revenue, 2 Cir., 80 F.2d 865; Merchants' Trust Co. v. Welch, 9 Cir., 59 F.2d 630; Ittleson v. Anderson, 2 Cir., 67 F.2d 323, 325; Continental Bank & Trust Co. v. United States, D.C., 19 F.Supp. 15.

Finally, respondent asserts that even though it should be determined that the trust was subject to tax for the years prior to 1939, it was improperly taxed for 1939 and is entitled to recover the amount paid for that year. The reasons asserted are (1) that most of the corpus of the trust was distributed to the beneficiaries on January 1, 1939, and the remainder on July 1, 1939, and though bonds were sold during the interim, their sale was for the purpose of making a division of the proceeds; and (2) that as the Massachusetts or Business Trust Act "was repealed as of December 31, 1938," the Trust should not have been taxed thereunder for 1939. He also asserts that the Trust was taxed for the year 1939 under the Corporation Income Tax Act, and it was therefore subjected to double taxation.

Appellants, in controversion, point out that in 1939 rentals from property of the trust estate under lease were collected, as were interest on notes and bonds and dividends on stocks, the whole amounting to $14,187.77; and that between January 1 and July 1, 1939, plaintiff sold 1 security held one year or less, 2 held one to two years, 1 held two to five years, and 1 held over five years, the net gain on such sales amounting to $493.50, and that transactions of less volume were held in Carson Estate Co. v. McColgan, supra, and Hise v. McColgan, supra, sufficient to constitute doing business. They also point out that the business trust act was not repealed until July 25, 1939. They concede, however, that the Legislature did not intend that both the franchise tax under the repealed act and the income tax under the amended Income Tax Act should be paid, and say that the tax paid under the former was properly deductible from the corporate income tax assessed. They assert, however, that as the 1939 tax under the former act was based on 1938 income and accrued January 1, 1939, it was properly collected, and that though respondent, in a proper proceeding, is entitled to recover the amount paid under the Income Tax Act, such amount cannot be collected in this action since it was not brought for that purpose.

[13, 14] While plaintiff-respondent sued in two separate actions, the one for taxes paid for the years prior to 1939, and the other for those paid for the year 1939, the complaint in the latter action was not made a part of the record on appeal and is not before us, nor does it appear when it was filed. However, the motion to consolidate, which was made by plaintiff-respondent, is supported by his affidavit which alleges that both actions were brought for the recovery of franchise taxes and that in each the principal issue was whether the Trust was a taxable business trust. Plaintiff's right to credit upon his 1939 corporation income tax for the amount paid for franchise tax for that year is therefore not an issue in the case before us, nor a matter proper for our determination on this appeal. Under the decisions in the cases above cited by appellants the trust was doing business during the year 1939 and was properly taxed under the Massachusetts or Business Trust Act which act was not repealed until July 25, 1939, after the trust estate had been finally distributed.

As for respondent's statement that the Act was repealed as of January 1, 1939, section 23 of the 1939 amendment to the Corporation Income Tax Act (Stats.1939, ch. 1049) provided that "The Massachusetts or Business Trusts Act * * * is hereby repealed except for the collection of taxes, penalties and interest accrued under its provisions, and for the refund of taxes erroneously collected under its provisions." Section 24 provided: "This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of section 1 of Article IV of the Constitution, take effect immediately, and shall be applied in the computation of taxes accruing subsequent to December 31, 1938." Respondent asserts that by virtue of section 24 business trusts were taxable only under the new act, beginning with the year 1939. But the franchise taxes to which respondent was subject had already accrued prior to the date of repeal, and section 24, while it provided that the provisions of the amended income tax act were to be applied to income received after December 31, 1938, did not state that business trusts were to be taxed only under the amended act.

Whether respondent was taxable under both acts, and whether, if an income tax was imposed upon the Trust for the year 1939, respondent was entitled to be credited thereon with the amount paid for the franchise tax, are not issues in this case as far as the record shows; and as we are satisfied that the respondent was a business trust doing business in this state during the period in controversy, within the meaning of the Act, the judgment should be and it is hereby reversed.

THOMPSON and PEEK, JJ., concur.

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71 Cal.App.2d 777

BUCKHANTZ v. R. G. HAMILTON & CO.

Civ. 14828.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1945.

1. Appeal and error ⇨1011(1)

A reviewing court may not invade field of fact-finding court, and where conflict in evidence exists findings of trial court are conclusive and every substantial conflict must be resolved in favor of the finding.

2. Appeal and error ⇨994(3)

Credibility of witnesses was for trial court.

3. Appeal and error ⇨931(1)

In reviewing evidence, all conflicts must be resolved in favor of respondent, and all reasonable inferences must be indulged by appellate court to sustain the judgment.

4. Appeal and error ⇨996

A judgment cannot be disturbed on ground that findings are not sustained by the evidence even if evidence is without conflict if opposing inferences may reasonably be deduced therefrom.

5. Appeal and error ⇨931(1)

The evidence and inferences to be drawn therefrom must be viewed by appellate court in light most favorable to judgment of court below and appellate court cannot weigh the evidence.

6. Appeal and error ⇨989

The only question on appeal is whether there is substantial evidence, even though contradicted, that will support conclusion reached by trial judge, and if there be such evidence finding sustained thereby is conclusive on appeal.

7. Appeal and error ⚷989

Where finding of fact that cotton which was delivered by seller to buyer was in accord with contract was supported by substantial evidence, appellate court would not extend its inquiry for purpose of determining whether seller's evidence was as "overwhelming" as claimed in brief.

8. Sales ⚷175

A buyer, who refused further deliveries of cotton of same quality and grade as that received by him in first shipment which was in accordance with requirements of contract, could not recover damages for loss of profits on amount not delivered.

9. Appeal and error ⚷717

An opinion of trial judge, although not part of record, is of value to reviewing court as an aid in illustrating theory of decision and in discovering process by which judgment has been reached, but trial judge's oral remarks or written opinion cannot be considered in determining whether findings are sufficiently supported by the evidence and cannot be used to impeach the findings.

10. Appeal and error ⚷717

Oral expressions or written opinion of trial judge cannot restrict his power to declare his final conclusion in his findings of fact and conclusions of law, which findings and conclusions constitute the final decision of the court, and an oral or written opinion cannot be resorted to for purpose of impeaching findings and judgment. Code Civ.Proc. § 632.

11. Appeal and error ⚷717

The findings of fact constitute the actual decision of trial court, and appellate court is concerned with correctness of decision and judgment rather than with reasons as expressed in opinion which motivated trial court in reaching its conclusion, and hence any conflict between findings of fact and written opinion of trial judge concerning evidence and inferences to be drawn therefrom will not be considered by reviewing court, and, if there be a variance, findings will control. Code Civ.Proc. § 632.

12. Appeal and error ⚷981

Ruling on motion for new trial on ground of newly discovered evidence will not be disturbed unless there be a manifest abuse of discretion.

13. New trial ⚷108(1)

A new trial on ground of newly discovered evidence is not warranted where it appears that different judgment would not necessarily result from the new evidence if presented.

14. New trial ⚷106

Denial of motion for new trial on ground of newly discovered evidence was not an abuse of discretion where, if such evidence had been introduced, the most that could be said for it, considering defendant's explanation of its possible inaccuracies, was that it would have created a further conflict in the evidence, and court had found upon substantial evidence that defendant had not violated its contract.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Morris Buckhanz against R. G. Hamilton & Company, a corporation, to recover damages for alleged failure of defendant to fulfill a contract whereby it sold and agreed to deliver to plaintiff a quantity of cotton. From a judgment for defendant, plaintiff appeals.

Affirmed.

Dudley Robinson, of Los Angeles, for appellant.

MacDonald & Pettit and Robert H. Edwards, Jr., all of Los Angeles, for respondent.

WILSON, Justice.

Action for damages for the alleged failure of respondent to fulfill a contract whereby it sold and agreed to deliver to appellant a quantity of cotton of a character, grade, and quality and at a price named in the contract, the details of which it is not necessary to amplify.

Appellant alleged that respondent failed to deliver the entire amount of the cotton contracted for, and that the portion that was delivered was of a quality or grade inferior to that provided for by the contract. For the alleged breach appellant sought damages. Findings of fact were in favor of respondent on all material issues and from the judgment which followed the appeal is taken.

1. *The evidence and the findings.* The evidence is in sharp conflict on all issues except as to the provisions of the contract which are admitted. Appellant offered expert testimony to the effect that the cotton which was actually delivered was not of the quality or grade required by the contract. On the other hand, respondent offered not only expert evidence but positive testimony of those who handled the cotton that the same was of the kind specified in the contract.

[1, 2] Counsel have entered into elaborate discussions of the qualifications of the experts and the value to be given to their testimony. Appellant asks us to review the evidence in its entirety and to weigh the various statements of some of the witnesses as opposed to testimony given by others. That duty devolved upon and was performed by the trial judge. It has been said so often that it seems unnecessary to repeat here that a reviewing court may not invade the field of the fact finding court, and that where a conflict in the evidence exists the findings of the trial court are conclusive and every substantial conflict must be resolved in favor of the finding. Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429; Morse v. Custis, 38 Cal.App.2d 573, 576, 101 P.2d 702; Hotaling v. Hotaling, 193 Cal. 368, 379, 224 P. 455, 56 A.L.R. 734; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157. The conflict here is not fanciful but is substantial and real. All of the expert witnesses examined and testified concerning samples of the cotton which was delivered. Appellant's witnesses opined that it was of a poorer quality than that called for in the contract. Respondent's experts were as positive in their statements that it was as good or better than that which respondent agreed to deliver, and in addition the source and quality of the cotton was testified to by respondent's witnesses who handled it. The trial judge was face to face with the witnesses and it is trite to say that he was able to determine and did determine from their demeanor on the stand and their manner of testifying which of the expert witnesses were qualified upon the subject and which of those giving positive testimony were entitled to greater credence.

[3-5] In reviewing the evidence all conflicts must be resolved in favor of the respondent, and all reasonable inferences must be indulged by this court to sustain the judgment. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123. Even if the evidence is without conflict but different and opposing inferences may reasonably be deduced therefrom, the judgment cannot be disturbed on the ground that the findings are not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 67, 148 P. 212. Not only the evidence but the inferences to be drawn from it must be viewed by an appellate court in the light most favorable to the judgment of the court below. Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 153 P. 951; Bandle v. Commercial Bank, 178 Cal. 546, 547, 174 P. 44. It is not within our province to weigh the evidence.

[6, 7] The only question for us to determine here is whether there is substantial evidence, even though contradicted, that will support the conclusion reached by the trial judge (Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 14, 47 P.2d 462), and if there be such evidence the finding sustained thereby is conclusive on appeal. Cate v. Certain-Teed Products Corp., 23 Cal.2d 444, 448, 144 P.2d 335. The finding of fact that the cotton which was delivered by respondent to appellant was in accord with the contract was supported by ample substantial evidence, and this court will not extend its inquiry for the purpose of determining whether appellant's evidence was as "overwhelming" as he claims in his brief.

[8] Appellant having refused further deliveries of cotton of the same quality and grade as that received by him in the first shipment is not entitled to recover damages for loss of profits on the amount not delivered.

2. *Effect of trial judge's opinion.* Appellant complains that a written memorandum or opinion filed by the trial judge, indicating his conclusions upon certain of the facts, is in conflict with the findings of fact subsequently signed and filed. We have made no comparison of the opinion and the findings for the purpose of ascertaining whether appellant's claim is well grounded for the reason that if there be such conflict the result of the appeal would not be affected.

The writing of opinions by trial judges is not to be discouraged, whether the questions determined be purely of law or of mixed law and fact. Such course is sanctioned by the Canons of Judicial Ethics of the American Bar Association and is desirable for the purpose of showing that the judge has a full understanding of the case and of indicating to the litigants and their counsel his reason for believing the evidence given by some of the witnesses and disbelieving that given by others.

[9-11] An opinion of the judge of the trial court, although not a part of the record, is of value to the reviewing court as an aid in illustrating the theory of the decision and in discovering the process by which the judgment has been reached. Coakley v. Ajuria, 209 Cal. 745, 749, 290 P. 33; In re Estate of Felton, 176 Cal. 663, 667, 169 P. 392. But a trial judge's oral remarks or written opinion cannot be considered in determining whether or not the findings are sufficiently supported by the evidence (Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347; In re Estate of Felton, supra), and cannot be used to impeach the findings. Messenkop v. Duffield, 128 Cal. App. 541, 543, 18 P.2d 67. Neither an oral expression nor a written opinion can restrict the power of the judge to declare his final conclusion in his findings of fact and conclusions of law. Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179. The findings and conclusions constitute the final decision of the court and an oral or written opinion cannot be resorted to for the purpose of impeaching or gainsaying the findings and judgment. DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444. The findings of fact constitute the actual decision of the court (Code Civ.Proc. § 632) and we are concerned with the correctness of the decision and judgment rather than with the reasons, as expressed in the opinion, which motivated the trial court in reaching its conclusion. Bealmear v. Southern California Edison Co., 22 Cal.2d 337, 339, 139 P.2d 20; Lincoln v. Superior Court, 22 Cal.2d 304, 315, 139 P.2d 13; International Ass'n, etc., v. Landowitz, 20 Cal.2d 418, 423, 126 P.2d 609. Hence any conflict, if such there be, between the findings of fact and the written opinion of the trial judge concerning the evidence and the inferences to be drawn therefrom, will not be considered by a reviewing court. We are interested in ascertaining whether the findings are supported by the evidence. If there be a variance, as asserted by appellant, between the findings and the opinion the former will control.

[12] 3. *The motion for a new trial.* Respondent's witnesses, in describing the character of the cotton and its origin, testified that the same was taken from certain railway cars which were identified by letters indicating the railway companies to which the cars belonged together with car numbers. Upon appellant's motion for a new trial affidavits were presented to the effect that subsequently to the trial appellant had ascertained that the cars thus identified were in other parts of the United States at the time when respondent's employees asserted that they were at Pinedale, California, where the cotton was unloaded. Respondent presented counter-affidavits to the effect that errors in the car numbers might have been made for the reason that the copies of the receiving weight sheets were made up from a fourth carbon copy, originally made by hand in pencil, which was practically illegible. The trial court weighed these affidavits and denied the motion for a new trial. When a motion for a new trial is made on the ground of newly discovered evidence the ruling of the trial court will not be disturbed unless there be a manifest abuse of discretion (Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 651, 139 P.2d 666; Berkowitz v. Kiener Co., 37 Cal.App.2d 419, 427, 99 P.2d 578) and we find none here.

[13, 14] A new trial on the ground of newly discovered evidence is not warranted where it appears that a different judgment would not necessarily result from the new evidence if presented. Berkowitz v. Kiener Co., supra. If the evidence referred to in appellant's affidavits had been introduced at the trial the most that can be said for it, considering respondent's explanation of its possible inaccuracies, is that it would have created a further conflict in the evidence. The court found, upon a plenitude of substantial evidence without considering the initials and numbers of the railway cars, that respondent had not violated its contract, and there is no reason to assume that the aggravation of the already abundant confusion would have resulted in a judgment in favor of appellant.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

71 Cal.App.2d 826

HOSEA v. BRATHER.

Civ. 3391.

District Court of Appeal, Fourth District, California.

Nov. 29, 1945.

1. Landlord and tenant 🔑49(2)

Evidence supported finding that tenant breached terms of lease of apartment house in failing to flush sewer at least every 10 days as required by lease, so as to entitle landlord to recover damages. Code Civ. Proc. § 1161, subd. 4.

2. Appeal and error 🔑1011(1)

A finding by trial court supported by conflicting evidence cannot be disturbed on appeal.

3. Appeal and error 🔑843(2)

Where lease expired by lapse of time after appeal from judgment in action for unlawful detainer and damages had been perfected and defendant vacated premises and delivered them over to plaintiff, question as to that portion of judgment ordering possession of premises delivered over to plaintiff and question as to plaintiff's right to evict defendant under rent regulation became moot.

4. Landlord and tenant 🔑49(2)

Evidence was insufficient to sustain award of damages for failure to replace damaged, worn-out, or missing furniture and furnishings as required by terms of lease of apartment house. Code Civ.Proc. § 427, subd. 2; § 1174.

5. Landlord and tenant 🔑49(2)

Evidence sustained award of damages for defendant's failure to properly maintain plumbing as required by terms of lease of apartment house. Code Civ.Proc. § 427, subd. 2; § 1174.

Appeal from Superior Court, San Diego County; H. S. Shaffer, Judge Assigned.

Action by Dudley H. Hosea against Charles Brather for unlawful detainer and damages. From a judgment for plaintiff, the defendant appeals.

Modified and affirmed.

Ruel Liggett, of San Diego, for appellant.

Chester A. Smith, of San Diego, for respondent.

GRIFFIN, Justice.

Action for unlawful detainer and damages. Defendant and appellant Charles Brather, by written lease dated August 25, 1939, leased, from Bertha Lawrence, the Raleigh Apartment House in San Diego, comprising about 18 apartments, and its furnishings and equipment as inventoried. He went into possession, used one apartment for his own living quarters and rented the balance to tenants. The lease was subsequently extended so as to expire August 31, 1945. Bertha Lawrence, on November 28, 1944, sold the property and assigned the lease to plaintiff herein. The lease, among other provisions, contained the following: "The lessee shall * * * keep and maintain in good order, repair, and condition, at his own expense, the interior of said apartment house, and agrees to flush the plumbing connection with the sewer at least every ten days." The lessor agreed to make all *major* repairs to the plumbing *in the building.* The lessee agreed to "keep and maintatin all the herein described personal property, equipment, furniture and furnishings, included in the leased premises, in good condition and repair during the period of this lease * * * and surrender the same to the lessor at the expiration of the period of this lease in as good condition as said property shall have been at the time of the commencement of the term hereof, except for the ordinary use and natural wear"; to "promptly repair any of said property that may become damaged, broken or so worn as to become unfit for the purpose intended"; to "replace the same with other property of the same kind and character, and of at least equal in value as the property so replaced; * * * that during all of said term said premises and every part thereof shall be kept by the lessee at his own expense in a clean and wholesome condition and in compliance with all health regulations"; that if lessee fails to perform any condition of the lease and continues to do so for ten days after service of notice of such default, lessor may terminate the lease.

The trial court found that the provisions of the lease had been breached by the lessee, particularly in reference to the failure of the lessee to keep and maintain in good order, repair and condition, the interior of the apartment house and to flush the plumbing connection at least every ten days during the term of the lease; that on December 20, 1944, the Board of Health condemned the premises as unsanitary and unfit for human habitation, and notice thereof was served upon defendant and posted on the property; that defendant did not repair all damaged or broken furniture as required by the lease nor did he replace all worn-out furniture and furnishings; that plaintiff did, on January 5, 1945, serve upon the defendant a written demand requiring that he keep and maintain the interior of the premises in good order and condition, that he flush the plumbing connection with the sewer every ten days and that he repair any damaged, broken or worn-out furniture or furnishings and that unless he did so within ten days the lease would be canceled and terminated; that the defendant did not, since the receipt of the notice, keep the interior of the premises in good order, repair and condition, and did not replace all broken or worn-out furniture. The court then found that plaintiff had been injured by the acts and omissions of defendant, and was damaged as follows: $250 for failure to maintain the plumbing in good condition, and $500 additional for failure to replace damaged, worn-out, or missing furniture and furnishings. The court rendered judgment for restitution of the premises "and such portions of the furniture or furnishings therein as are listed or inventoried in the lease and were in existence at the time of the filing of the complaint for money damages", totaling $750.

[1, 2] The apartment building was built in 1890. It consisted of a frame construction which was "sagging down" in places. In 1941 the Health Department condemned it and thereafter some renovation was made. During the occupancy of the lessee, constant trouble was had in reference to the plumbing and sewer stoppage. Both lessee and lessor were fully acquainted with this condition, and it was this condition which brought about the clause in the lease requiring lessee to flush the sewer at least every ten days during the term of the lease. On several occasions the sewage backed up in the pipes and overflowed through a leak or break in the sewer connecting pipe, which break was just under the surface of the dirt in the back yard and at the entrance to the back steps. The break had been covered with a cement cap. The health inspector was called on several occasions and found that at least on one occasion the sewer had been stopped up for two days and that the sewage had been running out of the break into the neighbor's yard sufficiently to create a nuisance. He testified that he ordered Brather to repair the pipe either with a Barrett or a "Y" clean-out, but that on December 19, when he returned to the property, Brather had not taken care of anything outside of fixing a few windows. He testified that he found a hole in the bathroom large enough for a cat to crawl through; that he condemned the property "mostly for the plumbing conditions, and partly because of lack of sanitation and repairs" and as "unfit for human habitation." A written notice of this fact was given to Brather and a copy thereof posted on the property. There was other corroborating evidence in respect to the plumbing and unsanitary conditions. Defendant offered evidence which merely created a conflict with that testimony. Without relating the evidence in full, suffice it to say, there was sufficient evidence, if believed by the trial court, to support the finding that certain conditions of the lease were, as a consequence thereof, breached by defendant. Egan v. Dodd, 32 Cal.App. 706, 164 P. 17; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 P. 1024; Connell v. Brownstein-Louis Co., 86 Cal. App. 610, 261 P. 331; Sec. 1161, C.C.P. Subd. 4. That finding cannot be disturbed on appeal. Waer v. Waer, 189 Cal. 178, 207 P. 891.

[3] It should be here noted that the lessee paid the last four months of rent under the lease, as extended, in advance. The sum paid was $460 for the months of May, June, July and August, 1945. This action was commenced on February 8, 1945, and was decided on May 2, 1945. Since this appeal was perfected the lease has otherwise expired by lapse of time. It was conceded by both counsel that in August, 1945, defendant, tenant thereunder, vacated the premises and delivered them over to plaintiff. The portion of the judgment ordering possession of the premises delivered over to plaintiff would be ineffectual and would serve no useful purpose. Any question as to the validity of that order, therefore, has become moot. The question raised by defendant as to the right of plaintiff to evict the tenant, lessee, from an apartment house containing 18 apartments, where he occupies but one apartment therein, under Sec. 6 of Rent Regulations for housing, issued by the Office of Price Administration under date of June 1, 1943, published in Federal Register as Title 32, Chap. XI, Part 1388, Sec.

1388.1181, 8 F.R. 7322, also became moot. Diederichsen v. Sutch, 47 Cal.App.2d 646, 118 P.2d 863; In re Estate of McSwain, 176 Cal. 287, 168 P. 117.

[4] We will therefore limit our discussion to the question of damages awarded by the court. It allowed $500 for "failure to replace damaged, worn-out, or missing furniture and furnishings in said premises." The right to award such damages is given under Sec. 427, subd. 2, and Sec. 1174, C.C.P., which latter section provides in part that the court shall assess the damages occasioned to the plaintiff by any unlawful detainer, alleged in the complaint and proved on the trial. Nathan v. Dierssen, 164 Cal. 607, 130 P. 12. We have carefully examined the entire record in relation to the proof of damage. The evidence produced by plaintiff on the subject was a copy of the lease and attached thereto was an itemized inventory of each room, which was taken at the time of the execution of the lease. No value of the several items was expressed therein. Counsel for plaintiff asked plaintiff, while on the stand, what it would cost to replace the broken and missing furniture and furnishings "based upon Mr. Brather's testimony alone." The trial court properly sustained an objection to the question on the ground that it was indefinite from Brather's testimony just what furnishings were missing. The trial court remarked: "I cannot tell what is missing at all, so the objection will be sustained." Counsel made no further endeavor to establish the value thereof or damage suffered, if any. The court refused to view the premises. The evidence as to what furnishings were missing, damaged, or worn out, is confusing. It cannot be ascertained from the record what articles were actually missing or what damage plaintiff suffered, if any, for failure to replace such furnishings. It is completely devoid of any evidence fixing or establishing their monitary value or the amount of pecuniary damage that resulted from failure to replace them. The evidence does not support the finding that plaintiff was damaged, in this respect, in the sum of $500. Erreca v. Meyer, 142 Cal. 308, 75 P. 826; Donovan v. Ætna Indemnity Co., 10 Cal.App. 723, 103 P. 365; Brown v. Johnson, 45 Cal. 76; De Thomas v. Witherby, 61 Cal. 92, 44 Am.Rep. 542; 5 Cal.Jur. 200, Secs. 33–35 et seq.

[5] The portion of the findings and judgment allowing $250 damages for failure to maintain the plumbing in good condition does have some evidentiary support. Plaintiff testified that he was a plumbing contractor by trade; that he was familiar with the cost of such repairs; that he thoroughly inspected the premises; that had defendant thoroughly flushed the sewer disposal pipe as agreed upon in the lease, the plumbing trouble would have been eliminated; that to put the plumbing back in condition would cost "perhaps five or six hundred dollars". The amount allowed by the court ($250) for this damage is supported by the evidence.

The portion of the judgment allowing total damages in the sum of $750 is therefore modified and the total damage is reduced to $250. The judgment is affirmed as modified. Each party to pay his own costs on appeal.

BARNARD, P. J., concurs.

PEOPLE v. GORY. *

Cr. 3877.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1945.

Rehearing Denied Dec. 6, 1945.

Hearing Granted Dec. 27, 1945.

1. Poisons 🔑4

Guilty knowledge is an essential element of the crime of unlawfully possessing cannabis sativa with which defendant was charged. St.1941, p. 2820, § 11160.

2. Criminal law 🔑1173(2)

Where prisoner at county farm was charged with possession of marijuana and evidence showed that marijuana was found in box issued to prisoner which was not under his exclusive control, and evidence raised only presumption of guilt, reading and withdrawal of instructions requiring that defendant knowingly have objects in his possession and have guilty knowledge before he could be convicted required reversal as amounting to miscarriage of justice. Pen.Code, § 4573; St.1941, p. 2820, § 11160.

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* Subsequent opinion 170 P.2d 433.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Morris Gory was convicted of the unlawful possession of cannabis sativa, and he appeals.

Reversed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant was charged in an information containing two counts with (1) unlawfully taking marijuana into a prison farm in violation of section 4573 of the Penal Code, and (2) the unlawful possession of flowering tops and leaves of Indian Hemp (cannabis sativa), in violation of section 11160, Health and Safety Code, St.1941, p. 2820. He was also charged with a prior conviction of felony, i.e., grand theft. Defendant admitted the prior conviction, and moved to dismiss count 1 of the information, which was granted. The jury found defendant guilty of the crime charged in count 2 of the information, the unlawful possession of cannabis sativa. From the judgment which followed, defendant has perfected this appeal, and he also appeals from the order by which his motion for a new trial was denied.

The record discloses that at the time of the alleged possession of marijuana, appellant was a prisoner at the Los Angeles County Honor Farm near Castaic, and with thirty some odd prisoners occupied one of the camp's bunk-houses or barracks, to which he had been assigned in April of 1944. As part of the equipment issued to each prisoner appellant received a metal box 8 inches deep, about 18 inches long, approximately a foot wide, in which to keep his toilet articles and small personal effects. There was no way of locking these boxes, each of which bore a number corresponding to the bed number of the space occupied by the particular prisoner. The boxes were placed on the floor at the head of each bed, and during the day when the prisoners were engaged in their duties on the farm, one man was selected from the personnel to stay in the bunk-house to "keep the inmates from monkeying with other people's property."

Officer Gunderson entered the bunk-house at 9:30 p.m. on June 2, 1944, and while several officers who accompanied him searched the boxes of other prisoners in the bunk-house, he went to appellant's bed on which the latter was lying, and picking up the metal box bearing the number of appellant's bed, he opened the box and found marijuana "scattered from the top down to the bottom * * * just loose in the box." Said officer took off appellant's clothes and examined them, turning the pockets inside out, but found no marijuana either on his person or in his clothes. Deputy Sheriff Huber, who was present at the time, testified that he asked appellant what he knew about this marijuana, stating: "This is your marijuana; where did you get it?" and that appellant did not answer. Appellant admitted in his own testimony that the material which the officers identified as marijuana was taken from his box, but stated that he had never seen it before the officers removed it from the box.

Appellant bases this appeal upon six points which enumerate the grounds upon which he relies for a reversal of the judgment of conviction.

In points I and II, he complains of error on the part of the trial court in reading, rereading and then expressly withdrawing from the jury's consideration an instruction, hereinafter referred to as "instruction 12", to-wit: "In order for defendant to have in his possession the objects charged in the information, you must be convinced by the evidence and beyond a reasonable doubt that he *knowingly* had such objects in his possession. The meaning of the word 'possession' includes the exercise of dominion and control over the thing possessed." Appellant urges that by such erroneous action the trial court effectively removed from the consideration of the jury the right to determine whether he had any knowledge of the presence in the box of the contraband substance; and was equivalent to a declaration that any object found among his effects was conclusively presumed to be there of his own knowledge. Moreover, "without the element of knowledge there can be no 'possession' as the word is used in defining the offense of which this defendant was convicted, and that the trial court denied to the defendant the right to urge as a defense that element which is basic in any charge of possession of narcotics."

In points III and IV, appellant specifies error in the reading, rereading and express withdrawal by the trial court from the jury's consideration an instruction, hereinafter referred to as "instruction 13", to-wit: "Even if you find from the evidence beyond a reasonable doubt that the defendant had in his possession, flowering tops of Indian Hemp or loco-weed, before you can find the defendant guilty of possessing the same, you must also be convinced beyond a reasonable doubt that the defendant had a *guilty knowledge* of the character of said flowering tops of Indian Hemp and possessed a *guilty intent.* If you find that the defendant was innocent of the *knowledge of the character* of the flowering tops of Indian Hemp or did not have a *guilty knowledge* of possessing said flowering tops of Indian Hemp, then you will find the defendant not guilty and must acquit him." Appellant contends that by reading the refused instruction to the jury, later rereading it, and then withdrawing it from their consideration with the admonition that they were to disregard it, the trial court removed from the jury the right to determine whether or not the defendant knew the object was marijuana.

To clarify his position with respect to the two instructions numbered 12 and 13, appellant states: "Whereas the first two points were directed to 'knowledge' of the existence of the object as a prerequisite to the 'dominion and control' necessary to constitute possession, Points III and IV are directed to 'knowledge' as applied to the character of the object as being a prohibited poison."

Respondent argues that instruction numbered 9 which was given to the jury fulfills all requirements of the law and constitutes a proper instruction on the question of possession: "Possession of narcotics as charged in the information means an immediate and exclusive possession and that such narcotics were under the dominion and control of the defendant." Also, that the term "wilfully" as used in instruction numbered 15, which was given to the jury, unquestionably invokes the element of knowledge, to-wit: "If you believe beyond a reasonable doubt that the defendant, on or about the 2nd day of June, 1944, at and in the County of Los Angeles, State of California, did wilfully, unlawfully and feloniously have in his possession flowering tops and leaves of Indian Hemp (marijuana), as charged in the information you should find the defendant guilty as charged." In this connection respondent contends that "it must necessarily and inevitably follow that if he (appellant) wilfully had marijuana in his possession, he knew what the substance was which he possessed."

It appears that in those cases wherein the courts have stated that neither intent nor knowledge is an element of the offense of possession of narcotics and that "mere possession" is a violation of the statute, People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777; People v. Johnson, 66 Cal. App.2d 164, 165, 152 P.2d 331; People v. Sweeney, 66 Cal.App.2d 855, 859, 153 P.2d 371, the evidence adduced therein presented sufficient facts and circumstances which conclusively established the guilty knowledge of the particular defendant. Such evidence usually included admissions and statements made by the defendant with respect to possession of such narcotics, which supplied the final link in the chain of circumstances connecting defendant with the offense charged against him. Moreover, in many instances, possession of drugs has been inferred from testimony that the defendant threw the drug out of the window, or otherwise disposed of it upon the approach of the arresting officers, and that it was later retrieved and identified as having been in the custody and under the control of defendant prior to his arrest. People v. Rodrigues, 25 Cal.App. 2d 393, 394, 77 P.2d 503; People v. Belli, 127 Cal.App. 269, 15 P.2d 809.

In the instant cause, the record is devoid of any evidence connecting appellant with the offense of possession of marijuana, except that the box assigned to him contained loose pieces of the drug scattered from top to bottom thereof and intermingled with his shaving material, tooth powder and other small articles. The box was incapable of being locked and stood open and accessible to any one passing through the barracks. Appellant denied that he had ever seen the "stuff" until the officers took it out of his box and told him what it was. At no time did he make any statements or admissions with respect to the marijuana found in his box, and when Officer Huber confronted him with it saying: "This is your marijuana; where did you get it?" appellant made no reply. Moreover, there is no evidence that appellant was, or ever had been, addicted to the use of narcotics.

Taken as a whole, the evidence produced by the prosecution herein raises only a suspicion of guilt.

In People v. Bassett, 68 Cal.App.2d 241, 156 P.2d 457, 460, this court in reviewing a judgment of conviction for possession of narcotics, held as follows: "'Possession' of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession. (Rest. Torts, sec. 216). The statute does not require 'proof of possession' at the very time of arrest, People v. Belli, 127 Cal.App. 269, 271, 15 P.2d 809, nor is it necessary to prove that the accused had the unlawful article on his person, People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23. The question therefore arises, does the evidence in the case before us establish the fact that 'possession' of the narcotics was immediate and exclusive and under the dominion and control of appellant."

In Matter of Yun Quong, 159 Cal. 508, 514, 114 P. 835, 838, Ann.Cas.1912C, 969, a proceeding in habeas corpus presented to the Supreme Court in 1911, it was stated: "There is no merit in the argument that the statute (Poison law, amendment of 1909) is unreasonable, and therefore void, because it is possible for one to have the possession of opium innocently and without knowledge. *The act clearly means a conscious and voluntary possession.* Ex parte McClain [134 Cal. 110, 66 P. 69, 54 L.R.A. 779, 86 Am.St.Rep. 243]."

In People v. Herbert, 59 Cal.App. 158, 159, 210 P. 276, 277, the court "instructed the jury in effect that the burden of proving possession of the narcotics as alleged in the information rested upon the prosecution, and such possession must have been an immediate and exclusive possession and one under the dominion and control of defendant. The instructions given by the court fully and correctly stated the law upon the subject." In the last-cited case, it was held that the evidence therein presented, which included admissions by defendant, was sufficient to connect defendant with the possession of the narcotics.

In People v. Gallagher, 12 Cal.App.2d 434, 55 P.2d 889, the appellant argued that the evidence was insufficient to show possession within the meaning of the law, as such possession must be personal and exclusively under the dominion and control of the person charged. In answer to this contention the court stated, 12 Cal.App.2d at page 436, 55 P.2d at page 890: "It has been frequently held in this state that the possession denounced by the act need not be a personal one, it being sufficient if such possession is constructive, so long as it is immediate and exclusive and under the dominion and control of the violator. People v. Sinclair, 129 Cal.App. 320, 19 P.2d 23; People v. Torres, 5 Cal.App.2d 580, 43 P.2d 374. Here * * * there is evidence to show that appellant directed the officers to the place where he had the narcotics concealed and gave them the keys to obtain entrance to the premises. There is also evidence that appellant admitted the morphine contained in the room was his. This evidence is amply sufficient to support the verdict."

In the instant cause, the record discloses that such possession as appellant had of the marijuana found in his box was neither exclusive nor under his dominion or control. The box was furnished by and was under the absolute control of the prison camp authorities. They had access to it at all times and at any time could have prevented appellant from even looking into it, and during his absence from the barracks, the box was under the sole and exclusive custody and control of such authorities.

In the recent case of People v. Gin Shue, 58 Cal.App.2d 625, 628, 137 P.2d 742, 745, the court recognized the necessity of proving that the defendant had knowledge of the presence of the narcotics when it declared: "On this evidence, on proper instructions of the trial court, there was submitted to the jury the question as to whether appellant had knowledge of the contents of the valise while it was in his possession."

That it is necessary to prove that a defendant knowingly possessed narcotics was also approved in People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25, 26, where the court declared: "Guilty knowledge and intent to violate the law may be shown by the facts and circumstances of the case, including the conduct of the defendant and any false or misleading statements which he may make to the arresting officers or others with relation to the material facts."

[1, 2] In accordance with the foregoing, it would appear that guilty knowledge is an essential element of the crime with which appellant was charged, and that the withdrawal from the consideration of the

jury of the two instructions, hereinbefore referred to, amounted to a miscarriage of justice.

For the reasons stated, the judgment and order appealed from are, and each of them is, reversed.

DORAN and WHITE, JJ., concur.

71 Cal.App.2d 767

PEOPLE v. PLATNICK et al.

Cr. 3942.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1945.

1. Criminal law ⇨1144(13)

On appeal from conviction, the evidence must be viewed in the light most favorable to the prosecution.

2. Burglary ⇨42(3)

The mere possession of stolen property unexplained by the defendant, was not of itself sufficient to sustain a conviction of burglary, but was a circumstance, which taken in conjunction with other incriminating evidence might be considered by the court or jury in determining defendant's guilt or innocence. Const. art. 1, § 13.

3. Criminal law ⇨316

Where defendant charged with burglary made no attempt to contradict, explain or deny any of the incriminating circumstances against him, the jury were entitled to consider such circumstances in determining defendant's guilt. Const. art. 1, § 13.

4. Burglary ⇨41(1)

Evidence sustained conviction of both defendants charged with burglary.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Alex Platnick and John Frabasilio were convicted of burglary in the second degree, and from the judgment pronounced against them, as well as from the order denying motion for new trial, they appeal.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant John Frabasilio.

Alex Platnick, in pro. per.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County defendants were accused of the crime of burglary. Defendant Platnick was also charged with a prior conviction of the offense of burglary and the defendant Frabasilio with two prior felony convictions, one for the offense of burglary and the other for petty theft with a prior felony conviction. Motions made by each defendant to set aside the information under section 995 of the Penal Code were denied; they each entered pleas of not guilty and denied the prior convictions. Subsequently all prior convictions were duly admitted. Following trial before a jury each defendant was found guilty of burglary in the second degree. Their motion for a new trial was denied. From the judgment pronounced against them, as well as from the order denying their motion for a new trial, defendants prosecute this appeal.

A brief was filed in this court by defendant Frabasilio, but none has been filed on behalf of defendant Platnick. He, however, has requested that his appeal be considered upon the brief filed on behalf of his codefendant.

[1] Viewing the evidence in the light most favorable to the prosecution, as we are required to do following guilty verdicts, we find in the record evidence that on the night of February 27, 1945, Louis Mauro operated a cafe at 114 East Seventh Street in the city of Los Angeles. He closed and locked the place shortly after midnight. When he returned the following morning, at about 6:30 o'clock, two police officers were at his place of business. The back door and the window were broken and the lock on the store room door had been pried open, the lock being found on the floor. Several cases of assorted brands of whisky and pinch-bottles of Scotch whisky, of the value of approximately $800, were missing, as was a Stromberg-Carlson

radio, some eight or nine dollars in money, a hand drill and a pair of finger-nail clippers. About four days prior to the burglary Mr. Mauro had seen the defendants in his cafe, but they were not together.

On the night of the burglary two police officers who were patrolling the district in the vicinity of 15th and Main Streets, which is about eight blocks from the burglarized cafe, observed two taillights on an automobile in an alley. Upon investigation they saw two automobiles parked side by side in a parking lot adjoining 1836 South Main Street. Defendant Frabasilio was sitting in one of the cars, a Chevrolet coupe, and the defendant Platnick was standing with his elbow leaning on the window on the left side of the same coupe. The officers put their spotlight on the two vehicles, whereupon defendant Platnick started to walk away, but halted upon command of the officers. When one of the officers asked him where he was going, he said, "I have just parked my car and I am going home." At that time defendant Frabasilio stepped out of his car and disappeared between the two automobiles. He was found crouched down against the wall in front of the cars and came out upon command of the officers.

In defendant Platnick's car, which was a Ford sedan, the police officers found approximately sixteen cases of assorted whiskies, a Stromberg-Carlson table model radio on the floor by the right front seat, two pairs of gloves, five pinch-bottles of Haig & Haig Scotch whiskey, and a hand drill. The defendants denied knowing each other. On the person of defendant Platnick the officers found a pair of finger-nail clippers and in appellant Frabasilio's pocket they found a considerable amount of silver which defendant Platnick stated Frabasilio had won in a poker game.

The officer asked where he got the whiskey and Frabasilio said, "That belongs to Platnick, I don't know where he got it." In answer to the officer's query as to whether he had been with Platnick that night, defendant Frabasilio said he had not.

The whiskey found in defendant Platnick's car was brought to the police station and subsequently identified at the trial by the cafe proprietor as being his property, as were also the finger-nail clippers and the hand drill.

Neither defendant took the witness stand at the trial, nor did they present any testimony in their behalf.

The sole ground urged by appellants for a reversal of the judgment is that the evidence is insufficient to connect them with the commission of the crime charged; that when considered in its entirety the evidence does no more than raise a strong suspicion of guilt which, however strong, is not sufficient to sustain a verdict and judgment against them. People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80.

[2, 4] As to appellant Platnick, the contention is without merit. The stolen property was found in his automobile, which he admittedly had driven into the auto park a short time after the burglary. While the mere possession of stolen property, unexplained by the defendant, is not of itself and standing alone sufficient to sustain a conviction of burglary, yet the possession of such stolen property is a circumstance which, taken in conjunction with other incriminating evidence, may be considered by the court or jury in determining the question of the guilt or innocence of a defendant charged with burglary. If the jury believed from the evidence that the property in question was stolen from the premises described in the testimony and was received into the possession of the defendant Platnick shortly after the theft thereof, the failure of the defendant to account for such possession or to show that such possession was honestly obtained is a circumstance tending to prove his guilt; and in order to remove the effect of the possession as a circumstance which, considered in connection with other suspicious facts disclosed by the evidence herein, such as the conduct of the defendant in attempting to hide upon the approach of the officers, the accused is bound to explain the possession. In the instant case the defendant Platnick made no attempt, by his own testimony or otherwise, to contradict, explain or deny any of the incriminating circumstances shown against him; therefore, as provided by our state Constitution (Art. I, sec. 13), the jury was entitled to consider these circumstances in determining his guilt. People v. McCabe, 60 Cal.App.2d 492, 498, 141 P.2d 54; People v. Perry, 14 Cal.2d 387, 395, 94 P.2d 559, 124 A.L.R. 1123; People v. Waller, 14 Cal.2d 693, 702, 96 P.2d 344; People v. Dozier, 35 Cal.App.2d 49, 57, 94 P.2d 598; People v. Ottey, 5 Cal.2d 714, 722, 56 P.2d 193; People v. Warner, 25 Cal.App. 751, 759, 145 P. 545.

[3] It is sufficient to say, without a further review of the facts, that the defendant

Platnick was found in possession of the stolen property under circumstances which, in the absence of any explanation, justified the jury in concluding that he was a guilty party in the burglary charged against him.

As to the defendant Frabasilio, there is in the record evidence that he was seated in his automobile while his codefendant was standing on the left side thereof, "with his elbow leaning on the window on the left side of the car." Upon the approach of the officers defendant Frabasilio "stepped out of his car and disappeared from sight between the two cars." He was found "crouched down between the two cars." The cafe proprietor testified that eight or nine dollars in silver and three dollars in currency were taken from his establishment in the burglary, and when the officers searched defendant Frabasilio they found in his right-hand side trousers pocket "approximately nine dollars in silver and three one-dollar bills." This defendant also had forty-three dollars additional on his person, but that was in his billfold. When interrogated by the officers as to whether they were acquainted with each other, each defendant denied knowing the other, although defendant Frabasilio stated to the officers that the stolen property belonged to his codefendant, while the latter stated that the money found in defendant Frabasilio's pocket was won by him in a poker game. Also significant to show the association of the defendant Frabasilio with his codefendant on the night in question is what transpired between the former and Officer Smith in a conversation on the way to the police station, wherein the officer said, "Why don't you tell us where you got that whiskey * * *. After all, we have been tailing you for quite a while", and to which defendant Frabasilio replied, "I know that, we saw you over at 12th and Wall Streets".

Appellant Frabasilio insists that inasmuch as none of the stolen property was found in his personal possession the evidence fails to disclose any circumstance whatever tending to connect him with complicity in the commission of the crime of burglary. As heretofore pointed out, this defendant had in his trousers pocket money which both in amount and denomination was similar to that taken in the burglary. However, though it be conceded that none of the property positively identified as having been taken in the burglary, such as the whiskey, was found in the personal possession of defendant Frabasilio, nevertheless the fact that this property was found in the possession of his codefendant, under all the circumstances developed against both men through the evidence, unexplained, must be held to constitute an inculpatory, as well as a relevant, material circumstance against the defendant Frabasilio, to which, after comparing and considering it with all the other proven circumstances in the case, the jury could accord such weight in the proof of guilt as in their judgment it was entitled. Upon the record before us it must be held that the jury was warranted in arriving at the conclusion that the crime charged in the information was the consummation of the combined or joint action of both defendants.

The judgment and the order denying a new trial as to each defendant is affirmed.

YORK, P. J., and DORAN, J., concur.

72 Cal.App.2d 39

AIELLO v. SLISKOVICH.

Civ. 3416.

District Court of Appeal, Fourth District, California.

Dec. 4, 1945.

1. Sales 🔑199

Title to specific or ascertained goods under a contract of sale passes at such time as parties to contract intend it to be transferred, and, in determining intention, regard should be had to terms of contract, conduct of parties, usages of trade, and circumstances. Civ.Code, §§ 1738, 1739.

2. Sales 🔑218½

Where contract is silent as to when title to a crop of fruit passes, the question is one of fact. Civ.Code, §§ 1738, 1739.

3. Sales 🔑218½

Payment of purchase price or a large portion thereof is strong evidence that immediate transfer of the property is intended. Civ.Code, §§ 1738, 1739.

4. Sales ⚷202(1)

A transaction involving a purchase price which is paid bears the indicia of a present and not a future sale. Civ.Code, §§ 1738, 1739.

5. Sales ⚷218½

Conflicting evidence sustained finding that contract of sale of olive crop, providing for immediate payment of two-thirds of estimated purchase price and deposit of balance as a guaranty of payment and for reduction of purchase price should crop amount to less than estimated tonnage, constituted a present sale of olive crop so that buyer would be liable for olives left on the trees and ground. Civ.Code, §§ 1738, 1739.

6. Appeal and error ⚷1011(1)

A judgment supported by substantial evidence and reasonable inferences is not subject to reversal on appeal because of conflicts in evidence.

7. Appeal and error ⚷1071(1)

Where trial court found that olives left on trees and ground belonged to buyer, another finding containing language indicating a future rather than a present sale of crop by referring to olives which buyer contracted to purchase was not sufficiently defective to require reversal of judgment against buyer for purchase price of olives left on trees and ground. Civ. Code, §§ 1738, 1739.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Sam Aiello against Petar Sliskovich to recover for olives delivered to and accepted by defendant and for other olives allegedly purchased by defendant but left on the trees and ground. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

Frank J. Kashare, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment for $1,400, being $750 for olives actually delivered to and accepted by defendant, and $650 for olives not picked from the trees and others which he left on the ground.

Plaintiff is the owner of a 40-acre olive orchard near Elsinore, in Riverside County, and defendant owns an olive processing plant in Rialto, in San Bernardino County. The two entered into the following contract:

"This contract entered into this 12th day of October, 1943, between Petar Sliskovich, party of the first part and Sam Aiello, party of the second part,

"To wit: The party of the first part agrees to pay the party of the second part the sum of $4500.00 for forty tons of olives, and the sum of $3000.00 is to be paid down and the balance of $1500 is to be deposited in the Bank of Perris as a guarantee of payment.

"If there is less than 40 tons of olives the party of the second part agrees to take $100.00 per ton off of the purchase price of $4500.00 and if there is more than 40 tons the party of the first part agrees to pay $100.00 per ton for all of the olives over the amount of $4500.00.

"These olives are located on the Gavilan Road and are owned by Sam Aiello. The picking is to be started the latter part of December, 1943. The trees are to be picked reasonably clean.

"The money is to be deposited in the bank as soon as the picking is started. A receipt of ($3000.00) Three Thousand Dollars is hereby acknowledged."

It is admitted that the duty of picking and hauling the olives rested on defendant and that plaintiff was paid $3,000 by check dated October 12, 1943, and $1,500 by check dated February 3, 1944.

The portion of the judgment for $750 for 7½ tons of olives actually delivered in excess of the 40 tons mentioned in the contract is not questioned by defendant as he admits that the evidence, though conflicting on the subject, is sufficient to support the finding that those olives were actually delivered to and accepted by him. The only question argued is the legality of the award of $650 for olives left on the trees and on the ground. There is evidence supporting the finding on the quantity of those olives and also that they were merchantable.

Under the issues raised by the pleadings, the important question for decision is this: Was there a present sale of the olive crop or an executory contract for a future sale?

[1] As was said in Tillis v. Western Fruit Growers, Inc., 44 Cal.App.2d 826, 113 P.2d 267, 269:

"Title to specific or ascertained goods under a contract of sale passes at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case. Civ.Code, secs. 1738 and 1739."

To the same effect are Wanee v. Thomas, 75 Cal.App. 231, 242 P. 509; Gopcevic v. California, etc., Co., 64 Cal.App. 132, 220 P. 1078; United Fruit Distributing Co. v. Stone, 95 Cal.App. 131, 272 P. 299; Sun-Maid Raisin Growers v. Jones, 96 Cal. App. 650, 274 P. 557; and Matmor Olive Co. v. Du Bois, 65 Cal.App.2d 467, 150 P.2d 816.

[2] In United Fruit Distributing Co. v. Stone, supra, it was held that where the contract was silent as to when title to a crop of fruit passes, the question was one of fact and not of law.

[3] In speaking on the subject of when title passes in Gianelli v. Globe Grain & Milling Co., 48 Cal.App. 103, 191 P. 720, 721, it was said:

"There is still another consideration of potent significance in establishing that the transaction was intended by the parties to constitute an absolute sale, and that title to the hay should immediately vest in the defendant, and that is in the fact that the writing above reproduced herein provided that a very large proportion of the purchase price—in fact, the larger proportion thereof—should be paid within four or five days after the execution of the instrument. It is not at all likely that, had the contract been intended or understood to be merely executory and its consummation dependent upon delivery of the hay by the sellers to the purchaser, the defendant would have bound itself to pay three-quarters of the purchase price within so short a time after the transaction and before (as we shall later see was true) the place of delivery was designated by the defendant. Referring to the circumstances of the payment down of a large amount of the purchase price of personal property as one shedding some light on the nature of the contract involving a transfer of such property—that is, upon the question whether the contract involves an absolute sale or is only executory—Williston, in his work on 'Sales' (1909 Edition), p. 368, says: 'If the buyer pays the price, or a large portion of it, it is evidence not so strong as delivery, but still entitled to great weight, that immediate transfer of the property is intended.'"

There are other circumstances disclosed by the evidence on the intention of the parties as to when title to the olive crop passed. Sometime between February 7th and 14th, when defendant's employees were picking the crop, he told plaintiff he would have to withdraw his crew and send them to another orchard, but that they would return and finish picking the olives. They did not return. A short time later, another buyer sought to purchase the olives on the trees and on the ground, but plaintiff refused to sell them because he had already sold them to defendant.

[4] Also, the contract provides that if there should be less than forty tons of olives there would be a reduction of $100 per ton of the shortage "off of the purchase price of $4500.00." Where there is a "purchase price" which is paid, the transaction bears the indicia of a present and not a future sale.

[5, 6] While there is evidence conflicting with that which we have outlined, we cannot reverse the judgment because of conflicts in the evidence where, as here, there is substantial evidence and reasonable inferences supporting the judgment.

[7] Defendant points to certain language in the findings concerning the 6½ tons of olives that were "left on the trees and upon the ground which the defendant contracted to purchase as per contract between the plaintiff and the defendant", and urges that this indicates a future rather than a present sale of the olive crop. While the quoted language is unfortunate, the trial court also found that the 6½ tons of olives belonged to defendant, which indicates a present and not a future sale.

We do not regard the findings as sufficiently defective to require a reversal of the judgment.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

71 Cal.App.2d 820

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15030.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1945.

1. Workmen's compensation ⚷1538

Testimony, afforded substantial evidentiary support for finding of Industrial Accident Commission that ventral hernia of employee was sustained while lifting a heavy timber, notwithstanding failure of physician making pre-employment examination several months later to discover hernia and evidence that shortly before discovery of hernia employee had jerked a water hose from under a car.

2. Workmen's compensation ⚷1939

Finding of Industrial Accident Commission that employee sustained injury while in the employ of a former employer, when supported by substantial evidence, could not be disturbed by reviewing court.

3. Workmen's compensation ⚷1207

Where the injury is latent, the six-month statute of limitations on claim for compensation does not begin to run until employee knows or should in the exercise of ordinary care have known that he has sustained a compensable injury. St.1937, p. 295, § 5405(a).

4. Workmen's compensation ⚷1939

When employee is chargeable with knowledge that he has sustained a compensable injury so that six-month statute of limitations on claim for compensation will commence to run, is essentially a question of fact for Industrial Accident Commission. St.1937, p. 295, § 5405(a).

5. Workmen's compensation ⚷1380

Insurance carrier opposing claim for compensation had burden of proving that claim was barred by six-month statute of limitations. St.1937, p. 295, § 5405(a).

6. Workmen's compensation ⚷595

The Workmen's Compensation Law does not award compensation for mere pain unless it is of such a character as to raise presumption of incapacity to earn.

7. Workmen's compensation ⚷11

The object of Workmen's Compensation Law is to make amends for a disability attributable to the employment.

8. Workmen's compensation ⚷1682

That physician making pre-employment examination several months after accident did not discover ventral hernia supported finding of Industrial Accident Commission that it was first reasonably discoverable that compensable injury had been sustained on a later date as respects running of six-month statute of limitations. St.1937, p. 295, § 5405(a).

9. Workmen's compensation ⚷1207

Finding of Industrial Accident Commission that fact that carpenter had sustained a compensable injury consisting of ventral hernia, as result of lifting a heavy timber in May, 1944, was first reasonably discoverable on August 30, 1944, was not as matter of law so lacking in evidentiary support as to require a contrary finding, and hence claim for compensation filed January 12, 1945, was not barred by six-month statute of limitations. St.1937, p. 295, § 5405(a).

◆

Application by Associated Indemnity Corporation for a writ to review an order of the Industrial Accident Commission of the State of California awarding disability compensation to Thomas J. Napier.

Award affirmed.

Syril S. Tipton, of Los Angeles, for petitioner.

Everett A. Corten, Dan Murphy, Jr., and R. C. McKellips, all of San Francisco, for respondent Commission.

FOX, Justice pro tem.

Thomas J. Napier was employed as a carpenter in July, 1943, at Bakersfield, California, by the Superior Oil Company. In May, 1944, while so employed he was assisting in lifting a heavy timber when he was seized with a sudden onset of pain across his upper abdomen. This was accompanied by a feeling of nausea. Swelling was observed in the abdominal region in a day or two but this disappeared in about two weeks. Except for an hour's rest Mr. Napier was not forced to stop working. He did not consult a physician. He did, however, experience the recurrence of pain in this same area from time to time during the ensuing months. By July 16th the condition had become so annoying that he took a week's vacation. Upon his return after vacation, he felt he could not do the heavy work assigned to him and so informed his boss. Since lighter work was not provided he quit. Mr. Napier was ill and took it easy until about August 26th when he entered the employ of the Santa Fe Railroad Company. The first night on this new job, he "could hardly make it" according to his testimony. The second night he was pulling about 10 feet of an inch and a quarter water hose out from under a car. It caught on the rail and he "kind of jerked it." As he straightened up pain hit him in the stomach and a bulge in the epigastric region recurred. On August 30th Dr. Joe Smith examined Mr. Napier and found that he had a ventral hernia. On September 2nd Dr. Morrison, chief surgeon of the Santa Fe, operated on Mr. Napier for this condition. The operation left Mr. Napier disabled for eleven weeks for which the commission awarded him compensation in the amount of $317. In his report Dr. Morrison says "The operative findings indicate that this hernia has been present for several months * * *." Prior to his employment by the Santa Fe Mr. Napier was given a pre-employment physical examination by Dr. R. M. Jones who reported "Abdomen normal."

Mr. Napier's application was not filed with the Industrial Accident Commission until January 12, 1945. At all times herein material the petitioner was the compensation insurance carrier of the Superior Oil Company.

Petitioner makes two contentions: (1) That the evidence is insufficient to support the finding that Mr. Napier "sustained a hernia while in the employ of the Superior Oil Company," and (2) that the claim is barred by the statute of limitations. Neither of these contentions is sound.

[1, 2] The argument on the first proposition is based on two circumstances: (1) The report of Dr. Jones to the effect that he did not discover a hernia on his external examination of Mr. Napier on August 22nd; and (2) the hose-jerking incident on August 27th while he was working for the Santa Fe. Of course the report of Dr. Jones does not establish that Mr. Napier did not have a hernia. The trier of fact may well have concluded that the hose-jerking incident was wholly insufficient to cause the condition which Dr. Morrison found. As opposed to whatever inferences may be drawn from these circumstances is the testimony of Mr. Napier and the report of Dr. Morrison. These furnish substantial evidentiary support for the finding that Mr. Napier sustained his said injury "while in the employ" of the oil company. The finding of the commission cannot therefore be disturbed by a reviewing court. Limited Mutual Compensation Insurance Co. v. Industrial Accident Comm., 37 Cal.App.2d 50, 98 P.2d 827; Stoll v. Industrial Accident Comm., 20 Cal.2d 440, 126 P.2d 865.

On the question as to when the injury occurred and therefore the date on which the six month statute of limitations started to run for filing application for compensation, sec. 5405(a), Labor Code, St.1937, p. 295, the commission found that "Said injury was caused by strain while lifting in the month of May, 1944, but it was first reasonably discoverable and apparent that compensable injury had been sustained on August 30, 1944, and said last mentioned date therefore constitutes the date of injury herein." Therefore since Mr. Napier's application was filed on January 12, 1945, his claim to compensation was not barred by the aforesaid statute of limitations.

[3-5] In a case of this kind where the injury is latent the statute of limitations does not begin to run until the employee knows or should in the exercise of ordinary care have known that he has sustained a compensable injury. Continental Casualty Co. v. Industrial Accident Comm., 11 Cal.App.2d 619, 54 P.2d 753; Marsh v. Industrial Accident Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563; Selders v. Cornhusker Oil Co., 111 Neb. 300, 196 N.W. 316; McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N.W. 615; Kostron v. American Packing Co., 227 Mo.App. 34, 45 S.W.2d 871; Guderian v. Sterling S. & R. Co., 151 La. 59, 91 So. 546; Wheeler v. Missouri Pac. R. Co., 328 Mo. 888, 42 S.W.2d 579; Williams v. Industrial Accident Comm., 71 Cal.App.2d 136, 161 P.2d 979. When an employee is chargeable with such knowledge is essentially a question of fact for the commission. Also, the burden of proving that the claim for compensation was barred by the statute of limitations was upon petitioner who opposed the claim. Williams v. I. A. C., supra.

[6, 7] The instant case is closely analogous to the Glantz case [Continental

Casualty Co. v. Industrial Accident Comm.], supra [11 Cal.App.2d 619, 54 P.2d 754]. In that case Mr. Glantz who was employed as a metal worker suffered an injury to his left wrist about July 21, 1932. He "thought he had sprained his wrist, had it bound with tape, and continued with his work. He was not incapacitated for work for a period of seven days though he might have missed a few days' work owing to pain in this wrist. On December 15, 1934, he suffered a second injury to the same wrist. While working on the door of an automobile it fell, cutting the flesh on the wrist to the bone. He consulted a physician and X-rays were taken which disclosed an old fracture of one of the bones of the wrist which had not united. It is admitted that this fracture occurred in the accident of July 21, 1932. It was the conclusion of the examining physicians that an operation was necessary to unite the two fragments of the bone. On February 11, 1935, Glantz filed with the Industrial Accident Commission an application for the adjustment of his claim growing out of his first injury." It was contended that this claim was barred by the statute of limitations. The commission, however, held that it was not barred and the court affirmed the award. "It is clear," says the court, "that Glantz had no idea that he had a broken bone in his wrist until informed of that fact by physicians in December, 1934. He believed that his wrist had been sprained and that it was making a slowly progressive recovery." A similar observation could properly be made here with respect to Mr. Napier's knowledge of his hernia. The workmen's compensation law does not award compensation for mere pain unless it is of such a character as to raise a presumption of incapacity to earn. Marsh v. I. A. C., supra. No such condition is here involved. The object of the law is to make amends for a disability attributable to the employment. Marsh v. I. A. C., supra. "The term 'injury' then is to be understood as connoting a compensable injury, and is correlated to an incapacity or disability justifying a compensatory award. [Citing authority.] Injury and compensable disability are thus more nearly synonymous expressions than are date of injury and date of accident." Continental Casualty Co. v. I. A. C., supra, 11 Cal.App.2d at page 621, 54 P.2d at page 755. The court concluded in the Glantz case, 11 Cal.App.2d at pages 623–624, 54 P.2d at page 756, that "the injury to Glantz occurred when it was discovered that he had a broken bone in his left wrist which would require an operation to cure, which would incapacitate him from working, and would justify a compensatory award. * * * It is true that he suffered pain and did lighter work than before July 21, 1932, but he did not suffer a compensable injury at that time * * *." Hence his application for compensation was not barred by the statute of limitations. The principles of the Glantz case should govern in the instant case.

[8, 9] Napier testified he did not know he had this injury. The pain, temporary nausea and swelling which Mr. Napier experienced might well indicate a hernia or some similar condition to a doctor, but such symptoms would not necessarily be so diagnosed by a layman. This is understandable for, as pointed out in Singer v. Industrial Accident Comm., 105 Cal.App. 374, 376, 287 P. 567, 568, which involved a hernia injury, "A workman, as most frequently happens, is unfamiliar with the development of injuries of this character and certain symptoms mean little or nothing to him unless they are objective and definitely pronounced." But an employee is not to be deprived of compensation because he fails to make a correct medical diagnosis. Winthrop v. Industrial Accident Comm., 213 Cal. 351, 2 P.2d 142; Continental Casualty Co. v. Industrial Accident Comm., supra, 11 Cal.2d at page 622, 54 P.2d 753. The failure of Dr. Jones in his pre-employment examination of Mr. Napier on August 22nd to discover this condition supports the finding of the commission that "it was first reasonably discoverable and apparent that compensable injury had been sustained on August 30, 1944. * * *" Inferences in support of this finding may also be drawn from the testimony and conduct of Mr. Napier. This finding is therefore not without sufficient evidentiary support. In any event, it cannot be said that the evidence, as matter of law, was such as to require a contrary finding. Hence Mr. Napier's claim was not barred by the statute of limitations.

The award is affirmed.

McCOMB, Acting P. J., and WILSON, J., concur.

71 Cal.App.2d 815

MANGLER v. PACIFIC ELECTRIC RY. CO. et al.
DEVERE v. SAME.

Civ. 14959, 14937.

District Court of Appeal, Second District, Division 1, California.

Nov. 29, 1945.

Hearing Denied Jan. 24, 1946.

1. Negligence ⚷83

The necessary elements of the doctrine of "last clear chance" doctrine are that plaintiff has been negligent resulting in his being in danger from which he cannot escape by ordinary care, that defendant has knowledge of plaintiff's situation and knows or by ordinary care should know that plaintiff cannot escape, and has last clear chance to avoid accident by exercising ordinary care, and fails to exercise such care resulting in an accident.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Negligence ⚷83

The doctrine of last clear chance is predicated on defendant's knowledge that plaintiff was in a position of danger and has not been modified so as to render defendant liable on ground that by use of ordinary care defendant should have seen plaintiff, notwithstanding jury may find defendant did see plaintiff regardless of defendant's statements to contrary.

3. Appeal and error ⚷1170(11)

Where trial court concluded an erroneous instruction on last clear chance doctrine resulted in miscarriage of justice, order granting a new trial should not be disturbed on appeal except on clear showing that ruling was wrong. Const. art. 6, § 4½.

4. New trial ⚷39

In action for damages sustained in collision between truck-trailer and electric railroad train when truck was unable to negotiate a curve onto the railroad tracks and was struck by train when unable to back up due to traffic, a last clear chance doctrine instruction that defendant was liable if motorman saw or by use of ordinary care should have seen truck in a position of danger, entitled railroad to a new trial. Const. art. 6, § 4½.

5. Appeal and error ⚷933(1)

Where trial court granted defendant a new trial on ground of an erroneous instruction, on appeal, a presumption that instruction was prejudicial existed so as to prevent reversal of trial court's order. Const. art. 6, § 4½.

◆

Appeals from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Actions by Frank K. Mangler and Joseph M. Devere, doing business under the fictitious firm name and style of Petroleum Transportation Company, also against the Pacific Electric Railway Company and others, for injuries and damages resulting from a collision between a truck and trailer and a train, consolidated for trial. Verdicts were returned for plaintiffs. From orders granting new trials, plaintiffs appeal.

Orders affirmed.

Le Roy Anderson and D. R. Gustaveson, both of Los Angeles, for appellant Frank K. Mangler.

Samuel A. Rosenthal, of Los Angeles, for appellant Joseph M. Devere.

Frank Karr, O. O. Collins, and C. W. Cornell, all of Los Angeles, for respondent Pacific Electric Ry. Co.

DORAN, Justice.

The actions herein were consolidated for trial, having arisen out of the same event, to-wit, a collision between a truck and trailer driven by the plaintiff Mangler and owned by the plaintiff Devere, and a train owned and operated by the defendant, Pacific Electric Railway Company. Verdicts were returned in favor of the plaintiffs, and upon motions for new trial, the trial court set aside the verdicts and granted new trials.

In the language of appellant's brief, "The issue on these appeals is limited to one question, namely, was the trial court justified in granting a new trial upon the sole ground that it gave an alleged erroneous instruction upon the application of the 'Last Clear Chance' doctrine?" The order granting the motion for new trial recites: "In this action the jury was given two instructions relating to the doctrine of last clear chance. The first one was the general instruction on the subject taken from 'BAJI' and being No. 205 in that volume. It is not questioned that this correctly states the law. The second instruction was requested by defendants but was modified by the court. The part to which objection is made is as follows (the italicized portion being that added by the Court): 'If the motorman did not have a clear opportunity to avoid the accident, after he actually saw *or by the use of ordinary care should have seen* the truck in a position of danger, then you must find that the motorman did not have a last clear chance to avoid the accident.' * * * The effect of the instruction in our case is that the jury may decide that the defendant did not see plaintiff, and yet if they find from the evidence that by the use of ordinary care he should have seen, they may hold defendant liable. Clearly this is not the law in view of the decisions above quoted."

The evidence in support of appellants' theory upon which the last clear chance doctrine was predicated, showed that the plaintiff Mangler, operating a truck and trailer 60 feet in length, attempted to cross defendant's railroad tracks; that the turn was too sharp to be made by the truck; that due to the traffic it was impossible to back up; that when Mangler stopped the truck on the track, the train was 700 to 750 feet away; that the truck was thereafter struck by the train at the front of the cab, resulting in personal injuries to the plaintiff Mangler and property damage to the plaintiff Devere.

It is the appellants' contention that the instruction hereinbefore quoted, "constituted a correct statement of the law and was not prejudicial", that therefore the granting of a new trial after judgments in favor of the plaintiffs, was improper and unwarranted. The basis for this contention, as expressed in appellants' brief, is that "The doctrine of 'Last Clear Chance' has been modified by leaving to the jury the question of defendant's actual knowledge of plaintiff's peril, his testimony to the contrary notwithstanding"; and that "the instruction properly contains the modification, to-wit: 'Or by the use of ordinary care *should have seen* the truck (or plaintiff) *in a position of danger.*'"

The above contention cannot be sustained under the California authorities dealing with the last clear chance doctrine. As pointed out in respondent's brief, apparently "Counsel for appellants confuses the well settled rule in this state as to when and under what circumstances the doctrine applies, with the conclusion which the jury, as triers of the fact, may draw from the evidence under proper instructions by the Court." It is true, that in Rasmussen v. Fresno Traction Co., 15 Cal. App.2d 356, 362, 59 P.2d 617, 620, and in other cases, the courts have held that "the jury is not required to take the defendant's word that he did not see but that, under proper circumstances, the jury may find that he (the defendant) did see" the plaintiff. These same cases however, invariably predicate the last clear chance doctrine upon the proposition that the defendant actually knew that the plaintiff was in a position of danger.

[1] The necessary elements of the doctrine of last clear chance are thus set forth in Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, and quoted with approval in Argo v. Southern Pacific Co., 39 Cal. App.2d 706, 709, 104 P.2d 77, 80: "That plaintiff has been negligent, and, as a result thereof is in a position of danger from which he cannot escape by the exercise of ordinary care; * * * *that defendant has knowledge that the plaintiff is in such a situation,* and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, * * *." (Italics added.).

In the case of Lasch v. Edgar, 46 Cal. App.2d 726, 116 P.2d 949, 950, the trial court granted a new trial because of an instruction which contained the following language: "* * * and the defendant either has knowledge of said situation, or in the exercise of ordinary care should have knowledge that the plaintiff cannot escape from said situation." On appeal the order granting a new trial was affirmed. As stated in respondent's brief, "The foregoing language is similar, but does not go as far as that used by the trial court in this case in his modification * * * wherein he instructed the jury that the doctrine applies if the motorman by the use of ordinary care should have seen the truck in a position of danger." The Lasch opinion quoted from the case of New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, as follows: "It is a well-settled rule in this state that this doctrine is only applicable to a defendant who actually perceived the predicament and danger of a plaintiff in time to have avoided the accident by the exercise of due diligence. A defendant cannot be held liable upon the theory that he would have discovered the peril * * * but for remissness on his part."

[2] It is apparent from the cases that no modification of the last clear chance doctrine has taken place which would justify the trial court's qualification of that doctrine by the language used in the instruction; "or by the use of ordinary care should have seen the truck in a position of danger". As hereinbefore indicated, the fact that the jury may find that the defendant did see the plaintiff notwithstanding defendant's statements to the contrary, has not changed the basic rule that the defendant must have had actual knowledge of the plaintiff's dangerous situation. Moreover, the relaxation of the rule proposed by appellants is fraught with obvious dangers. The language used in Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 362, 59 P.2d 617, is not inapplicable to the present situation: "we cannot agree that this humanitarian doctrine has been, or should be, so modified as to permit it to be used to reward a plaintiff for disregarding what he did see, where he had a better chance to avoid the accident than had the defendant, and under circumstances where * * * any finding that the defendant had a clear chance to avoid the injury, and the plaintiff had none, must rest more upon the whim or prejudice of a jury than upon the actual facts shown by the evidence."

[3] The trial court having concluded that the erroneous instruction on the last clear chance doctrine resulted in a miscarriage of justice, under the holding in Lasch v. Edgar, 46 Cal.App.2d 726, 729, 116 P.2d 949, and other cases, the order granting a new trial "should not be disturbed on appeal except in a case showing clearly that his ruling was wrong." There is no such showing in the instant case. The opinion in the Lasch case says: "It has been held that the trial judge is in a much better position than is an appellate court to judge of the effect which an erroneous instruction had on the verdict of the jury * * *. In Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244, 247, it was said: 'It is well established that, in passing on a motion for a new trial, a trial judge is as firmly bound by this constitutional provision (sec. 4½, art. VI., Const.) as is an appellate court when the cause is on appeal. It is his duty to sit as a thirteenth juror and weigh the evidence, pass upon its sufficiency and consider the credibility of witnesses. This is true even though he does not specify the insufficiency of the evidence as one of the grounds for granting a new trial because the Constitution contains the direction that he shall not grant a new trial because of errors in instructions to the jury until he has re-examined the entire cause and shall have formed the opinion that the errors complained of have resulted in a miscarriage of justice.'"

[4, 5] It is evident from the trial court's statement contained in the order granting a new trial hereinbefore quoted, that the entire cause had been re-examined and that the erroneous instruction was deemed prejudicial. Even without such a statement, a presumption to that effect, exists. Bieser v. Davies, 119 Cal.App. 659, 7 P.2d 388.

The orders granting new trials are therefore affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER, J., dissenting.

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72 Cal.App.2d 26

SOUTHERN CALIFORNIA FREIGHT LINES v. STATE BOARD OF EQUALIZATION.

Civ. 7138.

District Court of Appeal, Third District, California.

Dec. 4, 1945.

Hearing Denied Jan. 31, 1946.

1. Appeal and error ⚷1010(1)

Where it is contended on appeal that evidence does not support findings of trial court, an appellate court may not reverse judgment if record contains any substantial evidence, contradicted or uncontradicted, which, together with reasonable inferences to be drawn therefrom, will support findings on which judgment is based.

2. Appeal and error ⚷931(1)

In determining sufficiency of evidence to sustain findings, all conflicts must be resolved in favor of party for whom judgment was rendered and all reasonable inferences indulged in to support judgment.

3. Appeal and error ⚷996

Where two or more inferences reasonably can be deduced from facts, a reviewing court is without power to substitute its own deductions for those of the trial court.

4. Automobiles ⚷102

Where a corporation owned entire capital stock of highway common carrier and express company, carrier and express company entered into a joint facilities agreement whereby carrier was to transport all property tendered to it by express company and express company was to perform services of an express company including pickup and delivery service within limits of municipality, evidence supported determination that pickup and delivery service was actually performed by carrier and that revenue derived from that service was subject to tax on carrier's gross receipts. St. 1933, p. 928, as amended; Gen.Laws 1937, Act 6386, §§ 2(k), 2¾.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the Southern California Freight Lines against the State Board of Equalization of the State of California to recover transportation taxes paid under protest. Judgment for defendant, and plaintiff appeals.

Affirmed.

H. J. Bischoff, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

This action was brought by Southern California Freight Lines to recover transportation taxes assessed under the provisions of chapter 339, p. 928, Statutes of 1933 as amended, and paid under protest. Trial was had by the court sitting without a jury, and resulted in findings and judgment in favor of defendant.

Plaintiff is a highway common carrier, as that term is defined in section 2¾ of the Public Utilities Act, Gen.Laws 1937, Act 6386, engaged in the business of transporting property for hire over the public highways of this state, and as such transportation company is subject to a tax on its gross receipts under the provisions of the California Motor Vehicle Transportation License Tax Act. It filed monthly reports showing its gross receipts for the period between September 1, 1937, and February 28, 1939, and paid a 3% tax based thereon. Subsequently defendant Board of Equalization filed a claim for the additional taxes which are the subject of this action, the Board claiming that appellant should have reported as its revenue a portion of what plaintiff claims was the revenue of the Southern California Freight Forwarders, which latter company is an express corporation within the meaning of section 2 (k) of the Public Utilities Act, and, as such, is not subject to taxation under the Motor Vehicle Transportation License Tax Act, when vehicles operated by it are operated exclusively within the limits of municipalities.

The entire capital stock of both companies, which will be referred to hereinafter as the "carrier" and the "express company," respectively, is owned by Southern California Freight Lines, Ltd., a third corporation. On December 17, 1934, by a decision of the Railroad Commission, Southern California Freight Forwarders was granted the right to conduct an express business, and in August, 1935, its capital stock was increased to $8,150, but was not increased thereafter during the period covered by the tax in controversy. During the same period the capital investment of the carrier, which had been in existence for several years prior to the incorporation of the express company, was in excess of $200,000, while the express company had no assets other than furniture, fixtures and office equipment which it had acquired from plaintiff in return for certain shares of its capital stock, and which had a value of less than $8,000.

In 1935 the carrier and the express company entered into a joint facilities agreement, which, though by no means explicit in its terms, apparently was intended to provide that each company granted to the other the use of its facilities; that the carrier should transport on its trucks and trailers all property tendered to it by the express company for transportation over the highways of the state, and that the express company should perform the services of an express company, including pickup and delivery service within the limits of the municipalities which they served; that the express company should collect the revenue and distribute 40% thereof to the carrier for the transportation of goods tendered by the express company, and that the remainder of the revenue of the express company, except a small amount to be retained to cover depreciation of its property, should be applied to the expenses of the two companies; that express company should publish rates, issue through bills of lading and contract with the public to perform complete transportation service, and, in so doing, jointly with the carrier, engage the services of employees, secure facilities, and contribute its own facilities to the use of the carrier to avoid duplication.

For the period in controversy plaintiff made returns to the Board of Equalization including therein as a part of its revenue amounts received from the express company purporting to be 40% of the gross revenue of the latter company. The Board, being dissatisfied with these returns, made its own audit of plaintiff's books, and assessed against it additional taxes based upon its conclusion that while the express company had been active in acquiring business it had not in fact rendered pick-up and delivery service but that such service had been performed by the carrier. Plaintiff paid the additional taxes under protest, and brought this suit for their recovery.

The trial court found, as a part of findings VII and VIII, that the 40% provided to be received by plaintiff was adequate consideration for the services agreed to be performed by it under the contract, but that plaintiff, in addition to those services, had actually performed the service of store pick-up and delivery which it had performed prior to the execution of the contract. In finding IX it found that the proportion of the income from the express business represented in the pick-up and delivery service, and which was purported rendered by the express company, was in fact, a return to plaintiff from its own efforts and upon its own capital investment, and was principally used in defraying the cost of plaintiff's operations, and contributed to its profits; and in finding X, that the formal relation between plaintiff and the express company was merely colorable.

On this appeal it is contended by the carrier that said findings VII to X are not supported by the evidence; that on the contrary the evidence shows that the express company did render the pick-up and delivery service, that it collected its own revenue out of which it paid to the carrier the 40% due it under the agreement, and that it is not true that the relation between the carrier and the express company was merely colorable.

[1-3] It is well established that where it is contended on appeal that the evidence does not support the findings of a trial court, an appellate court may not reverse a judgment if there is to be found in the record any substantial evidence, contradicted or uncontradicted, which, together with reasonable inferences to be drawn therefrom, will support the findings upon which such judgment is based; that all conflicts must be resolved in favor of respondent, and all reasonable inferences indulged in to support the judgment; and that when two or more inferences reasonably can be deduced from the facts, a reviewing court is without power to substitute its own deductions for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

In support of its contention that findings VII and VIII are not supported by the evidence, appellant argues that there is no evidence that it rendered pick-up and delivery service or that it collected any of the revenue of the express company; that, on the contrary, the latter collected its own revenue, and out of same paid plaintiff the 40% due it; that the carrier was disbursing agent for both companies. In this behalf it relies upon the testimony of its only witness, R. Robert Buttcane, who stated that since August, 1939, the express company has disbursed its own payroll.

But there is evidence showing that prior to August, 1939, and during the period for which the tax was assessed, the express company had no bank account, that the revenue of both companies, including that attributable to the pickup and delivery service, went into plaintiff's bank account, that the truck drivers and general employees were paid by it, that insurance on the drivers was in its name, that trucks used in such service were owned by plaintiff, and bore its name only, that bills were rendered in the names of both companies, that city and county taxes were billed to plaintiff, that accounts receivable were shown as assets on its books, and that the express company had no assets other than certain office equipment of comparatively small value.

At the trial plaintiff introduced as an exhibit an analysis of the expenses of the two companies, made by Mr. Buttcane for the purpose of the trial, in which he allocated to each company, in a more or less arbitrary manner, the various items in conformity with what he called the "functions" of each company under the agreement, though such allocations were not shown on the books.

Respondent's witness H. D. Abbott, an auditor for the Board of Equalization, also made allocations from the books of plaintiff, allocating to it the expenses attributable to the pick-up and delivery service, on the theory that such service was actually performed by plaintiff and not by the express company, regardless of what may have been the so-called functions of each company under the agreement.

[4] It is apparent that the findings of the trial court are not based upon what the functions of the respective companies were under the contract, but upon the activities; and we are of the opinion that it was reasonable to infer from the foregoing that the pickup and delivery service, though it may have been one of the functions of the express company under the contract, was actually performed by plaintiff, and that the revenue derived from that service was actually the revenue of plaintiff upon which it was properly required to pay the tax assessed by respondent. The trial court obviously drew this inference and we cannot say that it is without substantial foundation. It is therefore useless to urge upon this court that there is evidence from which contrary inferences could have been drawn.

Appellant in its brief devotes some pages to an argument under the heading "Paragraph X of the Findings to the Effect That Southern California Freight Forwarders Is Not a Bona Fide Corporation Is not Supported by the Evidence." But that was not the finding. It was that the "formal relation" between the two companies was merely colorable—that is, as we understand it, that the so-called functions of the express company under the contract were not actually performed by it, but were merely colorable. The trial court did not, as appellant contends it did, disregard the corporate entity of the express company. It merely held that the pickup and delivery service was not actually performed by it, but that plaintiff attempted to show that it was by allocating the revenue therefrom to the express company in conformity with the agreement. Cases cited by appellant holding that corporate entity may not be disregarded are therefore not in point. More nearly in point are such cases as Buick Motor Co. v. City of Milwaukee, D. C., 43 F.2d 385, where plaintiff company sought relief from taxes assessed on the income from its business transacted in Wisconsin, and relied upon a contract with General Motors Company under which plaintiff was to buy automobiles, etc., upon a basis that would result in an annual net profit to it of $2,500 (10% upon its capital stock of $10,000). The court there held that the contract could not preclude the taxing authority from assessing taxes upon a greater net profit, if plaintiff's sales actually showed such greater profit. It said, 43 F.2d at 390: "It is my judgment that when the business transacted is found to be plaintiff's, conceding the 'subsidiary' relation to General Motors, the tax authorities of the state were not obliged to respect the contract as an instrumentality, relieving plaintiff, in whole or in part, from the effectiveness of the tax law against the income arising in or on such business. In other words, the contract cannot be interposed as a means of cutting off the income from the business, or from the plaintiff, and devolving it upon the motors company as the one solely responsible to the call of the law."

This case was affirmed in 7 Cir., 48 F.2d 801, 803, and in the opinion rendered by the appellate court it was said that "if appellant, notwithstanding the contract, continued to earn the income upon business transacted within the state, the contract would not serve to defeat the right of the state to tax the income so earned." Certiorari denied 284 U.S. 655, 52 S.Ct. 34, 76 L.Ed. 556. Also see Palmolive Co. v. Conway, D.C., 43 F.2d 226, affirmed in 7 Cir., 56 F.2d 83, certiorari denied 287 U.S. 601, 53 S.Ct. 8, 77 L.Ed. 524.

Under the decision in Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 130 P.2d 421, the revenue of plaintiff from the pickup and delivery service, if such service was actually performed by appellant, was a part of its gross receipts subject to taxation. The trial court found, on what we are constrained to hold is sufficient evidence, that such service was performed by appellant. As in Boessow v. Johnson, 10 Cal.App.2d 578, 52 P.2d 505, the contract relied upon was not, in fact, carried out, in so far as the pickup and delivery service was concerned, but plaintiff continued to perform it as it had done prior to the execution of the joint facilities agreement; and while in the Boessow case the court found that the agreement relied upon by appellant had been entered into as a mere subterfuge to avoid the payment of taxes without changing the relationship of the parties, we do not deem it necessary to find in the case before us, nor did the trial court find, that the agreement was entered into for that purpose. It is sufficient that, in so far as the pickup and delivery service was concerned, it was not, in fact, carried out, and the relations of the parties in that behalf were merely colorable—existed in form only. Also see Service Tank Lines v. Johnson, 61 Cal.App.2d 67, 141 P.2d 965.

It is not contended here that the carrier and the express company could not legally have so arranged their business as to lessen plaintiff's tax liability—the question is purely one of fact as to whether the contract which they made was so carried out as to shift the tax burden. On that question the finding of the court has sufficient substantial support in the evidence, and the judgment is therefore affirmed.

PEEK and THOMPSON, JJ., concur.

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71 Cal.App.2d 837

JACKSON v. JACKSON.
Civ. 7227.

District Court of Appeal, Third District, California.

Dec. 1, 1945.

1. Appeal and error 🔑417(3), 430(1)

Where notice of appeal from judgment for defendant was not signed by plaintiff or her attorney of record, but by an attorney employed at time of rendering judgment without being substituted as attorney of record as required by Code, and such omission was not waived, and right to file valid notice of appeal had expired, notice of appeal was void and appellee's motion to dismiss appeal was granted. Code Civ.Proc. §§ 283–285, 940; Rules on Appeal, rules 1(a), 2.

2. Appeal and error 🔑428(2)

A notice of appeal prematurely filed before entry of judgment was not invalid on that account. Code Civ.Proc. § 939; Rules on Appeal, rule 2(c).

3. Appeal and error 🔑1

The right of appeal is purely statutory and to entitle one to appeal he must conform to procedure required by statute.

4. Appeal and error 🔑417(3)

Notice of appeal must be signed by appellant or his attorney of record, and notice of appeal is invalid if signed only by attorney other than attorney of record unless that omission is waived. Code Civ. Proc. § 940; Rules on Appeal, rule 1(a).

5. Appeal and error 🔑429

Slight evidence may suffice to constitute waiver of defect in notice of appeal not signed by appellant's attorney of record. Code Civ.Proc. § 940; Rules on Appeal, rule 1(a).

6. Attorney and client 🔑75(1)

A substitution of an attorney for attorney of record before or after judgment must be made as provided in Code of Civil Procedure. Code Civ.Proc. §§ 284, 285.

7. Appeal and error 🔑417(3)
Attorney and client 🔑76(4)

The employment of an attorney who tries a case does not cease on entry of judgment for purpose of validating a defective notice of appeal signed by attorney who is not attorney of record. Code Civ.Proc. §§ 283–285, 940; Rules on Appeal, rules 1(a), 2.

8. Attorney and client 🔑76(4)

The authority of an attorney to act for his client while he remains as attorney of record even after rendering of judgment extends to any of steps of an action or proceeding, or on motion for new trial, or for purpose of enforcing judgment or having it set aside or reversed. Code Civ.Proc. § 283.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Action by Zenobia Jackson against C. S. Jackson to establish an alleged community interest in real property and to set aside a property settlement agreement. Judgment for defendant and plaintiff appeals. On defendant's motion to dismiss the appeal on the ground that notice of appeal was not signed by the attorney of record.

Motion granted and appeal dismissed.

Edward D. Mabson, of San Francisco, for appellant.

Rowland & Craven, of Sacramento, for respondent.

THOMPSON, Justice.

This is a motion to dismiss the appeal on the ground that the notice of appeal was not signed by the attorney of record.

A complaint was filed in the Superior Court of Sacramento County to establish an alleged community interest in real property, and to set aside a property settlement agreement. J. M. Inman appeared of record as the attorney for plaintiff. Rowland and Craven of Sacramento appeared of record as the attorneys for defendant. After trial and the adoption of findings favorable to the defendant, judgment was rendered accordingly and entered January 5, 1945. Notice of the entry of judgment was served on J. M. Inman, March 13, 1945. No motion for new trial was made. March 3, 1945, Edward D. Mabson, an attorney who resides in San Francisco, mailed to the County Clerk and filed a notice of appeal pursuant to Section 940 of the Code of Civil Procedure, and Rule 1(a) of Rules on Appeal. That notice of appeal was signed only by Edward D. Mabson. Thereafter Mr. Mabson gave notice to the clerk to prepare a transcript on appeal. May 25th, Mr. Mabson sent to J. M. Inman, by mail, a form for substitution of attorneys, which was signed by plaintiff and consented to by Inman, and filed on May 31st. On the last-mentioned date defendant's attorneys filed written objections to the settlement of transcript on the ground that the notice of appeal is invalid and ineffectual since it was not signed by either the plaintiff or J. M. Inman, her attorney of record. The objections to settlement of the transcript were heard by the court and sustained on July 21, 1945, on the ground that the notice of appeal was ineffectual since it was not signed either by the appellant or her attorney of record, and that the time for filing a valid notice of appeal had elapsed.

Motion was thereupon made in this court, upon notice thereof, to dismiss the purported appeal for lack of legal notice of appeal. Mr. Mabson appeared in opposition thereto. The motion was based on the certificate of the clerk to the record of the foregoing facts, together with an affidavit of Mr. Mabson in accordance therewith. There is no conflict of evidence. Mr. Mabson's affidavit avers that he was employed by plaintiff on January 4, 1945, to prosecute the appeal from the judgment. It appears from the record that the defendant's attorneys had no knowledge of the employment of Mr. Mabson until the filing of the notice for the clerk to prepare the transcript. They did not recognize appellant's new attorney by acknowledgment of any documents, by consent to continuances, or otherwise.

[1] Under the circumstances of this case, and the California authorities, we are impelled to hold that the notice of appeal in this case was ineffectual and void for the reason that it was not signed by either the appellant or her attorney of record, and that the motion to dismiss the appeal must therefore be granted.

[2] The notice of appeal was prematurely filed before the entry of judgment, but it was not invalid on that account. Sec. 939, Code Civ.Proc.; Rule 2(c), Rules on Appeal.

[3] The right of appeal is purely statutory. Superior Wheeler Cake Corp. v. Superior Court, 203 Cal. 384, 264 P. 488; Cullinan v. Superior Court, 24 Cal.App.2d 468, 472, 75 P.2d 518, 77 P.2d 471; 2 Cal.Jur. 111, sec. 4. To entitle one to an appeal he must conform to the procedure required by statute. Rule 2 of Rules on Appeal provides that an appeal may be taken within sixty days from the entry of judgment, unless a motion for new trial is pending, in which event the time is extended for thirty days after the entry of the order determining that motion. Rule 1(a) of the same rules requires notice of the appeal to be filed with the clerk of the court in which the judgment is rendered.

[4, 5] The California cases have uniformly held that the notice of appeal pre-

scribed by law must be signed by the appellant or his attorney of record, or, in other words, that a notice of appeal is invalid and ineffectual if it is signed only by an attorney other than the attorney of record, unless that omission is waived. Starkweather v. Eddy, 196 Cal. 73, 235 P. 734; Anglo-California Trust Co. v. Oakland Railways, 191 Cal. 387, 216 P. 578; Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 42, 152 P.2d 625; McMahon v. Thomas, 114 Cal. 588, 46 P. 732; Livermore v. Webb, 56 Cal. 489; Whittle v. Renner, 55 Cal. 395; Prescott v. Salthouse, 53 Cal. 221; Hobbs v. Duff, 43 Cal. 485, 491; Harrigan v. Bolte, Cal.Sup., 8 P. 184; 2 Cal.Jur. 319, sec. 111; 30 Cal.Law Rev. 441. The foregoing rule is too firmly established to justify this court in questioning its controlling effect. In the Harrigan case, supra, the court said: "We do not consider the question [that the notice must be signed by the attorney of record] an open one in this court." In the Starkweather case, supra, the Supreme Court was asked to overrule some of the preceding cases on the ground that they establish a harsh rule, but the court refused to do so. It is true that the authorities hold that slight evidence may suffice to constitute a waiver of the defect of the notice. But there is no evidence in this case of any act or conduct on the part of respondent or his attorneys which tends to indicate they recognized the right of Mr. Mabson to sign the notice of appeal or that they waived the defect thereof. Respondent urged the invalidity of the notice at the first opportunity. We are bound to concede he preserved his right to object to the invalidity of the notice.

Mr. Mabson was not an attorney of record at the time he signed and filed the notice of appeal, nor at any time within sixty days after the entry of the judgment. Notice of the entry of judgment was served March 13th. Mabson's substitution, as attorney for plaintiff, was not filed until May 31st. The time for filing a valid notice of appeal had then elapsed.

[6] A substitution of attorney "before or after judgment" must be made as provided in Sections 284 and 285 of the Code of Civil Procedure. We may concede that Mr. Mabson was actually employed as attorney to represent the plaintiff about the time of the rendering of judgment. But he was not substituted as required by the preceding sections of the Code until May 31st, at which time the right to file a valid notice of appeal had expired.

[7, 8] It may not be said, for the purpose of validating a defective notice of appeal which is signed by an attorney who is not of record, that the employment of the attorney who tries a case ceases upon the entry of judgment. The authority of an attorney to act for his client, while he remains as the attorney of record, even after the rendering of judgment, extends to "any of the steps of an action or proceeding," Sec. 283, Code Civ.Proc., on motion for a new trial (Simpson v. Budd, 91 Cal. 488, 27 P. 758), or "for the purpose of enforcing it or having it set aside or reversed." Reynolds v. Reynolds, 21 Cal.2d 580, 584, 134 P. 2d 251, 254. In the case last cited it is said: "The court is concerned in such cases not with whether the client is represented by an attorney, but whether he has an attorney *of record,* whether any change in attorneys has been made as provided in section 284 of the Code of Civil Procedure, and whether notice thereof has been given as provided in section 285 of that code. The authority of an attorney, however, ordinarily ends with the entry of judgment, *except for the purpose of enforcing it or having it set aside or reversed.*" (Italics added.)

Even though it be assumed in this case that the authority of Mr. Inman ceased upon the entry of judgment, there would then be no attorney of record because no substitution of attorneys had been made or filed as required by the statute.

The motion is granted and the appeal is dismissed.

ADAMS, P. J., and PEEK, J., concur.

27 Cal.2d 209

PEOPLE v. TALLMAN.

Cr. 4658.

Supreme Court of California, in Bank.
Nov. 9, 1945.

Rehearing Denied Dec. 6, 1945.

1. Assault and battery 🔑91

Evidence sustained conviction of two counts of simple assault in prosecution for assault by means of force likely to produce great bodily injury. Pen.Code, § 240.

2. Assault and battery 🔑55

The offense of assault with force likely to produce great bodily injury may be perpetrated by means of the hands alone.

3. Indictment and Information 🔑41(6)

In order to support the filing of a charge by information, evidence before a committing magistrate need not require conviction, but is adequate if it appears that a public offense has been committed and there is sufficient cause to believe defendant guilty thereof. Pen.Code, § 809.

4. Indictment and Information 🔑41(6)

Evidence taken at preliminary examination, disclosing that defendant seized his school girl victims and moved his hands in a clawing manner over their bodies, supported the filing of charges in an amended information of assault by means of force likely to produce great bodily injury with respect to each of the victims. Pen.Code, §§ 809, 1008.

5. Indictment and Information 🔑161(5)

An information is deficient, so as to permit its amendment, if it fails to charge one or more of the offenses shown by the evidence at the preliminary examination. Pen.Code, § 1008.

6. Indictment and Information 🔑122(2)

Where defendant was charged in original information with two counts, one with respect to each girl, of assault with intent to commit rape, evidence taken at preliminary examination disclosing that defendant seized his victims and moved his hands in a clawing manner over their bodies authorized filing an amended information charging in addition assault by means of force likely to produce great bodily injury with respect to each of the girls. Pen. Code, §§ 809, 1008.

7. Constitutional law 🔑265
Indictment and Information 🔑2(4), 156

The code sections authorizing an original information to charge offenses named in the order of commitment or any offenses shown by evidence taken before magistrate to have been committed, and authorizing amendment of information to so charge, are not violative of due process. Pen. Code, §§ 809, 1008.

8. Criminal law 🔑489

In prosecution for assault with intent to commit rape and similar offenses, where medical expert for defendant on direct examination testified that incidents related by the girls involved might be traceable to hallucinations as the figment of the adolescent mind disturbed by a developing sex-consciousness, cross-examination developing that a man might seek gratification under similar circumstances to those disclosed by prosecution evidence and that it did not necessarily follow that a girl's statement of such occurrence was the result of an hallucination was not objectionable as going beyond direct examination but was proper as having a direct bearing on credibility of expert and upon weight to be given her testimony.

9. Criminal law 🔑489

A wide latitude is permitted in cross-examination of an expert witness in all matters tending to test his credibility so that jury may determine weight to be given testimony, and an expert who has testified in answer to hypothetical questions may be cross-examined by opposing party by means of hypothetical questions in order to ascertain his knowledge of matters about which he gave an opinion.

10. Criminal law 🔑1172(1)

Where defendant was convicted of simple assault, a misdemeanor, in a prosecution for assault with force likely to produce great bodily injury, a felony, and offense of simple assault was correctly defined in the instructions, defendant was not prejudiced by lack of substantial difference between instruction defining simple assault and the one defining assault with force likely to produce great bodily injury. Pen. Code, § 240.

11. Criminal law 🔑829(18)

Where court fully instructed jury on subject of reasonable doubt, defendant was not prejudiced by failure to give requested instruction that a reasonable doubt as to identification of defendant was to be resolved in his favor.

12. Criminal law ⚷655(1), 713, 722(2)

Record failed to sustain charge that trial judge and district attorney were guilty of misconduct in making certain remarks which assertedly tended to disparage defendant and his attorney in minds of jurors.

13. Criminal law ⚷1023(11, 12)

Appeals from orders denying motion in arrest of judgment and from sentence were dismissed on ground orders are not appealable. Pen.Code, § 1237.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Frank E. Tallman, in a prosecution for assault by means of force likely to produce great bodily injury, was convicted of simple assault and from the judgment, order denying new trial, sentence, and order denying motion in arrest of judgment, he appeals.

Appeals from order denying motion in arrest of judgment and from sentence dismissed, and judgment and order denying motion for new trial affirmed.

Prior opinion, App., 159 P.2d 996.

Forrest A. Betts and Wm. J. Currer, Jr., both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

While on her way to school a fourteen-year-old girl was grabbed by a man as she walked through a hole in a hedge that surrounded the school grounds. The offender placed one of his hands under her skirt and his other hand was upon her body outside of her clothes. The child pulled herself free and ran to the school. On the following morning, at the same place and at approximately the same time a man committed a similar attack on a second school girl. She likewise pushed or kicked herself free and as the man departed from the scene in an automobile the girl's companion repeated the license number, which the girl then wrote on the cover of one of her books. Three days later defendant was traced through this license number and identified by the girls in a police line-up. Upon the trial, the girls also pointed to defendant as their assailant and described and identified his automobile as the one in which he had approached and departed from the scene of the offenses. The school book on which the license number had been inscribed was also introduced in evidence.

The jury rejected defendant's claim that he was elsewhere at the times in question and convicted him on two counts of simple assault, lesser offenses included in those charged against him. He was sentenced to serve six months in the county jail on each count, the sentences to run consecutively.

[1] The verdicts are amply supported by the evidence and its sufficiency is not challenged by defendant. His first contention concerns the manner in which he was charged by the information filed by the district attorney. It appears that following his preliminary examination defendant was held to answer on two counts (one with respect to each girl) of assault with intent to commit rape. An information charging these offenses was thereupon filed and upon his arraignment defendant pleaded not guilty. Before the commencement of trial, however, the district attorney was permitted, over defendant's objection, to file an amended information and the trial was continued to a later date. As amended, the information contained six counts and also charged a prior felony conviction of larceny which defendant admitted. The six counts describe three offenses against each of the two girls involved and all relate to the two occurrences above mentioned which were the subject of the evidence produced at the preliminary hearing. The amended information charged assault with intent to commit rape in counts 1 and 4; attempted rape in counts 2 and 5; and assault by means of force likely to produce great bodily injury in counts 3 and 6. Inasmuch as defendant was acquitted on four counts (1, 2, 4 aud 5) we need not concern ourselves with them.

[2-4] Defendant contends that the evidence at the preliminary examination showed at the most two offenses of simple assault, a misdemeanor, and that it was therefore improper to permit the filing of the amended information charging the offense of assault with force likely to produce great bodily injury, a felony. It is

settled that the offense of assault with force likely to produce great bodily injury (charged in counts 3 and 6) may be perpetrated by means of the hands alone. People v. Hinshaw, 194 Cal. 1, 14-18, 227 P. 156; People v. Bumbaugh, 48 Cal.App.2d 791, 796-797, 120 P.2d 703; see, also, People v. McIlvain, 55 Cal.App.2d 322, 331, 130 P.2d 131. The evidence taken at the preliminary examination which was before the trial court when it permitted the filing of the amended information, disclosed that defendant seized his victims and moved his hands in a clawing manner over their bodies. In order to support the filing of a charge the evidence before a committing magistrate need not require conviction but is adequate if it appears that a public offense has been committed and there is sufficient cause to believe defendant guilty thereof. The evidence taken at the preliminary hearing supports the filing of the charges contained in counts 3 and 6.

[5, 6] This brings us to a consideration of the question whether the court erred in allowing the information to be amended to add the two counts charging assault with force likely to produce great bodily injury. Section 1008 of the Penal Code governs the amendment of an information. It permits an amendment without leave of court at any time before the defendant pleads. At any stage of the proceeding, however, the court may order an amendment for any defect or deficiency unless the substantial rights of the defendant would be prejudiced, in which event a reasonable continuance is to be allowed. An information is deficient within the meaning of section 1008 so as to permit of its amendment, when it fails to charge one or more of the offenses shown by the evidence at the preliminary examination. People v. Shutler, 15 Cal.App.2d 704, 708, 59 P.2d 1050. The section forbids, however, an amendment which charges "an offense not shown by the evidence taken at the preliminary examination." Here, as already shown, the addition of counts 3 and 6 by amendment charged only offenses covered by the evidence produced at the preliminary hearing. They were offenses against the same girls named in the original information and were predicated upon their testimony as to the same two occurrences which underlay the charges set forth in the original information. The defendant was not caught unawares, since the evidence taken upon the preliminary examination disclosed the offenses with which he might be charged.

[7] It is established that the provision of the section allowing an amendment of an information so as to add an offense shown by the evidence at the preliminary examination, does not violate a defendant's constitutional rights. People v. Foster, 198 Cal. 112, 119-121, 243 P. 667; People v. Shutler, 15 Cal.App.2d 704, 705-708, 59 P.2d 1050; People v. Roth, 137 Cal.App. 592, 607, 608, 31 P.2d 813; see, also, People v. Bird, 212 Cal. 632, 638, 300 P. 23. Section 809 of the Penal Code which governs the filing of an original information was amended in 1927 to make it conform with section 1008 governing the filing of an amended information. As amended, section 809 provides in part that the original information "may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed." This section likewise has been held to do no violence to either federal or state constitutional provisions. People v. Bird, 212 Cal. 632, 636-645, 300 P. 23; People v. Sanders, 102 Cal. App. 237, 239-246, 283 P. 136; People v. Malowitz, 133 Cal.App. 250, 260, 24 P.2d 177. All that has been said from the standpoint of constitutional interpretation to support the validity of section 809 of the Penal Code may be urged with like force to sustain section 1008. In other words, if the district attorney may with propriety file an information charging an offense shown by the evidence taken at the preliminary hearing even though the defendant was not bound over or committed therefor, he may with equal propriety amend an information to charge an offense shown by the evidence at the preliminary examination even though not set forth in the order of commitment or in the original information.

[8, 9] Defendant next contends that prejudicial error occurred during the cross-examination of an expert witness called by the defense. The expert, a woman doctor, in answer to a hypothetical question testified that the incidents or occurrences related by the girls might be traceable to hallucinations, stating that her experience caused her to believe that in many of such cases the crimes had no foundation in fact, but were the figment of the adolescent mind disturbed by a developing sex-conscious-

ness. On cross-examination by the district attorney, the doctor testified that a man might seek sexual gratification under circumstances similar to those disclosed by the prosecution evidence or by exhibiting himself without touching the other person, and if an adolescent girl stated that she was involved in some such experience, it would not necessarily follow that her statement was the result of an hallucination. It is urged that since the direct examination of the witness was limited to the reactions of a girl and the cross-examination called for an opinion with respect to the conduct of a man it went beyond the direct examination and was improper. The cross-examination had a direct bearing on the credibility of the witness and upon the weight to be given her testimony. A wide latitude is permitted in the cross-examination of an expert witness in all matters tending to test his credibility so that the jury may determine the weight to be given the testimony, and an expert who has testified in answer to hypothetical questions may be cross-examined by the opposing party by means of hypothetical questions in order to ascertain his knowledge of the matters about which he gave an opinion. McFadden v. Santa Ana etc. Ry. Co., 87 Cal. 464, 470, 25 P. 681, 11 L.R.A. 252; People v. Hill, 116 Cal. 562, 567, 48 P. 711; 8 Cal.Jur. 163, § 243; see, also, 2 Wharton's Criminal Evidence, 11th Ed., 1784-1785, § 1023.

[10] Defendant contends that prejudicial error was committed by the trial court in the giving and refusing of instructions. It is asserted that there is no substantial difference between the instruction defining simple assault and the one defining the greater offense of assault with force likely to produce great bodily injury. The offense of simple assault was correctly defined, Pen.Code, § 240; People v. Bradbury, 151 Cal. 675, 676, 677, 91 P. 497, and since defendant was found guilty of that offense, he obviously was not prejudiced by any asserted similarity between the instruction on simple assault and the one defining assault with force likely to produce great bodily injury.

[11] It is further argued that the court erred in refusing a requesetd insstruction to the general effect that if a reasonable doubt exists as to the identification of the defendant it must be resolved in his favor. The court fully instructed the jury on the subject of reasonable doubt and defendant was not prejudiced by the failure to give the proposed instruction.

[12] Defendant finally contends that the trial judge and the district attorney were guilty of misconduct in making certain remarks which assertedly tended to disparage him and his attorney in the minds of the jurors. We find nothing in the remarks complained of which was prejudicial to the rights of defendant or resulted in a miscarriage of justice.

[13] The appeals from the order denying the motion in arrest of judgment and from the sentence are dismissed. Pen.Code, § 1237. The judgment and order denying a new trial are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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27 Cal.2d 296

RICE v. CALIFORNIA LUTHERAN HOSPITAL et al.

L. A. 19424.

Supreme Court of California, in Bank.

Nov. 27, 1945.

Rehearing Denied Dec. 27, 1945.

1. Hospitals 🔑7

The extent and character of care that a hospital owes a patient depends on circumstances of particular case.

2. Hospitals 🔑7

A private hospital owes its patients the duty of protection and must exercise such reasonable care toward a patient as his known condition may require.

3. Hospitals 🔑7

The measure of duty that a hospital owes its patients is to exercise that degree of care used by hospitals generally in that community and required by express or implied contract of the undertaking.

4. Hospitals 🔑7

A hospital is liable for want of ordinary care whether from incompetency of a nurse, or failure in duty by a duly qualified nurse.

5. Hospitals ⚷7

The duty of care imposed on a hospital extends to safeguarding patients from dangers due to mental incapacity.

6. Hospitals ⚷7

A private hospital is not an insurer of patient's safety, and rules as to care required are limited by rule that no one is required to guard against that which a reasonable person under circumstances would not anticipate as likely to happen.

7. Hospitals ⚷8

Evidence was sufficient for jury as to whether hospital employee was negligent in placing hot water within reach of patient recovering from major operation and within 2½ hours after she had been given narcotic to relieve pain, and leaving her unattended, so as to render hospital liable for burns sustained by patient when the water spilled on her.

8. Trial ⚷143

Trier of facts must resolve conflicts in evidence, whether such conflict is between witnesses on one side or on opposite sides.

9. Appeal and error ⚷1002

The Supreme Court on appeal will not disturb finding of trier of facts supported by any substantial evidence, even though there is a conflict in evidence adduced by prevailing party.

10. Hospitals ⚷8

In action against hospital by patient who was burned by hot water which had been placed within her reach when she was recovering from major operation and was under influence of narcotics and left unattended, patient's testimony as to her mental and weakened physical condition as result of operation and narcotics, and as to how accident occurred, was not inherently incredible in view of her age and circumstances.

11. Hospitals ⚷7

A hospital had duty to observe and know condition of patient burned by hot water left within her reach by hospital employee, since hospital's business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under circumstances, a vital part of which circumstances are the illness of the patient and incidents thereof.

12. Hospitals ⚷7

The conduct of hospital patient burned by hot water left within her reach after major operation and while she was under influence of narcotics must be measured by standard of a person of ordinary prudence under the circumstances, and her physical and mental condition are a part of such circumstances.

13. Hospitals ⚷8

Evidence that hospital employee placed hot water within reach of patient recovering from major operation, and while she was under influence of narcotics, established, as matter of law, that patient was not contributorily negligent in spilling such water on herself.

14. Hospitals ⚷7

A hospital was liable for negligence of its employee in placing hot water to make tea within reach of patient recovering from major operation and while she was under influence of narcotics, though patient's physician gave order that she was to be served tea at that time, since doctor did not purport to supervise process of serving tea but such duty rested on hospital.

15. Hospitals ⚷7

A hospital agrees to care for patient in usual manner by furnishing him with accommodations and maintaining such attendants, including nurses and internes, as will insure him proper care and attention before, during, and after an operation.

16. Hospitals ⚷7

That patient's own doctor ordered tea to be served to patient at certain time did not make employee of hospital, who placed hot water within reach of patient after major operation and while she was under the influence of narcotics, an employee of the doctor so as to relieve hospital from liability for negligence of such employee, where hospital retained control over its employees.

17. Hospitals ⚷7

Nurses or physicians may be servants of a hospital so as to require application of doctrine of respondeat superior to make hospital liable for their negligence even though they are performing professional acts.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Davied Ella Rice against the California Lutheran Hospital, the Lutheran Hospital Society of Southern California, and another, to recover for injuries allegedly caused by defendants' negligence while plaintiff was a patient in defendants' hospital. From a judgment for defendant last named notwithstanding verdict for plaintiff, the plaintiff appeals.

Reversed with directions.

Prior opinion 158 P.2d 579.

Sullivan & Lane, Robert J. Sullivan, William J. D. Lane, and George Stahlman, all of Los Angeles, for appellant.

Musick, Burrell & Pinney, Howard Burrell, Anson B. Jackson, Jr., and Clayton Straub, all of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff appeals from a judgment for defendant, Lutheran Hospital Society of Southern California, a corporation, notwithstanding a verdict in her favor, in an action for personal injuries alleged to have resulted from the negligence of said defendant.

Plaintiff, on the recommendation of her physician, entered the defendant's hospital as a patient at 7:30 p. m. on Thursday, October 8, 1942, for an operation consisting of the removal of her uterus which was affected with cancer. She was assigned to a room and put to bed, where she remained until the following Saturday morning when the operation was performed. The operation required an abdominal incision four or five inches long, and extended over a period of an hour and forty-five minutes. A spinal anesthetic was administered prior to the operation, and occasionally during the progress of it, nitrous oxide (laughing gas) was given to the patient.

At the time of the injury plaintiff's room was equipped with a table standing about a foot from the left side of the bed, the top of which was about six inches below the level of the bed. On the Monday following the operation at 12:30 p. m., while plaintiff was alone in her room, an employee of the hospital brought a tray with a teapot of hot water, a cup and saucer, a spoon and a tea bag which she placed on the bedside table. She left immediately. Later a nurse noticed that the call light at plaintiff's door was on and entered her room. She found the teapot and cup and saucer on the bed. The tray was on the bedside table. Plaintiff had suffered burns on her arm and breast. The nurse had been instructed in the morning by the doctor to serve plaintiff hot tea.

To support the judgment notwithstanding the verdict defendant urges that there was no substantial evidence of negligence; that plaintiff was, as a matter of law, contributively negligent and assumed the risk; that even if serving the tea constituted negligence, plaintiff's physician alone was liable, as defendant hospital was merely following his instructions.

[1-6] This court has recently stated the standard of conduct required of a hospital in the care of its patients:

"'The extent and character of the care that a hospital owes its patients depends on the circumstances of each particular case. A private hospital owes its patients the duty of protection, and must exercise such reasonable care toward a patient as his known condition may require. The measure of duty of a hospital is to exercise that degree of care, skill, and diligence used by hospitals generally in that community, and required by the express or implied contract of the undertaking. A hospital is liable for want of ordinary care, whether from incompetency of a nurse or failure in duty by a fully qualified nurse. * * * The duty of care imposed on a hospital extends to safeguarding the patient from dangers due to mental incapacity. * * * On the other hand, a private hospital is not an insurer of a patient's safety, and the rules as to care required are limited by the rule that no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.'" Wood v. Samaritan Institution, 26 Cal.2d 847, 851, 161 P.2d 556, 558.

[7] In the light of that standard there is sufficient evidence from which the jury could find negligence on the part of defendant in this case. Plaintiff was about 60 years of age. The operation was a serious one requiring nearly two hours to perform and severely taxing the strength of the patient. Only about 48 hours transpired between the operation and the injury. A drainage tube was maintained in the wound until Monday morning. A tube through the nose of the patient to her stomach was maintained to alleviate nausea. The patient was nauseated and frequently vom-

ited. She had had no oral nourishment. She was suffering pain, and drugs were administered to her, the last before the occurrence of the injury being at about 10 a. m. Monday and consisting of ⅓ grain of pantopon, a derivative of opium. About 2:50 Monday morning she had been given ⅙ grain of morphine. Dr. Chaffin, the surgeon on the case, testified:

"Q. Is it not a fact, Doctor, that in some instances it (morphine) produces drowsiness? A. It *usually* does produce some degree of drowsiness, more in some than in others. * * *

"Q. I will ask you to state whether from your observation you formed an opinion as to about how long there would be any effect from the administration of a dose of ⅙ grain of morphine in Mrs. Rice's case. A. We consider the morphine pretty well eliminated in about four hours from the system." (Emphasis added.)

And "Q. What would be the comparative strength, if that is the proper term, of ⅓ grain pantopon and ⅙ grain of morphine? A. It is about the same.

"Q. That (pantopon) was administered at what hour? A. 10:10.

"Q. 10:10 on Monday morning? A. That is right."

Plaintiff remained in a reclining position. Her condition was, as expressed by her: "I was feeling terrible; I was weak after the operation; I was lifeless, I could not move this way, I could not move that way, there was tubes here and tubes * * *," and on Monday morning she said her "mind was very weak." She described the occurrence of the injury as follows:

"I was asleep sometime after 12:00 o'clock, and my bed in my room faced this way, and over here against the wall is a dresser in front of the bed, was a dresser, down at the other end of the room, and as I woke up I saw a form there. * * * I saw this form standing there looking into the mirror, as she turned around she said something to me, what she said I don't know, and she walked out of the room.

"Q. Did you make any reply? A. No, not that I know of. Then in a few minutes I have no recollection what happened at all, I felt a terrific heat on me, I looked down, there was this hot water all over the side here, all under the arm here, and I screamed, and then two or three nurses came in, and they saw it was burned and then they put * * * the head nurse of the floor, she put salve on it, some kind of salve on the arm here, under here, under here, bandaged it all up."

No drinking tube was furnished with the hot water and tea. The employee serving it placed it on the bedside table and immediately left the room leaving plaintiff unattended. She did not advise plaintiff that the water was hot, although she testified that she told plaintiff that she should have a nurse help her with the tea.

From all of these circumstances the trier of fact was justified in finding that the standard of care required by defendant had not been met; that defendant either knew or should have known of plaintiff's condition; that it would be dangerous to leave the hot water and tea on the bedside table without any facility for drinking it, such as a tube, and without any safeguards or attendants; and that a hazard had been created that would probably result in an injury to plaintiff.

Defendant vigorously asserts that the only credible evidence in the case shows no liability on its part. It points to testimony of doctors, nurses and the hospital charts to the effect that plaintiff's condition was good a short time prior to the accident on the day thereof; that she was exceptionally alert mentally; that the narcotics administered to her were for pain alone and would not cause drowsiness or mental sluggishness; and that several witnesses testified that plaintiff had told them that the accident was her fault in that she tried to help herself to the tea to avoid bothering the nurses. It suggests that the evidence produced by plaintiff's own witnesses shows her condition to have been good, that the narcotics did not affect her mental clarity, and in that connection she is bound by the testimony of those witnesses.

[8-11] Contrary to that latter contention, however, it is within the province of the trier of fact to resolve conflicts in evidence whether the conflict is between witnesses on one side or on opposite sides. Hence, this court will not disturb the finding where there is any substantial evidence supporting it, even though there is a conflict in the evidence produced by the prevailing party. See Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 49 P.2d 590; Frazee v. Fox Film Corporation, 45 Cal.App. 661, 188 P. 286; Parker v. Herndon, 19 Cal.App. 451, 126 P. 183; Pedrow v. Federoff, 77 Cal.App. 164, 247 P. 212; Brock v.

Pearson, 87 Cal. 581, 25 P. 963; Weintraub v. Soronow, 115 Cal.App. 145, 1 P.2d 28; Isham v. Trimble, 5 Cal.App.2d 648, 43 P.2d 581; Gackstetter v. Market Street R. Co., 10 Cal.App.2d 713, 52 P.2d 998; Bushey v. Union Oil Co., 13 Cal.App.2d 350, 56 P.2d 1272; People v. Crownover, 34 Cal.App.2d 7, 92 P.2d 929; Rosella v. Paxinos, 110 Cal. App. 299, 294 P. 39. It may be conceded that the conflict in the evidence in this case is violent. Nevertheless, the credibility of the witnesses and the resolution of those conflicts was for the jury. We cannot say that plaintiff's testimony was inherently incredible, especially when we consider the background of her age, the seriousness of the operation, the time elapsing between the operation and the injury, and the narcotics administered, together with evidence that they usually made a patient drowsy and lasted for about four hours. Defendant attacks plaintiff's testimony that she was unconscious or asleep all the time, as being particularly incredible, and points to other testimony on her part in which she recites events that occurred. However, the jury could have concluded that her statement relating to her condition of unconsciousness was not meant literally and that she was aware of some things. It could reasonably have decided that she was in a mental condition that was far from alert—that her comprehension, awareness and ability to function were subnormal. Plaintiff denied the asserted admissions that the injury was due to her own carelessness. If her condition was as described by her, and the jury was justified in concluding it was, especially in light of the surrounding circumstances, then the jury was authorized to conclude that the hospital should have been aware of that condition inasmuch as it assumed the duty of proper care of its patients and of taking appropriate precautions. It is not vital that there was no evidence that plaintiff threw her arms or tossed about in delirium and thus brushed the hot water from the stand onto the bed. Nor is the fact that the top of the bedside stand was below the level of the bed of controlling significance. In her weakened physical condition and confused state of mind, which the jury could decide existed, it was not at all improbable that she would in one manner or another spill the hot water on herself. She may have assumed, as a person of ordinary prudence, in a half conscious fashion, that it was safe to attempt to consume the tea, not realizing the danger incident thereto or the extent of her weakness. According to defendant's evidence she had had no oral nourishment except tea on Sunday. The jury could have inferred that she would have a craving for the tea, and would, in view of the circumstances, underestimate her strength and ability to handle the hot water. Defendant on the other hand was under a duty to observe and know the condition of a patient. Its business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under the circumstances, a vital part of those circumstances being the illness of the patient and incidents thereof.

[12, 13] The foregoing discussion not only shows a basis for finding defendant negligent because it should have anticipated the hazard inherent in its omissions, but also establishes that plaintiff was not contributively negligent as a matter of law. Her conduct must be measured by the standard of a person of ordinary prudence under the circumstances. Her physical and mental condition are a part of those circumstances, and in determining what a person of ordinary prudence would do under the same circumstances, it is necessary to visualize a person in a similar condition when ascertaining what acts or omissions would be negligent and what would not be. We cannot say that the only reasonable hypothesis is negligence on her part or that reasonable and sensible men could have reached no other conclusion. See Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826.

[14-17] Defendant argues that if anyone is liable it is Dr. Chaffin, plaintiff's physician, who gave the order that plaintiff be served tea knowing the customary manner of serving it which was followed in the case at bar. If the duty of care resting upon the hospital embraced the serving of the tea, defendant cannot escape the responsibility for performance of that duty by attempting to shift it to the doctor. The doctor merely fixed the time when tea could be served to the patient, he did not purport to supervise the care and supervision to be exercised in the process of serving it. Even if he ordered the tea to be served in the customary manner, but that manner was negligent, the defendant would be liable in following such instruction where a duty of care toward the patient rested upon it. The obligation and duty assumed by the

hospital is stated generally in Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 103, 114 P.2d 15:

"The complaint charges only what is common practice, that the hospital agreed to care for the patient in the usual manner, that is, to furnish him with accommodations and to maintain such attendants, including nurses and internes, as would assure him proper care and attention before, during and after the operation. Under such circumstances it cannot be said that the hospital is practicing medicine in violation of law." The nurses attending plaintiff were employed by the defendant hospital and were not special nurses in the employ of either plaintiff or her physician. Likewise, the person who served the tea was defendant's employee. The defendant was bound to supply proper attendance and care to plaintiff and that duty extended to furnishing and supervising the furnishing of nourishment. It cannot be said that because the doctor ordered tea to be served plaintiff, he was making the nurses and the server of the tea his servants and employees to the exclusion of defendant hospital as the employer. The hospital still had direction and control over its employees and was responsible for the care to be observed by them in the process. Defendant relies upon such cases as Steinert v. Brunswick Home, Inc., 172 Misc. 787, 16 N.Y.S.2d 83; Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.N.S. 505, Ann.Cas.1915C 581; and Mesedahl v. St. Luke's Hospital, 194 Minn. 198, 259 N.W. 819. Reference may also be made to Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283. In the Ware case, a special nurse employed by the patient, not an employee of the hospital, was involved. In the Steinert case the nurse, an employee of the hospital, was assisting the operating surgeon, not an employee of the hospital, and was under his direct control and supervision when the nurse acted negligently. Assuming but not deciding the correctness of the general rule stated in that case, that is, that a hospital is not liable for the negligence of a nurse employed by it when acting under the direction of a physician not employed by it, in matters relating to medical care and treatment of a patient while confined in such hospital, such a case is not here presented. It may be that the giving of the order that tea be served was a part of the medical treatment, but the serving thereof and the care and attention in connection therewith certainly were part of the duties assumed by the hospital and were not a part of the medical treatment. The Mesedahl case must be said to go further than the Steinert case. It should be noted that a nurse or physician may be the servant of a hospital, thus requiring the application of the doctrine of respondeat superior even though they are performing professional acts. See Brown v. La Societe Francaise, 138 Cal. 475, 71 P. 516; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 466, 12 P.2d 744, 13 P.2d 905; Bowman v. Southern Pac. Co., 55 Cal.App. 734, 204 P. 403.

The judgment is reversed and the trial court is directed to enter judgment for plaintiff on the verdict.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

27 Cal.2d 343

ENGLAND v. CITY OF LONG BEACH et al.

L. A. 19414.

Supreme Court of California, in Bank.

Dec. 4, 1945.

Rehearing Denied Jan. 3, 1946.

1. Municipal corporations 🔑**220(9)**

Pension provisions of municipal charter must be interpreted in accordance with well-recognized rule that all pension laws are liberally construed to carry out their beneficent policy.

2. Municipal corporations 🔑**200**

Under Long Beach charter providing that after 20 years service, a fireman, on his application, shall be retired and paid in equal monthly installments from pension fund a limited pension of 50 per cent of his annual salary, with certain additional amount for each year over 20 and less than 30 years served, pension payments constituted general obligations of city and were not limited in amount to sums assigned to the pension fund. St. 1925, pp. 1333—1336, § 187(2–4, 6); St. 1931, pp. 2785, 2788, § 187(2, 6).

3. Municipal corporations ⚷220(9)

Where Long Beach charter did not expressly limit pension payments to money in pension fund, fact that charter enumerated certain particular sums which were required to be paid into pension fund did not constitute a limitation by implication on city's power to use other sources of revenue, either to pay pensions or to maintain the pension fund. St. 1931, p. 2788, § 187 (6).

4. Municipal corporations ⚷220(9)

Where Long Beach charter enumerated certain particular sums which were required to be paid into pension fund but did not expressly limit pension payments to money in pension fund, even if voters believed that sources of income provided for pension fund would constitute complete means of paying pensions, such fact would not necessarily indicate an intent to prohibit city from paying pensions from general fund in event of unforeseen deficit in pension fund. St. 1931, p. 2788, § 187(6).

◆

Proceeding in mandamus by Hyrum C. England against the City of Long Beach and others to compel the payment of money due petitioner as a retired fireman under a pension.

Writ granted with directions.

Prior opinion, 158 P.2d 589.

Kenneth Sperry and James C. Webb, both of Long Beach, for petitioner.

Joseph A. Ball, of Long Beach, as amicus curiae on behalf of petitioner.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

GIBSON, Chief Justice.

Petitioner, a member of the fire department of the city of Long Beach for more than twenty years, retired and was granted a pension on May 1, 1944, pursuant to provisions of the city charter. The accruing payments, however, have not been made to petitioner because, according to respondents, payments due to pensioners have greatly exceeded the sums paid into the pension fund.

In this proceeding petitioner seeks a peremptory writ of mandate to compel respondents to pay that portion of his pension which is now due. Respondents admit that the sum claimed by petitioner is owing and unpaid and that there is enough money in the hands of the city treasurer to pay him and other pensioners the installments due but contend they have no authority to make such payments until there is sufficient money in the pension fund for that purpose. Petitioner contends, however, that the pension constitutes a general obligation of the city and is not limited to payment from the pension fund.

When the charter was adopted in 1921, St. 1921, p. 2054, the city council was authorized to create a "Relief and Pension Fund" for members of the police and fire departments. The council, however, failed to exercise these powers, and in 1925 the charter was amended to provide for payment of certain specified pensions. Subdivision 2 of section 187, St. 1925, p. 1333, provided that any member of the fire or police department who served thirty years should, on application, be retired from further service in such department, "and he shall thereafter, during his lifetime, be paid in equal monthly installments from said fund a yearly pension equal to two-thirds of [his] annual salary * * *." It further provided that after twenty years' aggregate service a member on application "shall be retired and paid in equal monthly installments from said fund a limited pension" equal to fifty per cent of his annual salary. Subdivision 3 provided for certain monthly disability retirement payments, to be paid "from said pension fund." Subdivision 4 provided for pensions for widows or children in case of death, but here no mention was made of the fund as constituting the source of the payments.

Subdivision 6 of section 187 read in part: "For the purpose of creating, maintaining and providing a fund to meet the payment of demands drawn for the payment of pensions * * * a fund is hereby created to be known as the 'Relief and Pension Fund.'" It further provided that an actuary should be employed to render a report on the cost of maintaining the pension system on a reservation basis and that an amount based upon the report of the actuary, but not exceeding two per cent of the general tax levy, should be appropriated annually by the city council and paid into the fund, together with the amount of any deficit not exceeding two per cent of the general tax fund. It was also provided that, in addition, certain other specified sums, such as rewards and donations to the departments, should be paid into the fund.

The report of the actuary, appointed as directed by this subdivision, stated that the payment of two per cent of the general tax levy would be wholly inadequate and that an amount equal to at least five and one-half per cent would be required each year to place the pension system on a reservation basis. Thereafter, until 1931, the full two per cent authorized was not paid into the fund, but the city manager and the city council paid into the fund only a sufficient amount to pay such pensions as then became due.

In 1931, St. 1931, p. 2785, section 187 of the charter was again amended. That portion of subdivision 2 that is pertinent here remained substantially unchanged, but subdivision 6 was completely revised. The amendment eliminated the provisions to the effect that the city manager was authorized to include in his budget an amount to be paid into the pension fund not exceeding two per cent of the general tax levy and that the city council should annually appropriate the amount of any deficit not exceeding two per cent of the general tax levy. Instead, it provided that the city manager "shall include in his annual budget an amount equal to two per cent of the estimated pay of the members of the police and fire departments, as hereinafter provided, and the city council shall appropriate such amount to the 'Relief and Pension Fund.'" It also provided: "There shall be paid into the said fund, the following monies, to-wit: (a) The City Auditor is hereby authorized, and shall deduct and pay into said fund semi-monthly, two per cent of the salary of each member of the police and fire departments; (b) The amount appropriated by the city council, as hereinbefore provided * * * (c) All contributions, rewards and donations to the police and fire departments for services by any member or members thereof, except amounts of money donated to provide for any medal or permanent competitive award; (d) All fines imposed upon members of the police and fire departments for violations of the rules of said departments; (e) All proceeds from the sale of unclaimed property; (f) All contributions and donations to the said departments NOT specifically designated for inter-department relief funds. * * *"

Beginning with March, 1931, the city deducted two per cent from the salaries of the members of the police and fire departments, including the salary of petitioner prior to his retirement, which amounts, together with the miscellaneous funds provided, were paid into the pension fund.

In 1944 the voters of the city of Long Beach adopted a charter amendment, effective as of March 29, 1945, repealing section 187 and in effect eliminating all pensions with certain qualifications not pertinent here. Respondents concede, however, that since petitioner retired and was granted a pension prior to March, 1945, the repeal could not operate to deprive him of whatever rights he then had.

[1] The charter provisions must, of course, be interpreted in accordance with the well-recognized rule that all pension laws are liberally construed to carry out their beneficent policy. Gibson v. City of San Diego, 25 Cal.2d 930, 935, 156 P.2d 737; Dierkes v. City of Los Angeles, 25 Cal.2d 938, 942, 156 P.2d 741; Dillard v. City of Los Angeles, 20 Cal.2d 599, 602, 127 P.2d 917, 128 P.2d 537.

[2] In our opinion the pension payments directed to be made by the charter constitute general obligations of the city and are not limited in amount to the sums assigned to the pension fund by subdivision 6.

Subdivision 2 provided that after twenty years' service a fireman, upon his application, "shall be retired and paid in equal monthly installments from said fund a limited pension" of fifty per cent of his annual salary, with a certain additional amount for each year over twenty years and less than thirty years served. As petitioner asserts, this language, considered with the remainder of section 187 of the charter, may reasonably be interpreted to mean that a retiring fireman is entitled to a pension of the amount designated; that it was intended to provide an outright, unqualified pension; and that the words "from said fund," together with the provisions of subdivision 6, were not intended as a qualification or limitation but that the pension fund was created, and payments ordered made therefrom, simply as an orderly and customary means of administering city moneys.

There was no language in the charter which expressly limited pension payments to the money in the pension fund or to the particular items mentioned as sources of income to the fund by subdivision 6 of section 187 as amended in 1931. The only portion of subdivision 6 which might have been held to constitute an express limitation—the reference in the 1925 amendment to an amount not exceeding two percent of the general tax levy—was eliminated by the 1931 amendment. Respondents urge that if a general obligation had been intended, the voters would have stated specifically that the city should levy a tax sufficient to cover all pension payments. It may be argued with equal force, however, that the voters could have, but did not, specify that payments must be made from the pension fund alone.

[3] Respondents contend that since subdivision 6 enumerated certain particular sums which were required to be paid into the pension fund, it follows that under the doctrine expressio unius est exclusio alterius, the subdivision constituted a limitation or qualification by implication upon respondents' power to use other sources of revenue either to pay pensions or to maintain the pension fund. The application of the doctrine in this case, however, would constitute the writing into the charter of a restrictive provision that would prevent the complete fulfillment of the basic purpose of section 187, namely, that of paying as they accrue the pensions provided for therein. The rule of construction urged by respondents will not be permitted to defeat this purpose and must yield to the general policy of liberally construing pension provisions in favor of those to whom the benefits are granted.

We must, of course, reject any theory that the provisions of the charter were designed to create an appearance of granting pensions while at the same time withholding the benefits by providing inadequate funds. Cf. Gibson v. City of San Diego, 25 Cal.2d 930, 935, 156 P.2d 737, where the court said it was satisfied that the drafters of a charter did not intend to insert a clause which was either meaningless or fraudulent in design. The insufficiency of the fund may have resulted simply from a mistaken belief that the fund would be adequate or from an intent that it should constitute but a partial source of pension payments with the balance to be made up out of the city's general revenues.

The injustice that would prevail if the provisions relating to the fund were construed to be a limitation on the obligation to pay pensions is apparent. The existence of a pension plan is of course a strong factor inducing persons to enter into or remain in a particular employment. Morever, the employee involved here was required to contribute a portion of his salary to the pension fund. Although provision was made for substantial pensions, the inadequacy of the provisions for maintenance of the pension fund was not apparent from the face of the charter. As before noted, the charter did not expressly limit the obligation of the city to the payment of pensions from the pension fund. It would be obviously unjust to make the payment of pensions dependent upon the solvency of a particular fund, thereby depriving employees of the benefits of the system, unless we were compelled to do so by a clear, positive command in the charter.

[4] Respondents contend that if section 187 had been intended to make pensions general obligations of the city, subdivision 6 would have been a mere surplusage and there would have been no necessity for it. It is clear, however, that purposes other than that of creating a limitation upon pension payments could reasonably have been intended. It is the customary practice in administering a pension system to place the contributions of the employees and the matching payments in a designated fund. The allotment to the fund of other income specified in subdivision 6 can no doubt be explained by the fact that such sources are related to the business or functions of the departments covered by the pension system. Further, even though it be conceded that the voters believed that the sources of income provided by subdivision 6 would constitute the complete means of meeting pension payments, this would not necessarily mean an intent to prohibit respondents from paying pensions from the general funds of the city in the event of an unforeseen deficit in the pension fund.

The writ is granted and respondents are directed to pay to petitioner the amounts that have accrued on the pension granted to him.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

27 Cal.2d 335

MILANA v. CREDIT DISCOUNT CO. et al.

L. A. 19413.

Supreme Court of California, in Bank.

Dec. 4, 1945.

1. Usury ⚷138

Any person from whom a rate of interest greater than $10 on $100 for loan or forbearance of money for one year has been exacted may recover treble the amount of interest paid within one year preceding commencement of an action brought for that purpose. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

2. Sales ⚷1(1)

A "sale" is the transfer of general or absolute interest in property for a price in money.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

3. Money lent ⚷1

A "loan" is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use and if such is the intent of the parties the transaction will be deemed a loan regardless of its form.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan".

4. Usury ⚷26, 31

Contractors are free to buy and sell their property, including notes and other instruments, at a price agreed upon, and when the bona fides of the parties is established the percentage of profit has no relation to the usury law. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

5. Usury ⚷16

Courts disregard the form and consider the substance in determining whether plan of transacting business was designed to evade the usury law. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

6. Usury ⚷114, 117

All of negotiations, circumstances and conduct of parties connected with contract may be material in determining whether form thereof covered an intent to violate the usury law, and burden of establishing evasion must be met by evidence clearly showing the intent. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

7. Usury ⚷119

In action based on claim of usury arising out of transfer of manufacturer's current accounts under written agreement for sale thereof at a discount, evidence that transactions involved usurious loans and not sales of accounts was sufficient for trier of facts and motion for nonsuit was improperly granted. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

8. Usury ⚷26

Where manufacturer transferred current accounts under written agreement for sale thereof at a discount, fact that purported purchaser of accounts rather than manufacturer made collections and that notice of assignment of accounts was given to manufacturer's customers was not conclusive that transaction was not usurious loan. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

9. Usury ⚷26

Where manufacturer transferred current accounts under written agreement for sale thereof at a discount, the manufacturer's guaranties of payment within specified period or reversion of title and repurchase by manufacturer in event of delayed payment by customer was no more than a promise to repay purported purchaser amounts loaned with interest at purported discount rate of two or two and one-half per cent for each 60-day or less period, which would render transaction usurious. St.1919, p. lxxxiii, § 2; Const. art. 20, § 22.

10. Trial ⚷139(1)

A motion for nonsuit may not be granted where there is evidence of sufficient substantiality to support a finding for plaintiff.

11. Trial ⚷165

In determining whether there is sufficient evidence to support a finding for plaintiff so as to require denial of motion for nonsuit, evidence should be viewed most favorably to plaintiff with every legitimate inference drawn in her favor and conflicts must be disregarded.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Rose C. Milana against Credit Discount Company and others based on a claim of usury and seeking to recover treble the amount of interest paid within one year prior to the commencement of the action. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Prior opinion, 158 P.2d 409.

David Schwartz and Samuel Mirman, both of Los Angeles, for appellant.

Earl E. Moss and C. V. Caldwell, both of Los Angeles, for respondents.

SHENK, Justice.

The plaintiff appealed from a judgment of nonsuit in an action to establish that certain purported purchases by the defendants of accounts receivable were usurious loans, and to recover treble the amount of interest paid within one year prior to the commencement of the action. (Stats.1919, p. lxxxiii, Const. art. XX, § 22.) Assuming the transactions to be loans the court appointed a referee to report on the amount of interest that had been paid. Upon the filing of the referee's report the trial continued. At the close of the plaintiff's case a motion for a nonsuit was granted on the ground that the plaintiff's evidence was not sufficient to entitle her to relief. The question is whether the court correctly ruled that there was no substantial evidence to support a finding for the plaintiff on the issue of usury if such a finding had been made. The parties do not dispute the referee's finding of the amount of interest paid, if the nature of the transactions be determined to be that of a loan. The question on appeal will therefore be treated as presenting only the issue of whether there was sufficient evidence to support a finding that the transactions were loans and not sales.

The following appeared from the plaintiff's evidence: The plaintiff manufactured women's embroidered blouses and neckwear, and embroidered cocktail glass covers. She sold the merchandise to department stores, college and other shops in cities in the United States, but she required funds to operate the business. The defendant copartners acquired knowledge of the plaintiff's need and responded to a call from her. She made them acquainted with her desire to borrow money on her accounts and with the necessity for immediate funds to meet the payroll. They offered to render financial assistance. Accordingly they presented to her a so-called "sales agreement" dated May 22, 1940, prepared on a printed form, whereby defendants agreed to buy all acceptable current accounts and bills receivable in separate schedules at face value less customer's discount and less a further discount of two per cent. The plaintiff was to receive 85 per cent concurrently with the assignment of the accounts listed in each schedule, and the balance less discounts immediately after all of the accounts listed in the schedule were fully paid. The printed form contained the plaintiff's warranty that each debtor named in the schedule was solvent and would remain so until the maturity of the account. It also contained her unconditional guaranty that each and every account would be paid within sixty days after the date of the assignment. It was provided that the balance of the percentage reserved was to constitute security against accounts unpaid within the sixty-day period. In practice, accounts not paid within sixty days from assignment, although in some cases accounts were listed which were not yet due, were turned back to the plaintiff and were "repurchased" by the defendants under the same agreement, and an additional discount was taken on the so-called repurchases. The repurchase of accounts occurred in some instances in less than the sixty-day period. On September 5, 1941, a new "sales agreement" was entered into containing identical provisions with the exception that a two and one-half per cent instead of two per cent discount was charged by the defendants. The second agreement continued until the present action was filed in September, 1942.

Further provisions of the agreement required the plaintiff to give notice to her customers of the assignment of the accounts by stamping on the original and duplicate invoices the fact of assignment and a request to make checks payable to the defendants. So long as the plaintiff was not in default she could require the defendants to appoint one of her employees as their agent to report discrepancies in the accounts. The defendants had the option to terminate the agency upon suspension of the plaintiff's business on her request for a general extension of credit, on the filing of a petition in bankruptcy, on the assignment of assets for benefit of creditors, or on the appointment of a receiver or trustee in bankruptcy. In any such event the plaintiff agreed to reimburse the defendants for costs and attorneys' fees incurred in the enforcement of collection of any of the accounts. The plaintiff warranted that such agent would at the close of each business day transmit to the defendants in their original form, all moneys, checks, etc., received by the plaintiff or the agent, together with a memorandum of the debtor's instructions for application thereof. It was also agreed that moneys, checks, etc., coming into the possession of the defendants would be applied "on any indebtedness" to them of the plaintiff "arising out of the assignment of accounts or contracts in dispute or otherwise," the agent to hold separately any money pending dispute.

In practice, costs including telephone, telegrams, postage expense and attorneys' fees, incurred by the defendants in the collection of any of the accounts were charged against the reserves. In practice also the defendants' discount was computed on the total value of the accounts before the customers' discounts were deducted, whether or not those discounts were taken by the customers and charged against the defendants' advances to the plaintiff. Other specific provisions need not be noted.

[1] The statute (Stats.1919, p. lxxxiii) and the Constitution (art. XX, § 22) limit the rate of interest upon the loan or forbearance of money to ten dollars on one hundred dollars for one year. French v. Mortgage Guarantee Co., 16 Cal.2d 26, 34, 104 P.2d 655, 130 A.L.R. 67. Any person from whom a greater rate has been exacted may recover treble the amount of interest paid within one year preceding the commencement of an action brought for that purpose. Stats.1919, p. lxxxiii, § 2; Westman v. Dye, 214 Cal. 28, 4 P.2d 134.

[2, 3] A sale is the transfer of the property in a thing for a price in money. The transfer of the property in the thing sold for a price is the essence of the transaction. The transfer is that of the general or absolute interest in property as distinguished from a special property interest. A loan, on the other hand, is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form. In re Grand Union Co., 2 Cir., 219 F. 353, 356, 135 C.C.A. 237; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 528, 295 P. 1088.

In a sale the delivery of the absolute property in a thing and the receipt of a price therefor consummate the transaction. In a loan the initial transaction creates a debit and credit relationship which is not terminated until replacement of the sum borrowed with agreed interest.

In the present case the defendants made cash advances less discounts and in taking assignments of the accounts they exacted the plaintiff's guaranty of payment of their face value in full within sixty days. In practice they subjected defaulted accounts to payment from reserves, or return to the plaintiff and "repurchase" by the defendants under the same guaranties by the plaintiff. By the defendants' own testimony accounts not paid within the sixty-day limit were returned, and because the plaintiff was "hard pressed" for money and unable to meet the terms of her guaranties, she chose to "re-sell" them to the defendants at an additional two or two and one-half per cent discount for a further sixty-day period. In brief, the defendants by their contracts and practice secured themselves against loss and protected a return of two or two and one-half per cent for each sixty days or less during which their advances were in use by the plaintiff.

[4-6] Contractors are free to buy and sell their property, and this may include promissory notes and other instruments, at a price agreed upon, and when the bona fides of the parties is established the percentage of profit has no relation to the usury law. Rose v. Wheeler, 140 Cal.App. 217, 35 P.2d 220; Coast Finance Corporation v. Ira F. Powers Furniture Co., 105 Ore. 339, 209 P. 614, 24 A.L.R. 855; General Motors Acceptance Corporation v. Mid-West Chevrolet Co., 10 Cir., 66 F.2d 1. But lenders, intent on collecting compensation for the use of money in excess of the lawful rate, seek to avoid transacting their business in the form of loans. The courts have been alert to pierce the veil of any plan designed to evade the usury law and in doing so to disregard the form and consider the substance. Haines v. Commercial Mortgage Co., 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A.L.R. 725; Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Terry Trading Corporation v. Barsky, 210 Cal. 428, 292 P. 474; Smith v. G. Cavaglieri Mortgage Co., 111 Cal.App. 136,

295 P. 366; O. A. Graybeal Co. v. Cook, supra, 111 Cal.App. 518, 529, 295 P. 1088; Wood v. Angeles Mesa Land Co., 120 Cal. App. 313, 7 P.2d 748; Chase & Baker Co. v. National Trust & Credit Co., D.C., 215 F. 633, 638; 27 R.C.L. p. 211 and cases cited in note. The text of 27 Ruling Case Law, supra, states: "No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings." All of the negotiations, circumstances and conduct of the parties surrounding and connected with their contracts may be material in determining whether the form thereof covered an intent to violate the usury law, and the burden of establishing evasion must be met by evidence clearly showing the intent. Terry Trading Corporation v. Barsky, supra, 210 Cal. 428, 432, 292 P. 474; Van Noy v. Goldberg, 98 Cal.App. 604, 277 P. 538, citing 27 R.C.L. p. 212, § 13.)

[7] In other cases where the form of the transaction and the agreement of the parties were similar to those here involved, the courts have held the transaction to be not a sale, but a loan. Home Bond Co. v. McChesney, 239 U.S. 568, 36 S.Ct. 170, 60 L.Ed. 444; In re Grand Union Co., 2 Cir., 219 F. 353, 135 C.C.A. 237; Brierley v. Commercial Credit Co., D.C., 43 F.2d 724; Mercantile Trust Co. v. Kastor, 273 Ill. 332, 112 N.E. 988; Dorothy v. Commonwealth Commercial Co., 278 Ill. 629, 116 N.E. 143, L.R.A.1917E, 1110; Bundy v. Commercial Credit Co., 200 N.C. 511, 157 S.E. 860; Lloyd v. Keach, 2 Conn. 175, 7 Am.Dec. 256; In re American Fibre Reed Co., D.C., 206 F. 309; National Trust & Credit Co. v. F. H. Orcutt & Son Co., 7 Cir., 259 F. 830, 170 C.C.A. 630; Commercial Security Co. v. Holcombe, 5 Cir., 262 F. 657; Petition of National Discount Co., 6 Cir., 272 F. 570; Le Sueur v. Manufacturers' Finance Co., 6 Cir., 285 F. 490. Cf. In re Eby, D.C., 39 F.2d 76. From the evidence introduced by the plaintiff in the case at bar the trier of the facts could reasonably conclude that the contracts of the parties provided for a conditional transfer of title; that advances by the defendants were contemplated to be repaid within a specified time at a charge for the use of the money which was deducted in advance; that the essence of the agreements was the use by the plaintiff of the funds at prescribed rates of interest which were in excess of the constitutional rate; that the transactions were not sales of accounts receivable but loans secured by assignments of the accounts at usurious rates of interest; that the intent to accomplish such a result was discernible from the contracts themselves; and that the negotiations and the conduct of the parties under the contracts further tended to dissipate any doubt arising from the employment of sales terminology. A finding on the plaintiff's case alone to the effect that the sale form was used merely as a cover for the real intent would find support from the written contracts, the conduct of the parties, and the surrounding circumstances.

[8, 9] The defendants attempt to distinguish the cases cited on the ground that there the seller of the accounts, rather than the buyer, collected and remitted the proceeds of the accounts to the buyer, and that no notice of the assignments was given to customers. But, as those cases disclose, the objection to the transaction is not overcome merely by changing the method of collection and by giving notice to customers. Those are not the only factors which constitute the transactions loans rather than sales. The significant fact is that if the defendants had really purchased the accounts and had taken absolute title there would be no occasion for the provision or practice relating to guaranties of payment within specified periods, or reversions of title and "repurchase" in the event of delayed payment by the customer. The factor considered determinative in Brierley v. Commercial Credit Co., supra, D.C., 43 F.2d 724, 727, was the actual substantial result that if the accounts were not paid at maturity the seller was bound to repay the advance with interest, although that charge was called by another name. So here the guaranties of the plaintiff in those respects may be held to amount to no more than a promise to repay the defendants the amounts loaned with interest at two or two and one-half per cent for each sixty-day or less period—a usurious rate. It was said in Mercantile Trust Co. v. Kastor, supra, 273 Ill. 332, 112 N.E. 988, 911, that to call the transaction a sale of accounts did not alter the fact that it was merely an advancement of money to be repaid with in-

terest at a rate greater than allowed by law.

[10, 11] A motion for a nonsuit may not be granted where there is evidence of sufficient substantiality to support a finding for the plaintiff, and in arriving at a conclusion on the question the evidence should be viewed most favorably to the plaintiff with every legitimate inference drawn in her favor and conflicts disregarded. Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 99 P.2d 650, and cases there cited. Since there is sufficient evidence in the present record to support such a finding, the trial court was in error in granting the defendants' motion.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

27 Cal.2d 310

PEWITT v. RILEY et al.

L. A. 19454.

Supreme Court of California, in Bank.

Nov. 27, 1945.

1. Appeal and error ⇨931(1)

On appeal from judgment in favor of plaintiff, Supreme Court must view evidence in light most favorable to plaintiff, resolving all conflicts and indulging all legitimate and reasonable inferences to uphold trial court's findings.

2. Appeal and error ⇨931(1)

Where plaintiff, driving tractor, testified that defendant's truck, parked ahead on the highway, started to move in same direction as plaintiff and a little towards center of highway before turning across highway in plaintiff's path, but defendant testified he immediately began turn across highway, trial court, on appeal from judgment for plaintiff, must be presumed to have accepted defendant's testimony as being more accurate so as to make statute requiring warning before overtaking vehicle inapplicable. Vehicle Code, § 528 (b), St.1935, p. 182.

3. Appeal and error ⇨1008(1)

In action for damages sustained in collision between trucks, when defendant proceeded to move his truck from a parked position across highway and was struck by plaintiff's truck proceeding in the same direction, whether failure of plaintiff in approaching a curve where view was obstructed within 200 feet to sound his horn was a proximate contributing cause of the accident was for the trial court. Vehicle Code, §§ 528(b), 597, St.1935, pp. 182, 194; § 671(b), St.1937, p. 169.

4. Appeal and error ⇨931(4)

Where evidence would warrant trial court in concluding that defendant, struck by plaintiff's tractor while turning across highway with truck, was inattentive and would not have heard audible warning required by statute if given by plaintiff, Supreme Court must, in support of finding that there was no contributory negligence of plaintiff in failing to sound horn contributing to accident, presume that court did so conclude, even if evidence indisputably established that plaintiff was approaching a curve where view was obstructed within distance of 200 feet and was overtaking a vehicle, in which case statutory warning was required. Vehicle Code, §§ 528(b), 597, St.1935, pp. 182, 194; § 671(b), St.1937, p. 169.

5. Negligence ⇨136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists and that reasonable men could have drawn that conclusion and no other.

6. Appeal and error ⇨989

Supreme Court, on appeal from judgment in case tried before the court, could not weigh the evidence other than to determine the legal sufficiency thereof to support the findings.

7. Appeal and error ⇨1011(1)

Whether driver of tractor who collided with defendant's truck and trailer crossing highway from a parked position was exceeding 35 miles per hour speed was question for trial court on conflicting evidence.

8. Appeal and error ⇨931(4)

On appeal from judgment for plaintiff whose tractor collided with defendant's truck crossing highway, Supreme Court was bound to presume trial court determined conflicting evidentiary inferences regarding plaintiff's failure sooner to apply brakes in favor of plaintiff.

9. Automobiles ⟹206

Plaintiff driving tractor and trailer on highway was not required to anticipate that defendant having truck and tractor parked facing same direction would drive equipment directly across highway in front of plaintiff without first giving adequate warning of intention to do so as required by statute. Vehicle Code, § 543, St.1941, p. 2723; §§ 544, 670, St.1935, pp. 185, 222.

10. Appeal and error ⟹1008(1)

Whether plaintiff driving tractor and trailer negligently contributed proximately to collision with defendant's truck and trailer by plaintiff's failure to slow up before defendant turned from parked position into and across highway was for trial court. Vehicle Code, § 543, St.1941, p. 2723; §§ 544, 670, St.1935, pp. 185, 222.

11. Appeal and error ⟹1010(1)

Where plaintiff testified he was traveling at 30 to 35 miles per hour with tractor and trailer and was approximately 150 feet from defendant's trailer when defendant turned directly across highway in front of plaintiff and that plaintiff immediately applied brakes but could not stop in time, but evidence as to distances and as to grade were estimates, defendant did not establish as matter of law that plaintiff violated statute requiring brakes which will bring motor vehicle to stop within 113 feet at 35 miles an hour. Vehicle Code, § 670, St.1935, p. 222.

12. Automobiles ⟹244(12, 36)

Evidence warranted finding that defendant was guilty of negligence proximately causing collision by driving truck and trailer directly across highway in front of plaintiff's approaching tractor and trailer proceeding in the same direction without signaling intention so to do and without first ascertaining that such movement could be made with reasonable safety. Vehicle Code, § 543, St.1941, p. 2723; § 544, St.1935, p. 185.

◆

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Action by M. E. Pewitt against Foster Riley and another for damages resulting from a collision of defendant's truck and trailer with plaintiff's tractor and trailer. From a judgment in favor of plaintiff and cross-defendant, defendants appeal.

Affirmed.

Prior opinion, App., 159 P.2d 432.

Gibson, Dunn & Crutcher and Phillip G. Sterry, all of Los Angeles, for appellants.

Charles X. Arnold and Edgar T. Fee, both of Los Angeles, for respondent.

SCHAUER, Justice.

Defendants appeal from a judgment rendered by the court, sitting without a jury, in favor of plaintiff and cross-defendant in his action against defendants for property damages resulting from the collision of plaintiff's tractor and trailer, which he was operating, with a truck and trailer owned by defendant Riley and operated by defendant Gay. Each of the opposing parties charges that the negligence of the adversary operator was the sole proximate cause of the accident. The issue before us is whether the evidence is sufficient to sustain the findings "that the said accident was the direct and proximate result of the negligent actions of defendant Henry Gay" and that "it is not true that there was any negligence on the part of the plaintiff contributing proximately to the said accident." After reviewing the record we have concluded that such findings are supported by the evidence and that the judgment must be affirmed.

[1] Viewing the evidence in the light most favorable to the plaintiff-respondent, resolving all conflicts and indulging all legitimate and reasonable inferences to uphold the findings of the trial court, as is our duty (see Estate of Bristol (1943), 23 Cal. 2d 221, 223, 143 P.2d 689), the record discloses that the time and place of the collision and the events which immediately preceded it are as follows:

The accident occurred on July 22, 1943, at about 2:25 in the morning, on a portion of Highway 99 commonly known as the Ridge Route, and at a point thereon about five miles south of Gorman and opposite a filling station known as the Lemon. At the point of the collision Highway 99 is a paved three-lane roadway running north and south, with a slight down grade to the south, with clearly marked traffic lanes, and with a hard surfaced shoulder on each side. In a northerly direction from the Lemon, which is located on the east side of the highway, the road is straight for about 300 yards; it then curves about 20 degrees to the west.

Defendant Gay (hereinafter referred to as the defendant) was driving south a truck and trailer of an overall length of 40 to 45 feet, loaded with baled hay. Opposite the Lemon he parked his equipment on the right hand, or west, shoulder of the highway and walked across the road to the filling station in order to request the driver of another truck to move his vehicle so that defendant could drive up to the gas pumps in the station. Defendant then returned to his truck, and started to turn into and across the highway. Plaintiff, driving his tractor and trailer south, struck the left side of defendant's equipment at the rear of defendant's truck and the front of the trailer. Defendant testified that after he returned from the filling station he waited, while standing on the "bumper" of his truck for two south-bound cars to pass before he commenced to drive across the highway; that after starting his truck moving he did not pull ahead first but immediately began his turn across the highway and looked to the south but did not again look to the north and did not see plaintiff coming from the north until he, defendant, reached the center of the highway; and that he was then traveling approximately four miles per hour and "gave it a little more gas" in an attempt to "go on across out of" plaintiff's way, but failed to avoid the collision.

Plaintiff testified that defendant's truck was not moving when he first saw it 300 yards away as he drove south around the curve at 35 miles per hour; that he blinked his lights and "determined to go on by" defendant; that when plaintiff was still 250 yards away defendant's truck started to move south and a little toward the center of the highway; that plaintiff then slowed his speed to about 30 miles per hour and again blinked his lights but did not sound his horn and put "air in my lines so I could stop or slow down"; that he subsequently released the air from his lines and "picked up" two or three miles per hour; that when plaintiff was about 150 feet (at some points in his testimony he said "about 75 yards") away defendant turned directly across the highway in front of him; that he then applied "all of" his brakes but was unable to stop before colliding with defendant's truck and trailer while he, plaintiff, was still traveling approximately 12 to 15 miles per hour; that at the time of the collision defendant's vehicles were extending entirely and squarely across the highway; that defendant did not signal that he intended to turn across the highway; and that plaintiff's brakes had been overhauled approximately 30 days earlier and had been inspected, immediately preceding the accident, "at the top of the hill about 15 miles" north of the point of collision and were in good condition.

[2] Defendant first charges that plaintiff's failure to sound his horn as he approached defendant's equipment constituted negligence proximately contributing to the accident. In support of such contention defendant cites sections 597 and 528 of the Vehicle Code, St. 1935, pp. 194, 182, which on the date of the accident read as follows:

Section 597: "The driver of a motor vehicle traveling * * * upon mountain highways * * * upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway shall give audible warning with the horn of such motor vehicle."

Section 528: "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to the limitations and exceptions hereinafter stated * * * (b) * The driver of a motor vehicle, when traveling outside of a business or residence district, and under other conditions where necessary to insure safety, shall give audible warning before overtaking a vehicle proceeding in the same direction. * * *"

[3-5] The record, however, discloses legally satisfactory answers to both phases of defendant's proposition. In the first place, such record is devoid of evidence that the view around the curve in that section of the highway over which plaintiff had driven before first viewing defendant's equipment was "obstructed within a distance of two hundred feet along the highway" so as to

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* It may be noted that by amendment effective August 4, 1943, St.1943, p. 2173, the Legislature removed the above quoted subdivision (b) of section 528, leaving in effect concerning the use of horns only the quoted provisions of section 597 and the provisions of subdivision (b) of section 671 of the Vehicle Code, St.1937, p. 169, that: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used."

bring plaintiff within the provisions of section 597 of the Vehicle Code. In the second place, it is to be remembered that defendant himself testified that after starting his truck moving he did not pull ahead first but immediately began his turn across the highway; consequently the trial court may well have concluded that plaintiff was not "overtaking a vehicle proceeding in the same direction," within the terms of section 528 of the Vehicle Code as it read on the date of the accident. Plaintiff's testimony that defendant's truck started to move south and a little toward the center of the highway obviously reflects the appearance of the movement to him in the position from which he viewed it and is not conclusive of the actual fact. The trial court must be presumed to have accepted defendant's testimony as being more accurate on this point. In the third place, even had the evidence indisputably established that plaintiff was approaching a "curve where the view is obstructed within a distance of two hundred feet along the highway" (as described in section 597) and was "overtaking a vehicle proceeding in the same direction" (as was provided in section 528), and therefore was by law required to sound his horn, we are nevertheless of the opinion that it could not be held as a matter of law upon the record here that plaintiff's failure to so sound his horn was a proximately contributing cause of the accident. Defendant's testimony that after waiting for two cars to pass him while he was still outside the cab of his truck, he entered the cab and did not again look to the north before starting his truck and immediately turning across the highway and that he did not see plaintiff approaching from the north until he, defendant, had reached the center of the highway, coupled with plaintiff's testimony that he (plaintiff) twice blinked his lights, would warrant the trial court in concluding that defendant was inattentive to a degree that he would not have heard or heeded an audible warning had it been given. Under such circumstances we must, in support of the finding that "it is not true that there was any negligence on the part of the plaintiff contributing proximately to the said accident" presume that the court did so conclude. The applicable principles are those recently summarized by this court in Anthony v. Hobbie (1945), 25 Cal.2d 814, 818, 155 P.2d 826, 829, as follows: "But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." (See, also, Kirk v. Los Angeles Ry. Corporation, (1945), 26 Cal.2d 833, 838, 161 P.2d 673.)

[6] The cases of Moore v. Miller (1942), 51 Cal.App.2d 674, 125 P.2d 576, and Cadwell v. Anschutz (1935), 4 Cal.2d 709, 52 P.2d 916, relied upon by defendant are not controlling. In the Moore case upon the same principle which must govern our decision here—that in the absence of prejudicial error under the circumstances shown the judgment must be upheld if the evidence supports the verdict, or the findings of the trial court—a judgment in favor of defendant was affirmed. The application of the overtaking rule in that case was grounded upon the facts there established; i. e., a showing not as a matter of law insufficient to sustain the implied finding that the vehicles were "proceeding substantially in the same direction." The evidence here does not as a matter of law require the finding which was essential there. Cadwell v. Anschutz (1935), supra, is clearly an overtaking case. The facts therein presented are substantially different from those now before us in that the earlier case depicts a much stronger showing of contributory negligence of the plaintiff. However, it must be considered as overruled insofar as it may purport to weigh the evidence (to determine, contrary to the trial court, on conflicting inferences that a certain conclusion was "reasonably probable") rather than to determine the legal sufficiency thereof to support the verdict, or otherwise may appear to conflict with our decision herein.

[7] Defendant next urges that certain of the evidence establishes that plaintiff was exceeding the 35 mile-per-hour speed at which he testified he was traveling as he came around the curve and first saw defendant, and that plaintiff was contributively negligent in releasing the air from his brakes when he was 750 feet from defendant and after defendant's equipment

had started moving. So far as concerns the speed of plaintiff's equipment and its distance from defendant's vehicles when the latter started to move, the evidence to which defendant refers merely establishes a conflict on the point, which was resolved by the trial court in plaintiff's favor. Plaintiff testified directly that his speed was 35 miles an hour as he came around the curve and that he slowed to 30. From defendant's testimony that he began his turn across the road immediately upon starting his truck, coupled with plaintiff's testimony that he was about 150 feet away when defendant turned across such road, the court could have concluded that the distance separating the vehicles when defendant started to move was far less than plaintiff's estimate.

[8-10] Defendant's arguments concerning plaintiff's failure sooner to apply his brakes likewise bring up questions of conflicting evidentiary inferences which we are bound to presume the trial court determined in favor of plaintiff. Section 543 of the Vehicle Code, St.1941, p. 2723, requires that "No person shall start a vehicle stopped, standing or parked on a highway * * * unless and until such movement can be made with reasonable safety," and section 544 of the same code, St.1935, p. 185, provides in part that "No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal * * * in the event any other vehicle may be affected by such movement." Plaintiff here was not required to anticipate that defendant in disregard of the requirements of the code sections would drive his equipment directly across the highway in front of plaintiff without first giving adequate warning of his intention so to do. Under such circumstances the issue of whether plaintiff negligently contributed proximately to the collision by his failure to slow his equipment before defendant turned into and across the highway was also for the trial court to determine and we may not interfere with its decision in plaintiff's favor.

[11] Defendant seems to rely to some extent also upon an asserted violation by plaintiff of the terms of section 670 of the Vehicle Code, St.1935, p. 222, as establishing contributory negligence by plaintiff. So far as here material that section provides that: "No person shall operate on any highway any motor vehicle or combination of motor vehicle and other vehicle * * * of a type subject to registration hereunder unless such motor vehicle or at least one unit of any such combination * * * is equipped with brakes adequate to bring such motor vehicle or combination * * * to a complete stop [within a distance of 113 feet] when operated [at a speed of 35 miles per hour] upon dry asphalt or concrete pavement surface where the grade does not exceed one per cent * * *." As stated hereinabove, plaintiff testified that he was traveling at a speed of about 30 to 35 miles per hour and was approximately 150 feet from defendant when the latter turned directly across the highway in front of plaintiff, and that he, plaintiff, immediately applied his brakes but was unable to stop in time to avoid colliding with defendant's equipment. However, the only evidence in the record as to the grade of the highway at the site of the collision was testimony that there was a "slight down grade" to the south. Whether this was more than one per cent we do not know. Manifestly, also, the distances given by the witness were approximations or estimates. Under such circumstances defendant has failed to establish that as a matter of law plaintiff came within the quoted statute.

[12] Lastly, defendant asserts that he himself was guilty of no negligence proximately contributing to the accident. However from his testimony that he turned his equipment into and across the highway directly in front of plaintiff's approaching tractor and trailer without signaling his intention so to do, as provided by section 544 of the Vehicle Code, and without, as required by section 543, first ascertaining that such movement could be made with reasonable safety, and that he did not even see plaintiff until he, defendant, had reached the center of the highway, it is obvious that the trial court was warranted in its finding that defendant was negligent and, in the light of all the circumstances shown, that his negligence was the proximate cause of the collision.

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

71 Cal.App.2d 795

BROWN-FORMAN DISTILLERS CORPORATION v. WALKUP DRAYAGE & WAREHOUSE CO. et al.

Civ. 12867.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1945.

Rehearing Denied Dec. 28, 1945.

1. Appeal and error ⚷931(1)

In determining sufficiency of evidence to support judgment, evidence would be considered in light most favorable to prevailing party.

2. Evidence ⚷54

Under statute providing that an inference must be founded on a fact legally proved and on such a deduction from that fact as is warranted by the course of business or the course of nature, when a fact is first proved all reasonable deductions may be drawn from it and reasoning does not stop when one deduction has been made. Code Civ.Proc. § 1960.

3. Carriers ⚷132

In shipper's action against motor carrier for loss of goods, where shipper proved that motor truck with carrier's identifying mark received delivery of the goods, the shipper was entitled to rely on presumption that the ordinary course of business had been followed and that carriers would not allow one of its trucks to answer call of shipper without a duly authorized driver.

4. Carriers ⚷134

In shipper's action against motor carrier for loss of goods, evidence disclosing contract of carriage, delivery of portion of goods to first truck of carrier, promise to send another truck within definite time, arrival, within that time, of another truck distinguished by carrier's identifying mark, delivery of lost goods to such truck and failure to deliver goods justified judgment against carrier for loss of goods. Code Civ. Proc. §§ 1958, 1960; Civ.Code, § 3543.

◆

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action by Brown-Forman Distillers Corporation against Walkup Drayage & Warehouse Company and another for damages for failure of defendants as common carriers to deliver goods. The Merchants Express Corporation was substituted for the Fourth Doe Corporation as a defendant. From an adverse judgment, defendants appeal.

Affirmed.

Walter McGovern, of San Francisco, for appellants.

Single and Herrington, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued Walkup Drayage and Warehouse Co. and, by leave of court, substituted for Fourth Doe Corporation the Merchants Express Corporation. Both corporations are operated under the same management and both joined in the defense of the action. The suit involves the failure of the defendants as common carriers to deliver under contract sixty-five cases of whiskey of the value of $2,479.75. The cause was tried to the court without a jury and plaintiff had judgment against both defendants for the breach of the contract of carriage in the value of the goods lost.

[1] The appeal is grounded solely upon the question of the sufficiency of the evidence to support the judgment. Following the accepted rule we will state the facts in the light most favorable to the prevailing party.

On December 22, 1942, plaintiff had stored in the Metlar warehouse located at 750 Second Street, San Francisco, a large quantity of bottled whiskey. At about 1:30 p. m. of that day the shipping clerk at the warehouse telephoned to defendants to send one of their trucks to the warehouse to transport to a consignee in Oakland two hundred and twenty-five cases of such whiskey. The telephone operator received the call and turned it over to one of defendants' dispatchers who immediately accepted it and assigned one of his drivers to "pick up" the merchandise. Within half an hour thereafter the driver arrived at the warehouse with a "Walkup" truck and loaded one hundred and twenty-nine cases on his truck. Unable to carry any more cases on the truck the driver went to the warehouse telephone and called one of defendants' dispatchers to suggest that a second truck be sent to pick up the rest of the consignment. The driver then informed the plaintiff's shipping clerk that another truck would be along from Walkup to pick up the rest of the load in about twenty or thirty minutes. The dispatcher at defendants' office however failed to put the order through in accordance with the office practice. In about twenty minutes after this conversation another "Walkup" truck arrived. Both trucks were painted a bright red color which defendants used as one means of marking and identifying their fleet of some six hundred trucks which they were operating in the San Francisco and Oakland territory at the time. Both had painted on the sides in large red letters the word "Walkup." These features were known and recognized by plaintiff as distinguishing marks of defendants' trucks.

When the second driver appeared at the warehouse he asked the shipping clerk what he "had for Highway or P.M.T." The clerk told him he had nothing for either one, "just the balance for Merchants." The driver answered, "That is what I am after." (These expressions refer to Highway Transport, Inc., Pacific Motor Transport, and Merchants Express Corporation.) Sixty five cases of the whiskey were then loaded on the second truck. When the shipping clerk moved to the rear of the warehouse the driver got into the truck and moved rapidly away. One of plaintiff's employees followed him in his private car but lost the truck in the traffic. The shipping clerk immediately called the defendants' dispatcher who informed him that he had not dispatched a second truck to pick up the remainder of the consignment and that his records showed that such order was still "open." Though search was made for the missing liquor it was not found, and the identity of the second driver was not learned.

Appellants stress the lack of direct evidence that the second truck was driven by one of their employees. As the driver of that truck has not been identified respondent relies upon the inferences arising out of the operation of the truck. To support these inferences it is conceded that they must be founded on the facts in evidence. The facts proved, says the respondent, are both actual and circumstantial. These facts, as distinguished from the inferences, are: the appellants promised over the telephone to send another truck within twenty or thirty minutes. Twenty minutes after the call the second truck arrived at respondent's warehouse. This truck was painted a bright red color and was plainly marked "Walkup." This painting and marking was precisely the same as some six hundred other trucks operated by appellants in the same locality, and was the same as those which appellants had sent on request of respondent on numerous occasions. The evidence is clear that the only means of identifying these numerous trucks as belonging to appellants were these identifying marks on the trucks themselves. There is no evidence that each driver wore a special uniform, badge, or other form of identification. Appellants argue that respondent should have asked the name of the driver. What this would have accomplished does not appear.

[2] The question of law involved is whether, on all these facts and circumstances, a reasonable inference may be drawn that respondent made delivery of the goods to appellants under their contract of carriage. This is the inference which was drawn by the trial court in its finding that defendants received the goods from plaintiff under an agreement to transport and deliver but "failed, neglected and refused to transport and deliver * * * 65 cases thereof * * *." Appellants argue that to support this finding it was necessary to impose one inference on another and cite Hamilton v. Pacific Electric R. Co., 12 Cal.2d 598, 602, 86 P.2d 829, as holding that such a course of reasoning is not permitted. No authority for the statement was cited in the Hamilton case and it has been criticised in West Coast L. Ins. Co. v. Crawford, 58 Cal.App.2d 771, 783, 138 P.2d 384, where several authorities are cited, some of which flatly reject the statement as unsound, others accept the rule as stated in 31 C.J.S., Evidence, § 116, p. 730: "On the contrary, inferences may be based on facts whose determination is the result of other inferences, so long as the first inference is based on such evidence as to be regarded as a proved fact and the conclusion reached is not too remote." In accord with this statement are People v. Graves, 137 Cal.App. 1, 14, 29 P.2d 807, 30 P.2d 508; Paiva v. California Door Co., 75 Cal.App. 323, 330, 242 P. 887; Stewart v. Norsigian, 64 Cal.App.2d 540, 544, 149 P.2d 46, 150 P.2d 554. For a full discussion of the same subject see Vaccarezza et al. v. Sanguinetti et al., 71 Cal.App.2d 687, 163 P.2d 470. The correct rule stems from section 1960 of the Code of Civil Procedure which declares that an inference must be founded "On a fact legally proved; and, On such a deduction from that fact as is warranted

by * * * the course of business, or the course of nature." Thus when a fact is first proved *all* reasonable deductions may may be drawn from it. Reasoning does not stop when one deduction has been made. It is not necessary, as appellants argue, that one inference must first be drawn from one fact proved and then a subsequent inference piled up on each preceding one.

Here all the facts relating to the order and acceptance of the carriage, the delivery of a portion of the goods to the first truck, the promise to send another truck within a definite time, the arrival of such truck within that time and the acknowledged custom of appellants as to identifying marks on their trucks were all facts proved. No one of these facts depends upon an inference. But from all these facts certain inferences might be drawn, and all inferences may be drawn from all or from some only of the facts proved.

Retrace from first principles. The Code Civ.Proc. defines an inference as a deduction made from the facts proved. Section 1958. Webster's Dictionary defines a deduction as an "Inference in which the conclusion follows necessarily from the premises." One of the facts in evidence was the ownership of the truck. This was proved by the testimony of the witnesses. In Tieman v. Red Top Cab Co., 117 Cal. App. 40, 45, 3 P.2d 381, 383, a similar case but weaker in the facts proved, the court said: "Appellants contend that the evidence is insufficient to support the jury's finding that the company was the owner and Warrington, as its employee, was operating such taxicab. The following evidence, offered by the respondent, is the only evidence upon these issues. The companion's testimony that, immediately after the accident, he saw the company's name painted upon the taxicab, was sufficient proof of ownership. Guderitz v. Boadway Bros., 39 Cal.App. 48, 177 P. 859; Blashfield, Cyclopedia of Automobile Law, vol. 2 [§ 40], p. 1636." During the course of the trial appellants' counsel made this concession: "We, of course, concede if the driver of that truck was a Walkup driver, then, of course, he acted within the scope of his authority, and I don't think we would deny it, if they would tell us who the driver was."

[3, 4] Having proved that this was a "Walkup" truck the respondent was entitled to rely upon the presumption that "the ordinary course of business has been followed," and thus that appellants would not allow one of its trucks to answer the call of respondent without a duly authorized driver. The trial court having concluded that the truck and driver belonged to appellants, their concession covering the scope of the driver's authority supports the judgment.

From this it follows that the loss of the shipment due to the theft of the driver was occasioned by the negligence of appellants, and this brings into operation the maxim that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civil Code, section 3543. We find no error in the record.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

COLONIAL INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 15006.

District Court of Appeal, Second District,
Division 2, California.

Dec. 4, 1945.

Rehearing Denied Dec. 26, 1945.

Hearing Granted Jan. 31, 1946.

1. Workmen's compensation ⚷1074

Employer's industrial disease insurer, at time claimant became totally disabled from silicosis and for more than 2 years before such disability appeared, was not entitled to apportionment of award among the several insurance carriers who had insured employer during the 16 years of claimant's employment by such employer, though it was conceded that silicosis which caused disability resulted from continued exposure during the preceding 16 years.

2. Workmen's compensation ⚷201

Where Industrial Accident Commission finds that claimant has for purposes of compensation contracted an occupational disease while in employ of employer for whom he has been working immediately preceding illness and there is no evidence that disease existed before date of disability, commission is without jurisdiction to apportion award between immediate employer and prior employers on theory that claimant might have contracted disease to some extent during prior employment.

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* Subsequent opinion 172 P.2d 884.

3. Workmen's compensation ⚷551

As respects apportionment, employer's and insurance carrier's liability to pay compensation for disability resulting from silicosis arose at the time of the industrial disability from such disease.

◆

Proceedings by Colonial Insurance Company to annul an order of the Industrial Accident Commission of the State of California refusing to apportion among insurance carriers an award to Victor E. Pedroza for disability for silicosis. On petition for writ of review.

Order affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

McCOMB, Justice.

Petitioner seeks to annul an order of the Industrial Accident Commission which is predicated upon a finding that the applicant's occupational injury, disability from silicosis, had appeared during the period of petitioner's coverage of applicant's employer.

The essential facts are these:

The applicant started to work for the defendant Emsco Refractories Company on September 1, 1928. He worked continuously for the employer until August 29, 1942. Short layoffs had occurred because of economic conditions during the depression. From August 29, 1942, until September 16, 1942, he was off work by reason of a cold. Thereafter he continued work for the same employer until October 29, 1943, when he became totally disabled from silicosis.

During the sixteen years of applicant's employment with Emsco Refractories Company, the employer was uninsured some of the time and had various insurance carriers at other times. The facts as to insurance coverage during his employment are as follows:

September 1, 1928, to October 26, 1930, Associated Indemnity Corporation, a corporation;

October 26, 1930, to October 26, 1931, Travelers Insurance Company;

October 26, 1931, to October 26, 1933, Ocean Accident & Guarantee Corporation, Ltd.;

October 26, 1933, to December 22, 1933, Travelers Insurance Company;

December 22, 1933, to December 28, 1934, Limited Mutual Compensation Insurance Company;

December 29, 1934, to November 15, 1937, uninsured as to industrial diseases;

November 15, 1937, to April 17, 1941, Guarantee Insurance Company;

April 17, 1941, to October 29, 1943, petitioner, Colonial Insurance Company.

It is conceded that the silicosis which finally caused applicant's disability on October 29, 1943, resulted from continued exposure during the preceding sixteen years when he worked as a molder of silica bricks.

[1] This is the sole question presented for our determination:

Should the award be apportioned among all of the insurance carriers who had insured the Emsco Refractories Company during the years of applicant's employment by such company?

[2] This question must be answered in the negative. The law is established in California that where the Industrial Accident Commission finds that the applicant has for purposes of compensation contracted an occupational disease while in the employ of the employer for whom he has been working immediately preceding his illness and there is no evidence that the disease existed prior to the date of disability, the commission is without jurisdiction to apportion the award between the immediate employer and prior employers on the theory that applicant might have contracted the disease to some extent during the prior employment. Moore Shipbuilding Co. v. Industrial Accident Comm., 70 Cal.App. 495, 233 P. 392; Rubattino v. Industrial Accident Comm., 65 Cal.App.2d 288, 300, 150 P.2d 538.

[3] If the applicant had been employed by several employers during the sixteen years prior to his disability the award could not have been apportioned among

such employers since his disability did not occur until October 29, 1943. We cannot see any logical reason for apportioning the award among prior insurance carriers because there was only one employer instead of several employers. The insurance carrier's liability and employer's liability arise at the same time, which in this case was the date of the industrial disability, October 29, 1943.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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71 Cal.App.2d 835

PEOPLE v. DRAGSETH.

Cr. 3923.

District Court of Appeal, Second District, Division 2, California.

Nov. 30, 1945.

1. Criminal law 🔑1144(13)

On appeal from conviction, evidence must be viewed in light most favorable to the people and conflicting evidence must be disregarded.

2. Robbery 🔑24(1)

Evidence was sufficient to sustain conviction of first-degree robbery.

3. Criminal law 🔑572

In robbery prosecution, evidence was insufficient to establish alibi.

4. Criminal law 🔑739(2)

In robbery prosecution tried without jury, conflict in evidence on question of alibi was for determination of judge as trier of facts.

5. Criminal law 🔑260(11)

In robbery prosecution tried without jury, trial judge's determination, supported by substantial evidence, that defendant failed to establish alibi, is binding on appellate court.

6. Criminal law 🔑260(11)

The trial judge's fact finding, based on conflicting evidence, that robbery charged was committed by defendant, not by witness testifying that he alone committed robbery, is binding on appellate court.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Eugene Dragseth was convicted of first-degree robbery, and he appeals.

Affirmed.

Robert W. Kenny, of San Francisco, and L. G. Campbell, of Los Angeles, for respondent.

Paul E. Tapley, of Los Angeles, and E. W. Miller, of San Diego, for appellant.

McCOMB, Justice.

From a judgment of guilty of first-degree robbery after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying defendant's motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

On September 10, 1944, between 9:00 and 9:30 p. m., defendant while armed with a gun robbed a market located at 2801 Crenshaw Boulevard, Los Angeles, California.

[2] Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *There is not any substantial evidence to sustain the trial court's finding that defendant was guilty of first-degree robbery.*

This proposition is untenable. Three eyewitnesses testified that defendant was the man who, at the point of a gun, robbed a market located at 2801 Crenshaw Boulevard, Los Angeles, California, on September 10, 1944. Conflicting evidence must be disregarded by this court.

[3-5] Second: *Defendant established by clear and convincing testimony an alibi.*

This proposition is likewise untenable. Defendant's sister, Mrs. Clary, testified that defendant was at home at all times during the evening of September 10, 1944; however, three eyewitnesses identified defendant as the perpetrator of the crime. The conflict in evidence was for the determination of the trier of fact whose determination substantiated by substantial evidnece of three eyewitnesses who identified defendant as the perpetrator of the crime is binding upon this court.

[6] Third: *The crime was committed by Marion Palmer and not defendant.*

This proposition is also untenable. One Marion Palmer, an ex-convict, testified that he alone committed the robbery for which defendant was convicted. However, this testimony was in direct conflict with the testimony of the three eyewitnesses who previously testified and identified defendant as the perpetrator of the crime. Therefore the trial judge's finding of fact based upon conflicting evidence is binding upon this court.

The record is free from error and for the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

72 Cal.App.2d 43

HARRIS v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

LEARNED v. SAME.

No. 12839.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1945.

Rehearing Denied Jan. 4, 1946.

Hearing Denied Jan. 31, 1946.

1. Reference ⇨24, 76(2)

A stipulation as to matter of procedure, such as appointment of referee, or fixing of his compensation, made by attorney in open court and taken down by court reporter, is binding even though it is not made in writing and is not entered in minutes of court. Code Civ.Proc. § 283.

2. Reference ⇨76(2)

The fact that stipulation regarding appointment of referee did not fix compensation but specifically left the fixing thereof to court did not affect validity of stipulation, since if parties agreed that court could fix rate of compensation, it was in effect an agreement as to rate of compensation and a substantial compliance with requirements of statute relating to referee's fees. Code Civ.Proc. §§ 283, 1023.

3. Reference ⇨76(2)

Record established that stipulation with reference to appointment of a certified public accountant as referee and for the payment of reasonable compensation related only to preliminary steps of the accounting and was not a blanket waiver for all time, regardless of the cost involved. Code Civ. Proc. §§ 283, 1023.

4. Reference ⇨76(2)

In action to recover sums claimed to be due some 2,200 school teachers, stipulation whereby deputy city attorney, appearing for defendants, stipulated that a certified public accountant be appointed by court as referee and that he would receive fair and reasonable compensation to be fixed by court, did not justify order almost three years later appointing a certified public accountant as referee and fixing fees of referee at $50 per day where, even if counsel intended stipulation to relate to more than preliminary steps of accounting, defendants and their counsel had decided that manner in which the accountant proposed to proceed would involve much greater expense than that contemplated when stipulation was made. Code Civ.Proc. §§ 283, 1023.

◆

Appeal from Superior Court, San Francisco County; John J. Van Nostrand, Judge.

Action by Milton D. Harris, as administrator of the estate of Wensinger F. Mahoney, deceased, and action by George H. Learned against the Board of Education of the City and County of San Francisco and others to recover certain sum claimed to be due school teachers who had assigned their claims to plaintiff. The court made an order appointing a certified public accountant as referee and directed a further accounting, and defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellants.

Piccirillo & Wolf and Sullivan, Roche, Johnson & Farraher, all of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Respondents, as the assignees of some 2,200 school teachers, brought actions to recover certain sums claimed to be due the teachers. In 1931, pursuant to a stipulation entered into between the parties, a judgment was entered in respondents' favor, the amount to be recovered to be thereafter calculated and determined by an accounting. A referee, Wilbur S. Owensby, was appointed to make the calculations, and some accounting was done which resulted in certain payments being made. Much litigation arose as a result of the various transactions (some of the details of which will be hereinafter set forth) and finally the present matter came up, on December 9, 1940, apparently on motions to remove the referee and to modify an order made several years previously. After some five hearings, which took place over a period of almost two and a half years, the court, on November 10, 1943, made an order appointing Donald Craig, a certified public accountant, as referee, and directing a further accounting—from which order the present appeal is taken. The order is entitled "Second Amended Order Directing Further Accounting," and, among other things, it fixed the fees of the referee at $50 a day and allowed $25 a day for each senior accountant, $15 a day for each junior accountant, and $7.50 a day for a secretary. Section 1023 of the Code of Civil Procedure provides: "The fees of referees are five dollars to each for every day spent in the business of the reference; but *the parties may agree, in writing,* upon any other rate of compensation, and thereupon such rates shall be allowed." (Italics ours.)

This appeal is from that portion of the order which fixes the fees and compensation of the referee in excess of $5 per day. Appellants contend that there was no valid waiver of the provisions of section 1023 and respondents contend that the trial court was justified in making the order appealed from because of a waiver by appellants of the provisions of said section.

In order to understand the questions involved upon this appeal, it is necessary to review briefly the background and history of the litigation. From an examination of the transcript, the affidavits included therein, the statements of counsel, the trial court's order, and the statements made in a previous decision and the record thereof on appeal, Learned v. Board of Education, 37 Cal.App.2d 561, 99 P.2d 1100, the situation which gave rise to the order appealed from appears to be as follows:

As heretofore stated, respondents are the assignees of some 2,200 school teachers, and in 1931, pursuant to a stipulation entered into by the parties, a judgment was entered in their favor in an action to recover certain money which had been withheld from the teacher's salaries, the amount to be recovered to be thereafter calculated and determined by an accounting. In 1932, after an audit had been made by Wilbur S. Owensby, special auditor employed by appellants to compute the amounts due respondents, certain sums were paid to respondents and a partial satisfaction of judgment was entered and filed. At the same time a stipulation was entered into wherein it was agreed that respondents had the right to ascertain the manner in which the amounts found to be due respondents were arrived at, and to have any errors corrected, and that if any additional amounts were found due, appellants would pay said amounts to respondents. In 1933 and 1934, orders to show cause were filed, in which it was set forth that the amounts paid to the respective teachers were not correct. The trial court granted the orders to show cause and ordered a further accounting, appointing Owensby as referee for the purpose of rendering such accounting. In 1939 the court rendered an "Order Directing Further Accounting." Appellants appealed, and repondents moved to dismiss the appeal, which motion was granted dismissing that appeal and others taken from similar orders made previously. Learned v. Board of Education, supra. On May 24, 1940, appellants presented to the trial court a motion to modify the order directing a further accounting, and sought the removal of Owensby as referee, whereupon, after hearings were had, the last being on April 6, 1943, the order appealed from was made November 10, 1943, and filed the same day.

The reporter's transcript in the present case begins with the hearing on December 9, 1940; and during the discussion had at that hearing with reference to the change in the referee and the further accounting to be had, the court stated: "Well, now, as I understand, for the purpose of the record, you are willing to stipulate that the provision that the Code provides, limiting the per diem to $5.00 a day, you are willing to abrogate that. It was so stipulated at the last hearing." The deputy city attorney, Mr. Walter A. Dold, appearing for appellants, replied: "We are willing to stipulate that a certified public accountant be appointed by the Court as a referee may receive a fair and reasonable compensation to be fixed by the Court, and we will waive the $5.00 provision of the Code in that connection."

A second hearing was held on June 17, 1941, at which it was stated that Mr. Craig had been employed by appellant Board of Education for eight or ten days, and had inspected the records of the board and found that it was necessary that a mathematical basis be agreed upon and set forth in an order of the court; and there was considerable discussion by counsel and the court in an apparent effort to reach some agreement as to the method or procedure. At one point the court remarked: "Yes, suppose we do this. We will get a start, and after Mr. Craig has that done, he will get another order." At this same hearing, counsel for respondents stated: "Now, with reference to compensation, will there be any difficulty in that matter?" To which counsel for appellants replied: "It is up to the Board. We will have the same proposition. I am satisfied that they will probably go along on the basis of this same paragraph, and probably will go along on the whole basis if it is submitted to them, and it is reasonable, but of course I can't say."

On February 8, 1943, another hearing was held, at which it was reported that Mr. Craig had examined 25 cases out of the 2,200, for which he had been paid $1,912.50 by the appellant Board of Education; and Mr. Craig stated that it was impossible to establish a definite mathematical basis for the 2,200 cases. Counsel for appellants filed an affidavit of the secretary of appellant Board of Education, stating that because of the failure to arrive at any mathematical formula, the cost of a complete accounting, based upon the amount that appellants had paid Craig for the 25 cases examined, would amount to approximately $150,000, and that therefore appellants opposed the elimination of that portion of the order requiring a definite mathematical formula, and objected "to any fee of the referee fixed over and above the sum allowed by Section 1023 of the Code of Civil Procedure." At this same hearing the court asked counsel for appellant Board of Education if they were "going to insist on that $5.00 rule" and said counsel replied that they had been requested by the board to inform the court that the board was willing to pay only the statutory amount. There was considerable discussion and it was stated by Mr. Craig that he could work out a formula in about two weeks, whereupon the court stated that it would not want Mr. Craig to work two weeks at $5 a day, and requested counsel for appellants to take the matter up with the board and "let us know the result."

On March 23, 1943, another hearing was held, at which Mr. Craig again indicated that the accounting would be a long-drawn-out and costly proceeding; and counsel for appellants again stated the unwillingness of the Board of Education to waive any rights.

On April 6, 1943, a further hearing was held, and counsel for appellants again contended that the court had no right to allow any greater sum than $5 per day as compensation for the referees, and stated that they had been instructed by appellant Board of Education that they would not agree to any greater sum.

No further hearings appear in the record, and on November 10, 1943, the court made and entered the order appealed from.

Appellants make three main points upon this appeal: 1, that the stipulation, if any, was not in conformity with said section 1023; 2, that if there was a stipulation, appellants' attorneys were without authority to bind their client by such a stipulation, under the provisions of section 283 of the Code of Civil Procedure; and, 3, that the stipulation referred only to certain preliminary steps of the accounting then being discussed, and was in no sense a blanket waiver for all time regardless of the cost involved. Points 1 and 2, being interrelated, will be discussed together.

In support of their contention that there was no valid waiver of the provisions of section 1023, appellants contend that that section contains three separate requirements; (1) The parties have to agree; (2) the agreement must be in writing; and (3) the rate which is agreed upon in writing must be specified and it is such rate which shall be allowed; that these requirements were not fulfilled, and therefore there was no valid waiver. They argue that even if their counsel agreed orally to pay more than $5 a day "There was not and has not been to this day anything 'in writing' and certainly there has been no specified rate of pay agreed upon"; that a "reasonable rate" agreed upon is not sufficient to meet the code requirement, but a definite rate in monetary terms must be set forth.

Respondents rely on the stipulation made in open court by appellants' attorney at the first hearing on December 9, 1940, and hereinbefore set forth, as constituting a waiver in compliance with section 1023 of the Code of Civil Procedure, giving the court jurisdiction to make the order appealed from. They contend that such a stipulation was binding on appellants under section 283 of the Code of Civil Procedure which provides that an attorney shall have authority "To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." They argue that "The power of an attorney to enter into stipulations which are binding upon his client depends under this section upon whether the subject matter to which the stipulation relates falls within his authority"; and that "If a party by his attorney can stipulate to a reference and to the appointment of a referee thereby obligating the party for the fees provided for by law, the attorney must certainly have authority to stipulate to the fees of the referee appointed where under the statute the fees are insufficient to obtain a referee to perform the work."

Furthermore, respondents argue in effect that the stipulation was an agreement in writing within the provisions of section 1023, even if not actually in writing, because it was made in open court and appears in the transcript of the proceedings. They rely principally in this regard on the case of Webster v. Webster, 216 Cal. 485, where at page 489, 14 P.2d 522, at page 523, the court said: "The parties stipulated in open court that the allegations of the supplemental complaint were to be deemed denied. This stipulation appears in the reporter's notes taken upon the trial of the cause and has been brought to our attention by diminution of the record heretofore duly authorized by this court over the plaintiff's objection. Such a stipulation made in open court constitutes 'not only agreements between the parties, but between them and the Court, which the latter is bound to enforce, not only for the benefit of the party interested * * *, but for the protection of its own honor and dignity.' Meagher v. Gagliardo, 35 Cal. 602; 23 Cal.Jur. 811, § 2. Nothing in section 283 of the Code of Civil Procedure militates against the binding effect of a stipulation entered into and executed by the parties in open court and duly reported in the proceedings of the trial. McLaughlin v. Clausen, 116 Cal. [487] 490, 48 P. 487; Smith v. Whittier, 95 Cal. 279, 287, 288, 30 P. 529, 550; Welch v. Stratton, 73 Cal.App. 765, 768, 239 P. 380. In Smith v. Whittier, supra, it is stated: 'The evident object of this section [§ 283, Code Civ.Proc.] is that, whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be *such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record,* if oral, that it shall be entered in the minutes, and, if written, that it shall be filed with the clerk. "It is not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise." Preston v. Hill, 50 Cal. [43], 53, 19 Am.Rep. 647. The section *does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding unless entered in the minutes of the court or filed with the clerk.* * * *'"

Respondents rely also on Cathcart v. Gregory, 45 Cal.App.2d 179, 113 P.2d 894, a case in which a judgment was entered on a stipulation of counsel for the respective parties made in open court and taken down by the court reporter but not reduced to writing and filed with the clerk nor entered on the minutes of the court. In that case the court said, 45 Cal.App.2d at page 187, 113 P.2d at page 899 "We believe the facts of the instant case clearly bring it within the rule thus announced. There can be no question that the *stipulation was actually entered into by counsel in open court.* There can be no question of its exact terms, character and effect because it was taken down by the reporter who transcribed his notes." (Italics ours.) See, also, Witaschek v. Witaschek, 56 Cal.App.2d 277, 283, 132 P.2d 600; Zurich G. A. & L. Co. Ltd. v. Kinsler, 12 Cal.2d 98, 81 P.2d 913.

[1] We do not agree with appellants' contention that the asserted stipulation was of no effect because it was not in writing and did not specify any specific amount of compensation. We believe that both reason and the authorities hereinbefore cited support the conclusion that a stipulation as to a matter of procedure, such as the appointment of a referee or the fixing of his compensation, made by an attorney in open court and taken down by the court reporter,

is binding even though it is not in writing and is not entered in the minutes of the court. It is clear to us that sections 283 and 1023 of the Code of Civil Procedure were not enacted to permit or encourage the repudiation of a stipulation solemnly made by an attorney in open court, but that said sections were for the purpose of requiring such a record of the stipulation as would preclude any question concerning its character and effect. The following language of our Supreme Court in Webster v. Webster, supra, 216 Cal. at p. 489, 14 P.2d 522, is applicable to section 1023 as well as to section 283: "Nothing in section 283 of the Code of Civil Procedure militates against the binding effect of a stipulation entered into and executed by the parties in open court and duly reported in the proceedings of the trial."

[2] The fact that the asserted stipulation did not fix the exact amount of the compensation of the referee, but specifically left the fixing of the amount to the court, does not, in our opinion, affect the question of the validity of the stipulation, because if the parties agreed that the court could fix the rate of compensation it was in effect an agreement by the parties as to the rate of compensation and a substantial compliance with the requirement of said section 1023.

[3] A far more serious question is presented by the third contention of appellants, which is that the asserted stipulation referred only to certain preliminary steps of the accounting then being discussed and was in no sense a blanket waiver for all time regardless of the cost involved. The stipulation relied upon by respondents, and upon which the trial court based the order appealed from, was a statement made in open court on December 9, 1940, just a few weeks less than three years before the order appealed from was signed by the court. It is apparent to us from the record of that hearing, and of the various subsequent hearings, that the statement of counsel related to the preliminary steps of the accounting then being discussed upon the basis then being considered, and while appellants should not be permitted to avoid liability for any expense that may have been incurred in reliance upon such asserted stipulation (a matter which is not involved here, as there is no question as to payment for services already performed), yet we are convinced that the asserted stipulation of December 9, 1940, does not, upon the record here, justify the order appealed from, made by the court on November 10, 1943.

But even if it should be considered that counsel did intend his stipulation of December 9, 1940, to relate to more than the preliminary steps of the accounting then being discussed, it is clear from the record that long before the order appealed from was made, appellants and their counsel had reached the conclusion that the manner in which Mr. Craig proposed to proceed would involve a much greater expense than could possibly have been anticipated when counsel made the statement upon which the asserted stipulation is based, and counsel informed the court that appellants no longer considered themselves bound by said stipulation. In long-drawn-out litigation it is not always possible to anticipate what may develop, and it happens frequently that a statement or stipulation made by counsel in the early stages of the litigation may prove later on to be impractical and highly detrimental to the party if continued in effect. Counsel should not be discouraged in the making of stipulations in an effort to expedite the earlier completion of litigation by any rule that will prevent their being relieved from continuing under such stipulation when a situation that could not have been anticipated arises. When in the instant case it appeared that Mr. Craig had examined 25 cases out of the 2,200, and had been paid the sum of $1,912.50 for such examination, and it appeared further that Mr. Craig reported that he had not been able to arrive at any mathematical basis or formula that would materially lessen the labor and expense of investigating the remaining cases, we believe that it was not only the right but the duty of appellants to decline to proceed further under said asserted stipulation made more than two years before, and that the court erred in making its order that the referee proceed at the rate of compensation set forth in the order appealed from.

We conclude, therefore, as to the third main contention of appellants, that the asserted stipulation of December 9, 1940, reasonably construed, related only to the preliminary steps of the accounting then being discussed; but that if it was intended to apply to the entire case, the court below erred in insisting that appellants continue to be bound by said stipulation after it developed that the manner in which the referee proposed to proceed would involve enormous expense, far greater than could have been anticipated at the time appellants' counsel made the statement upon which the court based its order.

In view of the foregoing, the orders appealed from are reversed.

PETERS, P. J., and WARD, J., concur.

72 Cal.App.2d 33

SLOCUM v. NELSON.

Civ. 3411.

District Court of Appeal, Fourth District, California.

Dec. 4, 1945.

1. Judgment 🔑181, 185

A motion for summary judgment presents question whether any triable issue of fact is raised which might defeat or reduce plaintiff's demand, and for purposes of such motion, facts alleged in defendant's affidavits must be accepted as true. Code Civ.Proc. § 437c.

2. Judgment 🔑186

On motion for summary judgment, court's province is to determine judicially whether there is an issue of fact which, if resolved in favor of defendant would preclude a verdict for plaintiff in whole or in part of his demand. Code Civ.Proc. § 437c.

3. Bills and notes 🔑104

Where note is executed or obtained through a clear threat of criminal prosecution, and particularly where that is carried to extent of actually initiating a prosecution, note is void. Civ.Code, § 1668.

4. Judgment 🔑185

In action on note, maker's affidavits that prior to execution of note, payee and her attorney made threats of criminal prosecution, that maker was arrested, arraigned and released on bail, and that shortly before trial note was executed on payee's promise to obtain dismissal of prosecution and that district attorney dismissed the prosecution, were sufficient to show a triable issue of coercion, and hence payee was not entitled to summary judgment. Code Civ.Proc. § 437c; Civ.Code, § 1668.

5. Judgment 🔑181

In action on note for amount allegedly exacted on claim that payee had suffered a loss in selling stock in order to obtain cash to make investment with maker, issue of fact was presented whether such loss was chargeable to maker, and hence payee was not entitled to summary judgment. Code Civ.Proc. § 437c.

6. Judgment 🔑185

In action on note, maker's affidavits showing that foreclosure action in connection with a former note and mortgage was pending, presented an issue of fact in that any recovery in foreclosure action might reduce amount recoverable in action on the note, and hence payee was not entitled to summary judgment. Code Civ.Proc. § 437c.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Hazel Slocum against Frank Nelson to recover on a note. From a summary judgment for plaintiff, defendant appeals.

Reversed.

Homer C. Compton, of Los Angeles, for appellant.

Leonard Wilson, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a summary judgment entered pursuant to section 437c of the Code of Civil Procedure.

The complaint is based upon a promissory note for $7,650, dated July 2, 1942. The answer denied every allegation of the complaint and, as separate defenses, pleaded lack of consideration and that the defendant had been forced to sign the note as a compromise of an alleged claim through coercion, intimidation and threat of criminal prosecution. It was alleged that the plaintiff caused a criminal charge to be lodged against defendant; that the defendant had been arrested; that the defendant was told by the plaintiff and her representatives that if he signed the note they would obtain a dismissal of this prosecution, and that otherwise it would continue; that the note was executed solely in order to avoid a continuance of the prosecution; and that after the note was executed the criminal charge was dismissed.

Thereafter, the plaintiff filed an affidavit in which she prayed for a summary judgment. She alleged therein that in July, 1939, she invested $6,000 and a bracelet worth $6,000 in a mining venture in which the defendant was engaged and which he represented would be profitable; that two written agreements were executed by the terms of which she was to have 5% of the capital stock of a proposed corporation when the same should be incorporated, or at her option, exercised within six months, she was to have a mortgage on the mining property guaranteeing the payment to her of $6,000; that although repeated demands had been made the defendant had failed and refused to deliver to the plaintiff the interest referred to in these instruments; that on March 1, 1940, the defendant returned the bracelet to the plaintiff; that on November 1, 1941, the district attorney of Los Angeles County began an investigation of the defendant in relation to this transaction: that the district attorney finally filed a complaint charging the defendant with a violation of the Corporate Securities Act, St.1917, p. 673, as amended; that the defendant made frantic efforts to induce the plaintiff not to prosecute the action and finally on July 2, 1942, gave the plaintiff the note here in question; that the plaintiff then addressed a letter to the district attorney stating that she did not desire to appear as a witness against the defendant; that the case was then, on motion of the district attorney, dismissed; that while the matter was pending the defendant's attorney wrote to the district attorney requesting that the prosecution be dismissed and suggesting that an effort was being made to settle the civil obligations of the defendant; and that the amount named in the note represented the $6,000 advanced to the defendant and $1,650 "interest and costs" which had accumulated.

The defendant's attorney filed a counter-affidavit alleging that early in November, 1941, he received a telephone call from plaintiff's attorney stating that he had some documents which indicated criminal activity on the part of the defendant; that at a conference on November 10, 1941, this attorney showed him several documents and stated that the same constituted a violation of the Corporate Securities Act; that this attorney made statements to him which gave him a clear and distinct impression that unless the money claimed by the plaintiff was paid to her the defendant would have to face a criminal prosecution; that on November 21, 1941, the defendant brought to him a letter from a deputy district attorney of Los Angeles County addressed to the defendant, stating that complaint had been made in reference to this transaction, and asking him to call at the office if he had any statement to make; that affiant arranged with the deputy district attorney for a continuance of the matter; that the defendant later brought to him a second letter from the deputy district attorney which referred "to an investigation requested by Mrs. Hazel Slocum", stated "I have been requested to continue with this investigation" and asked the defendant to call at the office; that he later learned that a warrant had been issued for the arrest of the defendant in connection with this matter; that the defendant was taken to municipal court where he was arraigned and released on $500 bail; that the matter was afterward adjusted by the giving of the promissory note here in question; and that long prior to the bringing of this action an action was filed seeking to foreclose a real estate mortgage, which foreclosure action is still pending in the superior court of Riverside County.

The defendant also filed a counter-affidavit denying that he had approached the plaintiff with reference to investing in this mining venture, and alleging that the plaintiff and a friend of hers visited the mine and sought an opportunity to invest therein; that this friend of the plaintiff agreed to raise additional monies which were necessary to carry on the mining project; that the plaintiff made her investment in this project knowing that it could not proceed unless her friend raised these sums; that on September 22, 1939, a mortgage on the mining property was given to the plaintiff to secure a note for $6,000, being the amount of cash invested by the plaintiff, the bracelet having been returned; that the mining enterprise did not proceed because the plaintiff's friend failed to keep his agreement to raise the necessary additional money; that an action was filed in the superior court of Riverside County to foreclose the $6,000 mortgage and is still pending so far as the affiant is advised; that when he was unable to pay the note secured by the mortgage the plaintiff on numerous occasions threatened to take the matter up with the Corporation Securities Commission; that he subsequently received two letters from the office of the district attorney of Los Angeles County which he took to his attorney and an effort was made to adjust the matter; that he was told by the plaintiff and by her attorney that unless he made a cash adjustment there would be a criminal prosecution; that because he was unable to raise any money a criminal charge was filed against him; that he made frantic efforts to induce the plaintiff not to prosecute him but she refused unless the matter was adjusted on a basis satisfactory to her; that solely because of these facts the note in question was executed after he had been arrested and arraigned on a charge of violating the Corporate Securities Act, after his trial was set, and while he was at liberty on bail; that the amount of the note, $7,650, included an amount in excess of that which the plaintiff claimed to have invested, plus interest, which excess amount she pretended she had lost in disposing of stocks in order to get the money to put into this enterprise; that he signed this note solely by reason of the threat of the continuance of this prosecution and in order to avoid the publicity of a trial, which would have seriously jeopardized his business activities; that as soon as the $7,650 note was executed, pursuant to the understanding previously had between all of the parties, plaintiff's attorney stated that he would inform the district attorney that the matter had been settled and that they did not want to prosecute the criminal action which was to have been tried within a few days; and that the plaintiff thereupon and on July 2, 1942, addressed a letter to the deputy district attorney in which she said: "With reference to the case of People v. Frank Nelson, I am pleased to advise that satisfactory arrangements for reimbursement to me have been made. I do not wish to appear and testify against Mr. Nelson. Thank you for your past courtesies."

After a hearing of the matter based upon the pleadings and these affidavits, a summary judgment was entered in favor of the plaintiff for $7,650 with interest from July 2, 1942, with attorney's fees and costs. From this judgment the defendant has appealed.

[1, 2] A motion for summary judgment presents the question as to whether any triable issue of fact is raised which might defeat or reduce the demand of the plaintiff. For the purposes of such a motion the facts alleged in the defendant's affidavits must be accepted as true. Eagle Oil & Ref. Co. v. Prentice, 19 Cal.2d 553, 122 P.2d 264; McComsey v. Leaf, 36 Cal.App.2d 132, 97 P.2d 242. In the first of these cases, the court said: "The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true fact in the case." [19 Cal.2d 553, 122 P.2d 265] In McComsey v. Leaf [36 Cal. App.2d 132, 97 P.2d 245], the court quoted from a New York case as follows: "The court is not authorized to try the issue, but is to determine whether there is an issue to be tried. * * * The defendant must show that he has * * * a plausible ground of defense, something fairly arguable and of a substantial character * * * that his denial or his defense is not false and sham, but interposed in good faith and not for delay." In Baxter v. Szucs, 248 Mich. 672, 227 N.W. 666, 667, the general rule is thus stated: "The province of the court, on motion for summary judgment, is to determine judicially whether there is an issue of fact which, if resolved in favor of defendant, would preclude a verdict for plaintiff in whole or in part of his demand."

Under these well established rules it seems clear that in several respects facts were here presented which raised triable issues and which, if true, constituted a defense in whole or in part to the plaintiff's demands.

[3] There was first the issue as to whether the execution of the note sued upon had been obtained by coercion and through menace or duress on the part of the plaintiff, under circumstances which make the note void under section 1668 of the Civil Code, or as against public policy. It has been uniformly held that where such an instrument is executed or obtained through a clear threat of criminal prosecution, and particularly, where this is carried to the extent of actually initiating a prosecution, the instrument so obtained is void and unenforceable. Morrill v. Nightingale, 93 Cal. 452, 28 P. 1068, 27 Am.St.Rep. 207; Murray Showcase, etc., Co. v. Sullivan, 15 Cal. App. 475, 115 P. 259; People v. Beggs, 178 Cal. 79, 172 P. 152; Merchants' Col. Agency v. Roantree, 37 Cal.App. 88, 173 P. 600; Tiffany & Co. v. Spreckels, 202 Cal. 778, 262 P. 742; Miller v. Walden, 53 Cal.App. 2d 353, 127 P.2d 952.

[4] The plaintiff, apparently, concedes that this is the general rule but argues that

the affidavits filed by the defendant set forth only conclusions and hearsay and, at most, show merely a fear of prosecution on the part of the defendant. In effect, it is argued that the affidavits are entirely insufficient to indicate any threat of criminal prosecution by her, and that it clearly appears that any prosecution which occurred was instituted by the district attorney without any connection therewith on her part. That these contentions are without merit clearly appears from the affidavits themselves, which we have briefly summarized. Taking the allegations of the defendant's affidavits as true, it appears that a strongly implied threat of criminal prosecution was made by the respondent's attorney early in November, 1941, before any activity on the part of the district attorney appears. Not only were direct threats of prosecution thereafter made by both the plaintiff and her attorney, but the letters of the district attorney frankly state that activity on his part had been requested by the plaintiff. The defendant was actually arrested, arraigned and released on bail. Further threats were made to have the prosecution continued, and about a month after the arrest and shortly before the time set for the trial of the criminal action the note in question was executed. Before the note was given it was agreed that the district attorney would be informed that the matter had been settled, if the note were given. Immediately after the note was executed the district attorney was informed that the matter had been settled and that the respondent did not wish to appear and testify. The affidavits were sufficient to bring this case within the rule above referred to and a very clear triable issue of coercion and menace, if not of duress, appears.

[5] It further appears that the note sued on was for an amount considerably above that originally invested by the respondent, with interest to the date of the note. It appears from the affidavits that the making of the note for this amount was exacted on the claim that the plaintiff had suffered a loss in selling certain stocks in order to get the cash to make the investment. So far as here appears such a loss, if any, may not be chargeable to the appellant and an issue of fact was presented which might have reduced any judgment which the respondent might otherwise have recovered.

[6] Another such issue of fact appears in connection with the note and mortgage which was given to the respondent before the note here in question was executed. It appears from the affidavits that a foreclosure action in connection with a former note and mortgage had been begun and was still pending when the judgment, from which this appeal was taken, was entered. Any recovery in that foreclosure action might well reduce the amount otherwise recoverable in the present action, and an issue of fact was presented which was sufficient to defeat a motion for a summary judgment. Under well established rules, the motion for a summary judgment was improperly granted and is not supported by the record.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

72 Cal.App.2d 1

PEOPLE v. BRIGHAM.

Cr. 3913.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1945.

Hearing Denied Jan. 3, 1946.

1. Bribery 🔑1(1)

The crime described in statute penalizing receiving a bribe is complete when officer or employee "asks, receives, or agrees to receive, any bribe", and no action on part of victim is necessary to complete the offense. Pen.Code, § 68.

2. Criminal law 🔑814(15)

In bribery prosecution, where evidence failed to show that victim aided or abetted defendant in seeking the bribe, requested instruction on subject of accomplice was properly refused. Pen.Code, § 68.

3. Criminal law 🔑829(3)

Refusal of requested instructions on subject of intent was not error, where other instructions adequately included same subject.

4. Criminal law 🔑1001

Trial court's announced conclusion that defendant was not eligible for probation because of statutory provision did not entitle defendant to a reversal even if shown that such statutory provision was not applicable, where trial court also relied on other reasons in concluding that defendant was not eligible for probation. Pen.Code, § 1203.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Frank Brigham was convicted of bribery in violation of Penal Code, § 68, and he appeals.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment following a verdict of guilty.

Defendant was charged by information with the violation of section 68 of the Penal Code. The information alleged the offense substantially in the language of the statute. The evidence established that defendant was employed by the California Department of Motor Vehicles as Drivers' License Examiner at Los Angeles; that, as such employee, defendant assisted applicants for drivers' licenses and, in particular, illiterate applicants; that, in this connection, illiterates "took the same tests as any other applicant, with the exception that they were given an oral test on the traffic laws, inasmuch as they were unable to read, and this examiner had that job of giving them the oral test"; "that the oral test was to be followed by a driving examination"; that the examiner determined whether the applicant was qualified to receive a driver's license; that, if qualified, the examiner issued the license for which, in the case of an original license, there was no charge or fee. The evidence further reveals that Dock Berry applied for a driver's license, was given the oral examination by defendant, was given a book to study, and "sent home"; that, quoting from appellant's brief, "he returned on November 20th and saw defendant in a little office and was seated in a corner until defendant came and got him and proceeded to give him the oral reexamination. After the oral examination he took an eye test, which he passed all right. Defendant then got the license and told him to get his car for a driving test. His wife was in the car but defendant told him that she could not ride on the test, so she got out before defendant got in and they went for the driving test. After driving, in the next block from the Motor Vehicle Department defendant told him to 'draw to the curb and stop' and then asked him what the license was worth to him and he replied 'a lot' because he had 'just paid a ticket' for not having one. That defendant told him he would let him have this license for $10.00. Witness told defendant he didn't have $10.00, but would go back to his wife and see what she had. Defendant then told him to drive around on the next block when he got out and told him to come back around three. He then drove around and picked up his wife, who gave him $5.00 and drove back where he left defendant and gave him the $5.00 telling defendant that he would bring him the other five the next evening; that defendant told him 'You be god damn sure you bring it' and gave him a little piece of paper and gave him the license. That same evening he drove down Central Avenue until he saw the highway patrolmen, showed them the license, and then went home. The next morning the policemen came to his home. He went with them to Newton Street Police Station and they gave him five $1.00 bills. He went back to the Motor Vehicle Department and found defendant in his office with a colored man, and waited for the colored man to go out. Defendant went out and told him to wait. When defendant came back Berry told him he had brought him the money and he gave him the five one dollar bills." Berry was corroborated in part by Mrs. Berry.

Officer Griffin, an officer from the Attorney General's Office, supplied Berry with the five one dollar bills, was present and witnessed Berry enter defendant's office and entered the office himself as Berry left. Officer Griffin testified, quoting the reporter's transcript of the evidence as given at the trial, "at that moment I noticed that Police Officer Elser was at my right side. He went into the office, there was a desk or two desks—I think there's two desks in there—and he stood at the first one, and I said, 'I want that five dollars that man gave you.'

"He said, 'Nobody gave me five dollars.'

"I said, 'Put your property on the desk.'

"With his left hand he reached into his left hand trousers pocket and he put down a folded up wad of currency, and there were, I believe, two scattered other bills that were wadded up, and a small amount of silver, possibly a dollar in silver. I picked up the five—correction—I picked up the wad of bills and I said, 'I know these bills. I can identify every one of them.' I spread them flat, and the top one was a one dollar bill.

"Mr. Elser said, 'One of those bills has the large word "Hawaii" printed on it.'

"I spread the bills out and counted them. There were five of them. They were all one dollar bills. One of them, I think the second or third one, had the printing of 'Hawaii' on it. And I said to Mr. Brigham, 'These are the bills that man gave you.'"

The defendant testified in substance that the five dollars was a present and, on cross-examination, described its delivery as follows:

"Q. All right. Now, after Mr. Berry left you that day you saw him the following day, didn't you? A. Yes, sir.

"Q. In your office? A. Yes, sir.

"Q. When you saw him there did he speak to you first or did you speak to him? A. He spoke to me.

"Q. What did he say to you? A. He said, 'You thought I had forgotten you, didn't you? Well, I haven't. Here is something for you.'

"Q. What did you say? A. There wasn't much for me to say.

"Q. What did you say? A. I don't think I said anything.

"Q. Didn't you even say, 'Thank you'? A. I didn't have much of an opportunity, Mr. Crail. He shoved his hand out, like this. It is instinctive for you to open yours. And he dropped the folded money in my hand and he was out of the door like a shot."

It is contended by appellant that the court erred in refusing to instruct the jury on the subject of accomplice. A number of defendant's instructions on this subject were refused and in that connection it is argued by appellant that "the people included in the charge, and the information is predicated upon the theory *that there was an 'agreement' between appellant and Dock Berry that,* in consideration of the money given by Berry to appellant, appellant's 'action' on the application would be influenced favorably to Berry." (Italics included.) It is further argued that by including the "element" of agreement in the offense, instructions on the subject of accomplice were necessary.

Dock Berry testified, referring to the defendant and to the incident in question, "He asked me what was the license worth to me, and I told him, I says, 'I don't know'. I said, 'It's worth a whole lot to me because I just paid a ticket because I didn't have mine'. And he told me, he says, 'Well, I will let you have this license for $10.00'". The evidence reveals that Berry then drove around the block to where he had left his wife and got $5 from her, which was all she had, returned, and gave the $5 to defendant, assuring defendant that the other $5 would be paid the next day, whereupon, defendant stated, "be damned sure you bring it". Thus it will be seen that, by the language used, the defendant not only *asked* for a bribe, but implied that if the money was not forthcoming there would be no license. The evidence falls far short of establishing or even suggesting the so-called *agreement* contended for by appellant. But, appellant's argument, in effect, goes further; it assumes that, in order to complete the offense defined by section 68 of the Penal Code, there must be proof of an *"agreement"*. And, that an *agreement* of necessity would constitute Berry the accomplice of the defendant. People v. Davis, 210 Cal. 540, 293 P. 32, and In re Jang, 25 Cal.App.2d 529, 78 P.2d 250, are cited in support of this contention. The Davis case is not analogous. The Jang case concerns section 137 of the Penal Code which provides that "Every person who gives or offers, or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced * * * is guilty of a felony." The court held in effect that the offense was not complete with the mere gift, offer or promise to give, but that the state of mind of the "witness" was also an element of the offense. In other words, the individual to whom the offer is made, must acquiesce in order to complete the offense. The difference between the language of sections 137 and 67 of the Penal Code is noteworthy. The latter section reads in part as follows, "Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him * * *." Thus, the mere offer, with the corrupt intent referred to completes the offense. From the standpoint of construction and interpretation, to compare section 68 with section 137 would serve no purpose. There is no resemblance between the subjects respectively of the two sections, nor is there any possible relation between them. On the contrary, a comparison of section 68 with section 67 is an aid to the construction of section 68. In adopting sections 67 and 68 the legislature obviously was concerned primarily with the bribery of executive officers. Although section 68 includes other public employees, the analogy remains. Section 67 is concerned with the offense of giving or offering of a bribe to an executive officer with intent to influence "him", etc., and is complete when the gift or offer is made with corrupt intent as therein provided. No act or intention on the part of the executive officer is necessary to complete the offense. Only the state of mind of the giver of the bribe is involved. In such circumstances, the "executive officer" is in no sense an aider or abettor and therefore is neither a principal nor an accomplice.

[1, 2] Section 68 of the Penal Code, the violation of which appellant was adjudged guilty, is concerned with the bribe seeking executive or ministerial officer, employee of the state, county or city, etc. There is nothing in the language, when analyzed, to suggest any intention to include the victim as an offender. Here the culprit is the bribe seeker. And, the crime is complete when the individual described in the section "asks, receives, or agrees to receive, any bribe." No action on the part of the victim, such as payment, delivery or otherwise, is necessary to complete the offense. Appellant adopts a meaning for the words "agrees", "agreement" and "understanding", as used in the statute, that lend plausibility to the argument relied on and, if such meaning expressed the intention of the legislature, appellant's contention would have to be upheld. But, the provisions of section 68 are not that complicated. The word "agree" has several meanings, one of which is to *promise*, another to *consent*, and, it is quite apparent that, in order to effect the obvious intent of the section, such meanings must be applied. Thus, every executive officer who asks, receives or *consents* to receive, etc., upon any *promise* or understanding, etc., commits the offense contemplated by the statute. And, as pointed out in People v. Kerns, 9 Cal.App.2d 72, at page 75, 48 F.2d 750, at page 751, "It is not necessary that there be an understanding, in the sense of an agreement, with the person unlawfully approached, but merely an understanding on the part of the bribe seeker himself that his official action shall be influenced." The "agreement or understanding" as used in section 68 is not to be confused with the same words when used in connection with the valid and uncontaminated agreements incident to honest and honorable transactions. In other words, the "agreement or understanding" refers only to "his", the bribe seeker's state of mind, and not the victim's. It may be conceivable that in some situations, under the provisions of either sections 67 or 68, the bribe seeker could be the accomplice of the bribe giver or vice versa but, by reason of the evidence in the within action, no such problem is presented. The crime was complete when defendant, in substance and effect, sought the bribe. There is nothing in the evidence to suggest that Dock Berry aided or abetted the defendant in seeking the bribe. Dock Berry, therefore, was not an accomplice; hence the instructions on that subject were properly refused.

[3] It is also urged by appellant that the court's failure to give certain requested instructions on the subject of intent was error. It is sufficient to note that other instructions adequately included the same subject; hence, no error resulted.

[4] Finally, appellant contends that the court erred in its announced conclusion that defendant was not eligible for probation because of the provisions of section 1203 of the Penal Code. But the trial court stated further, "There is no doubt in the Court's mind that this defendant, Mr. Rosenthal, comes squarely within the provisions of section 1203 which prohibit probation, and the Court's hands are necessarily tied in that matter. For that reason, therefore, and for other reasons, the application for probation is necessarily denied." There appears to be no legal or logical reason for disagreement with the trial court's application of section 1203, but, in any event, inasmuch as other reasons were also relied on, appellant's contentions with reference to probation are untenable.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

WOODBINE v. VAN HORN.*

Civ. 14977.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1945.

Hearing Granted Jan. 31, 1946.

1. Contracts ⚷10(4)

A contract providing that in consideration of moneys paid and to be paid by buyer, seller "hereby sells and conveys" to buyer all of eucalyptus wood located on designated property and that buyer was to render a statement of number of cords of wood received during each month and pay thereafter was not void for lack of mutuality since quoted words are definite words of immediate conveyance whereby title to the wood passed to buyer upon signing of the contract. Civ.Code, § 1783.

2. Sales ⚷28

A document reciting approximate quantity of merchandise sold, price and terms of payment and a definite description of articles sold, contains all essential elements of a contract.

3. Sales ⚷1(1)

The essentials of a "sale" are an article which is transferred from seller to buyer, and a price in money paid or promised.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

4. Sales ⚷1(4)

A contract for sale of all of eucalyptus wood located on designated property consisting of 3000 or more cords at purchase price of $9 per cord delivered f.o.b. trucks of purchaser, payment to be made 10 days after end of each month in which wood was received was not void for uncertainty. Civ.Code, § 1657.

5. Appeal and error ⚷1011(1)

The determination of trial judge who weighed conflicting evidence and rendered findings of fact thereon would not be disturbed by appellate court.

6. Trial ⚷404(1)

Findings of fact must be liberally construed and such minor inconsistencies as may be found will be resolved in favor of upholding rather than of defeating the judgment.

7. Trial ⚷404(2)

To avoid injustice, if a finding of fact is erroneously described as a conclusion of law it will be considered to be a finding of fact.

8. Appeal and error ⚷931(1)

An ambiguous finding will be construed to sustain judgment since presumptions are in favor of judgment.

9. Trial ⚷404(2)

A finding that defendant was unable to respond in damages was not objectionable as a legal conclusion where such finding was followed in same paragraph by detailed findings of fact as to defendant's assets, property owned by him and its value, incumbrances against it and his other debts and liabilities from which it appeared that a money judgment would be uncollectible.

10. Evidence ⚷546

Alleged lack of qualification of witness to testify concerning quantity of wood on property involved affected only weight of his evidence.

11. Appeal and error ⚷1050(1)

Alleged error in permitting plaintiff's unqualified witness to testify regarding quantity of wood on property involved was immaterial where defendant's own evidence did not differ materially as to number of cords of wood from that of witness.

12. Sales ⚷418(3)

In buyer's action for damages for seller's failure to deliver a quantity of eucalyptus wood purchased at price which was $1 less than wholesale market price per cord, judgment was properly rendered for $1 per cord for number of cords which seller had converted to his own use and for that which remained in his possession and which he refused to deliver to buyer.

13. Appeal and error ⚷71(3)

An order issuing preliminary injunction was final and hence appealable so that where no appeal was taken sufficiency of affidavits on which order was issued would not be considered on appeal from judgment ordering that preliminary injunction as modified should remain in force.

14. Injunction ⚷118(4)

In action for damages for seller's failure to deliver eucalyptus wood, complaint alleging that it was impossible to purchase in open market such wood by reason of which buyer would suffer irreparable damage unless seller was enjoined from disposing of the wood to his own use, that seller could not respond in damages, that remedy at law was inadequate and that multiplicity of suits would result if buyer were required to maintain action for each conversion, stated sufficient cause of action.

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* Subsequent opinion 173 P.2d 17.

15. Injunction ⚷118(4)

An allegation of irreparable damage is a legal conclusion which, standing alone, is insufficient to warrant the granting of injunction, but if facts are alleged from which conclusion may be drawn, injunctive remedy may be applied.

16. Injunction ⚷19

If repeated acts of wrong are done or threatened and there is adequate legal remedy for each act, injunction will issue to prevent the wrong and to avoid repetition of similar actions.

17. Injunction ⚷18

Defendant's complete insolvency need not be shown to warrant injunctive relief.

18. Appeal and error ⚷110

An order denying new trial is not appealable.

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by W. H. Woodbine against H. R. Van Horn to recover damages for defendant's failure to deliver a quantity of eucalyptus wood purchased by plaintiff. From a judgment for plaintiff and from an order denying a new trial, defendant appeals.

Judgment affirmed, and purported appeal from the order dismissed.

J. La Marr Butler, of Los Angeles, A. H. Brazil, of San Luis Obispo, and William J. Clark, of Los Angeles, for appellant.

Leo B. Ward, John M. Hines and John A. Holland, all of Los Angeles, for respondent.

WILSON, Justice.

Plaintiff recovered a judgment against defendant for damages growing out of the failure of the latter to deliver a quantity of eucalyptus wood which had been purchased from him by plaintiff. Defendant has appealed from the judgment.

The material portion of the contract which is the basis of the action reads as follows: "For and in consideration of the promises and agreement of the parties hereto, and of the moneys paid and to be paid as hereafter set out, H. R. Van Horn, hereby sells and conveys to W. H. Woodbine, all of the eucalyptus wood located on the property *to* [sic] Messrs Garrett and Hollister, twelve miles west of San Luis Obispo, California, consisting of *of* three thousand or more cords, to be cut in sixteen and twenty-four inch lengths and all wood over five inches in diameter to be split, at the purchase price of nine ($9.00) dollars per cord, delivered F O B trucks of W. H. Woodbine. A statement is to be rendered by Woodbine to Van Horn of the number of cords of wood received by him during each month and payment therefor to be made ten days thereafter."

As grounds for a reversal of the judgment appellant asserts that the contract is void for want of mutuality and for uncertainty, that the findings of fact are not sustained by the evidence, and that the court erred in receiving evidence to which objections were offered.

[1] 1. *The contract is not lacking in mutuality.* The contract is not subject to the construction placed upon it by appellant, to wit, that respondent was not bound to take any part of the wood other than that which was actually delivered to him and that the contract is for that reason wanting in mutuality. The instrument is not, as claimed by appellant, a contract by which he agreed to sell but respondent did not agree to purchase. On the contrary, the words "hereby sells and conveys" are definite words of immediate conveyance whereby appellant sold the word to respondent and title passed to the latter upon the signing of the contract. As the owner he became entitled to delivery and was required to pay for it according to the terms of the contract. If he had refused to accept and pay for any part of the wood appellant could have maintained an action against him for the purchase price. Civil Code, sec. 1783.

[2, 3] A document reciting the proximate quantity of merchandise sold, the price and terms of payment, and a definite description of the articles sold, contains all

essential elements of a contract. Kaplan v. American Cotton Oil Co., 5 Cir., 12 F.2d 969, 970. The word "convey" has both a technical and a popular meaning. Technically, it applies to the legal title to real estate. Popularly, it may apply to the equitable title to real estate, or to personal property, and may be read in the sense of "assign," "sell," or "transfer." Crookshanks v. Ransbarger, 80 W.Va. 21, 92 S. E. 78, 83. The essentials of a sale are: (1) An article which is transferred from the seller to the buyer; (2) a price in money paid or promised. "To suppose a sale without a transfer of the property in the thing which forms the object of the sale is simply to suppose an impossibility. * * * The expression 'to sell,' and the expression 'to transfer property for a price in money,' are convertible; and, as a consequence, it is no more possible to sell without transferring ownership than it is possible to sell without selling, or to transfer ownership without transferring ownership, or to do any other thing without doing it." Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193, 196.

None of the cases cited by appellant supports his objection to the contract. For example: California Refining Co. v. Producers Refining Corp., 25 Cal.App.2d 104, 76 P.2d 553, was one in which the refiner agreed to refine all oil delivered to it by the producer, but the latter did not agree to furnish any quantity of oil whatsoever to the refiner. It was a mere conditional acceptance of the terms specified for refining oil by the refiner in the event the producer saw fit to deliver oil for that purpose, but there was no mutuality of agreement with respect to the delivery of oil. It will not be necessary to refer at length to the federal cases cited by appellant for the reason that in each case there was a promise on the part of one party with no corresponding promise on the part of the other, the quantity of merchandise to be delivered having been conditioned in those cases by the desire or whim of the purchaser.

[4] 2. *The contract is not void for uncertainty.* The property sold is specifically described as "all" of the eucalyptus wood located on certain property, which is sufficiently identified, consisting of 3,000 or more cords. The purchase price per cord was specified and respondent agreed to pay therefor at a time certain, to wit, ten days after the end of each month in which wood was received by him. The contracts construed in the cases cited by appellant were indefinite and uncertain as to one or more requirements, as examples: Hardman v. Polino, 113 W.Va. 404, 168 S.E. 384, 89 A.L.R. 1356, a contract to advance money for the development of lands, the amount to be advanced not being stated; Factor v. Peabody Tailoring System, 177 Wis. 238, 187 N.W. 984, a contract to deliver a suit of clothes which did not describe the material of which the suit was to be made; Bennett v. Clark County, 201 Ill.App. 222, the contract specifying a rate for certain items and providing that others would be done "at fair and reasonable prices."

Respondent's promise to pay the agreed price per cord for the wood was not dependent on a condition that he send trucks to haul the wood, nor did the contract reserve to him an unlimited option as to the time when he would send his trucks for the wood. Section 1657 of the Civil Code provides that "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." Hence if respondent had not provided a sufficient number of trucks to haul the wood from the property within a reasonable length of time appellant could have sued for the purchase price.

The words "F O B trucks of W. H. Woodbine" are not inconsistent with the immediate passage of title and do not impair respondent's ownership. "F O B" is so commonly used in commercial transactions that its meaning is well known in business and in law. No uncertainty is created when it appears in written instruments. As used in the contract in question here, those initials mean that the price of $9.00 per cord which appellant was to receive included the loading of the wood on respondent's trucks by appellant.

The language of the contract manifestly denotes an absolute transfer of title to the wood and nothing appears in the document to negate the clear intent of the parties to that effect.

Any uncertainty as to the amount of wood that was to be cut in sixteen or twenty-four inch lengths operated to the benefit of appellant. Obviously it would cost less to cut the trees in the greater lengths. Appellant could have tendered the wood in such proportions of the specified lengths as he desired and respondent would have been compelled to accept it as offered. The latter is the only party who could have raised the question of uncertainty and he has not done so.

[5] 3. *The findings of fact are sustained by the evidence.* The court made findings of fact as to the number of cords of wood on the premises, distinguishing between trees that had been severed and those that remained standing, the former being referred to as "wood" and the latter as "timber." The court also made findings as to the number of cords received by respondent, the number not delivered to him, and the number appropriated by appellant to his own use. The court also found that the failure of respondent to remove the wood was occasioned by appellant's failure to obtain a splitter and to cause the wood to be split and ready for removal as required by the contract. All of these findings are sustained by competent evidence. The evidence is conflicting upon some points and this court will not attempt to analyze it nor to determine the weight to be given to the testimony of any witness. The trial judge having weighed the evidence and rendered its findings of fact thereon, his determination will not be disturbed by the appellate court. For a discussion and citation of cases on this question see our opinion in Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P.2d 756.

We have given no attention to appellant's censure of the evidence given by respondent personally as being unworthy of belief. All of the matters on which he testified—the signing of the agreement, the amount of wood on the property, its market value, and other essential facts to support the judgment—were proved by other witnesses.

[6-8] 4. *Other objections to the findings.* Findings of fact are to be liberally construed and such minor inconsistencies as may be found will be resolved in favor of upholding rather than of defeating the judgment. McAlvay v. Consumer's Salt Co., 112 Cal.App. 383, 391, 297 P. 135; Wilson v. Mattei, 84 Cal.App. 567, 574, 258 P. 453. To the end that injustice shall not result to litigants, if a finding of fact is erroneously described as a conclusion of law it will nevertheless be considered to be a finding of fact. Roloff v. Hundeby, 105 Cal.App. 645, 651, 288 P. 702; Gossman v. Gossman, 52 Cal.App.2d 184, 191, 126 P.2d 178; Kramer v. Watnick, 63 Cal.App.2d 308, 310, 146 P.2d 947; Linberg v. Stanto, 211 Cal. 771, 776, 297 P. 9, 75 A.L.R. 555. If a finding is ambiguous and uncertain yet, since all presumptions are in favor of the judgment of the trial court, it will receive a construction that will sustain the judgment. Peterson v. First National Bank, 101 Cal.App. 532, 539, 281 P. 1104; Schomer v. R. L. Craig Co., 137 Cal.App. 620, 628, 31 P.2d 396.

The alleged inconsistencies in the findings complained of by appellant dissolve upon examination. The court found that there were approximately 4000 cords of wood fallen; that respondent received 246⅓ cords and appellant converted 159 cords to his own use. Subtract the total of these two amounts from the 4000 cords and 3594⅔ cords remain. The court found that at the time of the trial there were 3526 cords on the property, or 68⅔ fewer than the computation indicates should have been there, the difference being in favor of appellant. Respondent charged in his complaint that appellant had unlawfully converted and disposed of 500 cords to his own use. In response to this allegation the court found that appellant had converted 159 cords and not 500. The court also found that appellant had appropriated to his own use, by failure to deliver to respondent, said 3526 cords which had been severed from the land and which were covered by the contract. These findings are sustained by the evidence.

[9] Appellant complains that the finding that appellant is not able to respond in damages is a legal conclusion. Even so, it is followed in the same paragraph by detailed findings of fact as to appellant's assets, the property owned by him and its value, the incumbrances against it, and his other debts and liabilities, from which it appears that a money judgment would be uncollectible.

[10, 11] 5. *Qualifications of witness.* Objection is made that one of the witnesses was not qualified to testify concerning the quantity of wood on the property. Lack of qualification, if any, affected the weight of his evidence and the trial judge gave such consideration to it as he deemed it to deserve. The point is immaterial, however, in view of the fact that appellant's own evidence did not differ materially as to the number of cords of wood from that of the witness whose qualifications are questioned.

[12] 6. *The measure of damages.* Appellant enumerates in his brief several rules for the ascertainment of damages for breach of contract, among them: (1) that where a contract for the sale of personal property is broken by the vendor, the measure of damages is the difference between the contract price and the market value at the time and place of the contract; (2) that the person injured shall receive compensation commensurate with his loss, and no more; (3) that damages must be incidental to the contract and occasioned by its breach; (4) that damages must be certain both in their nature and the cause from which they proceed; (5) that the purchaser can recover no more than it would cost him to supply himself with the same property by resort to the market. The court found that the wholesale market price of the wood at the date of the contract upon the premises on which the wood in question was located was $10.00 per cord, or one dollar more per cord than the contract price. Judgment was rendered for that amount for the number of cords which appellant had converted to his own use and for that which remained in his possession and which he refused to deliver to respondent. Other items of damages were awarded for losses which respondent had suffered. There is no error in the findings as to damages.

[13] 7. *The injunction.* When the action was commenced respondent filed affidavits upon which the court issued a temporary restraining order whereby appellant was enjoined from selling the wood or converting it to his own use pending the hearing of the simultaneously issued order to show cause why a preliminary injunction should not be granted. Upon the return day appellant filed an affidavit in opposition to the order and oral evidence was heard by the court, whereupon a preliminary injunction was issued as prayed. This was an appealable order (Code Civ.Proc. § 963) but there was no appeal. It remained in force until the entry of the judgment from which the present appeal was taken. In view of the finality of said order we do not consider the sufficiency of the affidavits on which it was issued and it need not be considered further. See Ots v. Superior Court, 10 Cal.App. 168, 169, 101 P. 431. The judgment ordered that the preliminary injunction remain in force only as to 500 cords of wood, releasing the remainder from the effect of the previous order, and directed that the preliminary injunction, as thus modified, should remain in force until the money judgment in favor of respondent was satisfied, or until further order of the court.

The language of the judgment continuing the modified preliminary injunction in effect is inept. The judgment would have been in more appropriate form if it had contained a proper injunctive provision without attempting to continue the former order in force by reference. But it is apparent that the court intended the order to be a permanent injunction after trial and it will be so construed.

We have referred to the evidence concerning appellant's assets and liabilities and to the finding that his financial condition was such that the judgment for damages could not be enforced. Appellant did not maintain a bank account, all his transactions having been conducted by payment in cash.

[14] Title to the wood, as we have stated, was vested in respondent. By reason of appellant's acts respondent had been unable to obtain possession of it and appellant had converted a portion to his own use. The complaint alleged that the business of selling wood fuel is peculiar and unique; that on account of the condition of the wood fuel market in California it is impossible to purchase in the open market well seasoned eucalyptus wood of the grade, character, and quality contracted for by respondent, by reason of which he would suffer great and irreparable loss and damage unless appellant was enjoined from disposing of the wood to his own use; that appellant's financial condition was such that he could not respond in damages; that the remedy at law was inadequate and a multiplicity of suits would result if respondent were required to maintain an action for each conversion. The complaint stated a sufficient cause of action to warrant an injunction and the evidence and findings sustained the allegations.

[15-17] An allegation of irreparable damage is a legal conclusion which, standing alone, is insufficient to warrant the granting of an injunction, but if facts are alleged from which the conclusion may be drawn the injunctive remedy may be applied. Eames v. Philpot, 72 Cal.App. 151, 157, 236 P. 373. If repeated acts of wrong are done or threatened and there is a legal remedy which is adequate for each single act, an injunction will nevertheless issue to prevent the wrong and to avoid a repetition

of similar actions. Id., 72 Cal.App. at page 158, 236 P. at page 376; Kellogg v. King, 114 Cal. 378, 387, 46 P. 166, 55 Am.St. Rep. 74; Slater v. Pacific American Oil Co., 212 Cal. 648, 655, 300 P. 31. Absolute and complete insolvency need not be shown. Paige v. Akins, 112 Cal. 401, 412, 44 P. 666.

[18] 8. *Appeal from order denying new trial.* Appellant attempted to appeal from the order denying a new trial. Such an order is not appealable. Kellett v. Marvel, 6 Cal.2d 464, 476, 58 P.2d 649; Joseph v. Vogt, 35 Cal.App.2d 439, 442, 95 P.2d 947; Grimes v. Nicholson, 71 Cal.App.2d 538, 162 P.2d 934.

The judgment is affirmed. The purported appeal from the order denying a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.

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72 Cal.App.2d 161

IRWIN v. CITY OF BLYTHE.

Civ. 3413.

District Court of Appeal, Fourth District, California.

Dec. 11, 1945.

1. Municipal corporations 🔑951

Moneys paid into city treasury by property owners for the payment of improvement bonds, and which moneys had been set aside in a bond fund, belonged to the holders of the bonds and could not be claimed by the city for its general fund on theory that the lien of the special assessment had been extinguished by other tax liens, and that the subsequent payments made into the bond fund were not required to be made. St. 1923, p. 1067, as amended; Gen. Laws 1937, Acts 8199, 8209; Pol. Code, § 3787.

2. Action 🔑6

Where cross-complaint was entitled as one for declaratory relief but the prayer was for a judgment determining the respective claims of certain parties to moneys in a special fund, and for an injunction, the action was not one strictly for declaratory relief which could not be dismissed on the sustaining of a demurrer.

3. Action 🔑6

The dismissal of a cross-complaint upon sustaining a demurrer was not improper on theory that the action was for declaratory relief, where cross-complainant could not have recovered in any event.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by W. H. Irwin against the City of Blythe to compel the payment of street improvement bonds from funds in the hands of the city which were allegedly collected for that purpose, wherein the City filed a cross-complaint for a determination of the respective claims of certain parties to the moneys, and for an injunction. From a judgment dismissing the cross-complaint, after sustaining a demurrer thereto, the City appeals.

Affirmed.

Walton Gateley, of Blythe, and Roscoe R. Hess, of Los Angeles, for appellant.

Cruickshank, Brooke, Dunlap & Ross, of Pasadena, for respondent.

BARNARD, Presiding Justice.

The defendant city has appealed from a judgment of dismissal after the sustaining of a demurrer to its amended cross-complaint, without leave to amend.

So far as material here, this cross-complaint alleged that in 1927 the city established an assessment district for the purpose of improving some of its streets and caused street improvement bonds to be issued and signed by the city officials, all pursuant to the Improvement Act of 1911, Gen. Laws, Act 8199, and the Improvement Bond Act of 1915, Stats. 1915, p. 1441, Deering's General Laws, Act 8209; that these bonds totaled $93,833.53 and one-fifteenth of the principal amount, with interest, matured and was payable each year from 1928 to 1942; that all of the outstanding bonds are owned by the cross-defendant Irwin; that varying amounts have been paid on the bonds maturing in the years 1936 to 1941, inclusive; that $22,500 is unpaid on the interest on all of the bonds; that the city treasurer, pursuant to the provisions of the 1915 Act, established a redemption fund for the payment of these bonds; that there is now in said redemption fund the sum of $6,671.97, which was derived from the collection of assessments entered on the tax roll of Riverside County for the tax year 1941–1942 and collected by the county tax collector as an installment payment on these bonds; that after the collection of this money the county officials of the county of Riverside transmitted this money to the city treasurer of Blythe; that during the years 1928 to 1933 there was a varying delinquency in the payments made by property owners within the district on account of the assessment representing this bond issue; that during these years these same parcels of land were also delinquent in the payment of general city and county taxes; that all parcels so delinquent were sold to the State of California in accordance with the law; that prior to July 10, 1939, all such parcels were deeded to the state; that on January 10, 1927, when these bonds were issued the tax laws provided, in section 3787 of the Political Code, that a deed so given conveyed to the state absolute title, free from encumbrances except any lien of taxes for municipal and irrigation district purposes; and that the deeds here issued conveyed to the state an absolute title free and clear of any lien arising from any assessment for the payment of these bonds.

It is then alleged that all lands in this assessment district are also located in the Palo Verde Irrigation District; that on January 10, 1927, the law relating to this district (Stats. 1923, p. 1067, and amendments) provided that a tax deed to the district should convey absolute title, making no exception in favor of municipal or other taxes or assessments; that prior to July 10, 1939, deeds were executed conveying to this irrigation district all lands within this assessment district which had theretofore been sold to the irrigation district by reason of tax delinquencies; that said deeds conveyed to the irrigation district an absolute title free from any lien on account of these bonds; that between 1927 and 1935, the total amount of the various taxes on each of the delinquent parcels within this assessment district was in excess of the market value of each parcel, respectively; that between 1929 and 1935 the economic situation was such that many of the property owners in this assessment district had abandoned all interest in the parcels of land owned by them; that in 1934, pursuant to the provisions of section 3897d of the Political Code, the county of Riverside and the Palo Verde Irrigation District executed an agreement approved by the state controller pursuant to which, after due proceedings, the tax collector of Riverside County executed deeds conveying to the irrigation district the respective parcels in this assessment district which had been deeded to the state; and that these deeds conveyed title to these properties to the irrigation district free and clear of any liens or assessments theretofore levied or in effect.

It is then alleged that in 1935, after receiving such deeds from the county, the irrigation district entered into numerous agreements with various persons whereby these persons agreed to buy certain parcels within the assessment district, paying one-fifth down and agreeing to pay any taxes levied by the county for the next four fiscal years; that these buyers paid to the county tax collector, as a part of the taxes assessed for the fiscal year 1941–1942, the amount of the assessment for this street improvement which was payable in the fifteenth year; that the amount of that assessment and all of the payments so made in the year 1941–1942 were paid voluntarily and without protest; that the county tax collector, after the receipt of the monies so paid for the year 1941–1942, delivered the same to the treasurer of the city of Blythe and these monies constitute the sum of $6,671.97 now in the redemption fund for these bonds; and that the city treasurer of Blythe will, unless restrained, pay to the cross-defendant Irwin this amount and any other money he may receive from the officials of the county of Riverside and collected on account of the assessments for those bonds.

It is then alleged that a controversy exists in that the city of Blythe contends that the deeds thus executed by the county of Riverside to the Palo Verde Irrigation District conveyed full title to the irrigation district, free and clear of any lien for this assessment district and fully extinguished any lien for the payment of these bonds, and that since the purported assessments for the purpose of paying these bonds, which were levied in the year 1941–1942, were voluntarily paid by the taxpayers the city became legally entitled thereto as the residuary beneficiary thereof, while the cross-defendant Irwin contends that he is entitled to all of the money in this redemption fund and that the city is not entitled to any part thereof. The prayer is for a judgment determining the respective claims of the city and of Irwin to any and all money arising from the assessment for this improvement district as levied and collected for the year 1941–1942, and for an injunction enjoining the city treasurer from paying out any of said monies until the controversy is decided.

It is admitted that after these properties were resold on contract by the irrigation district the purchasers thereof paid for four years, in accordance with their contracts, the amounts levied for the payment of these bonds which were included with the county taxes, that the amount so collected during the years 1936 to 1939, inclusive, were turned over by the county tax collector to the treasurer of the city of Blythe, were placed in this redemption fund and were paid to Mr. Irwin, and that many of these purchasers were the original owners of the properties. It also appears, without dispute, that for the years 1940 and 1941 similar amounts for the payment of these bonds were levied and assessed in connection with the county taxes, were paid by the taxpayers, turned over to the redemption fund and paid to Mr. Irwin. The entire controversy here relates to similar payments assessed in connection with county taxes and paid by the taxpayers for the year 1942 when, for the first time, the city asserted its claim to the monies thus deposited in the redemption fund established by the city for the payment of these bonds.

Counsel for the city present an intricate and involved technical argument with an ability that almost makes it seem plausible. However, reduced to its essentials and in practical effect, the argument is that while the city received these improvements and signed and agreed to pay these bonds, and while under the law then existing the assessment for these bonds was a lien upon the property, this lien was entirely extinguished by legislation passed later the same year and in subsequent years; that the bondholder may not complain of this because when he bought the bonds he should have known that under its taxing powers the state could at any time pass laws which would have the effect of nullifying his bonds; that under legislation subsequently passed the tax sales to the state and to the irrigation district, with the subsequent transfer of the state's interest to the irrigation district, completely extinguished any lien on account of these bonds; that after this occurred the county authorities could not legally include with the county taxes and collect the portion designed for the payment of these bonds; that although the taxpayers were unjustly compelled to pay this amount they are not entitled to a return of the money, and have no claim or interest which need be respected, since they were "easy" and did not protect their rights by paying under protest; that although this money was illegally collected it is now in the city's hands; that while this money was taken from the taxpayers under the pretext that it was needed and would be used to pay the just obligation for these improvements, and while it has already been placed in a fund created for the redemption of these bonds in accordance with the command of the statute, it is not "properly" in that fund; that since the money has improperly been placed in this redemption fund in charge of a city official, which fund can only be used to pay these bonds until they are fully paid, the city has the right and duty to withdraw it from that fund; and that since there is no law to protect the rightful owners of the money, it follows that the city has a right, with which a court must not interfere, to take and use this money for its general fund.

Incidentally, it is urged that this court overrule all statutory and judicial laws and rules upholding the doctrine of parity as between different tax liens, and that it promulgate a new and practical "philosophy of governmental survival" by establishing, once and for all, that some one tax lien is paramount and extinguishes all others upon failure of redemption within the time allowed, regardless of what laws were in force at any particular time. While this course might, as counsel state, remove many of the perplexities, inconsistencies and uncertainties which now exist in this field it is subject to the more or less important (according to the point of view) objections that it would ignore all constitutional questions and all vested contractual rights, that it would have the practical effect of nullifying all statutes inviting and providing for the issuance of improvement bonds, and that it would make it certain that no one would ever again be so foolish as to purchase or accept a bond of that nature.

The very statement of these contentions furnishes a most convincing argument that some better solution of the problem before us should be found, and suggests that some principle should here be applied other than the primitive rule that "he may take who has the power and he shall keep who can."

[1] The basic question here is as to who is entitled to this money which has been actually paid by these taxpayers and which has actually been placed in this redemption fund. The appellant's theory is based upon the main premise that the balance or surplus of a public fund, when it is subject to no other claim, becomes the property of the public body administering the fund. It is then contended that this situation exists here because the taxpayers have no claim to this money since they paid their taxes voluntarily, and because the bondholder has no claim thereto since any assessment lien was extinguished by the tax sales. Although the question as to whether this assessment lien was extinguished by these tax sales may be an interesting one it is not controlling, under the facts of this case, and need not be here decided. Assuming, but by no means holding, that the lien here was thus extinguished it does not follow that the bondholder is not entitled to the money which has been collected and paid in this manner and which has thus come into this special fund. The appellant city could not and would not have obtained possession of this money except for the existing proceedings taken under the Improvement Bond Act, and the attempt of the officials to carry out its provisions. The city and the county officers acted under and because of that proceeding and the money was paid and received because thereof. Under the provisions of that act all monies assessed and collected from the landowners and placed in this redemption fund were to be paid to the bondholders, and under the provisions of the act there could be no surplus in this fund until the bonds were paid in full.

Regardless of whether or not the lien of this assessment had been extinguished there was here a just debt which has never been extinguished. A certain class of people, the owners of these lands, were obligated to pay this debt. The city was also obligated under certain conditions and if the landowners failed to pay. The assessment lien was but one of the means of enforcing payment of the debt, and whether or not a lien on the land still remained in force a levy of taxes was actually made for the purpose of paying the debt. No attack was made upon the tax levy so made. The amounts were thereupon paid and turned over by the county authorities to the city and placed in the fund established by it for the purpose of paying the debt. The city acquiesced and participated in the proceedings for this purpose and applied the proceeds in payment of the bonds for a period of six years after the land was resold by the irrigation district. In the final year the city permitted the same things to be done, again accepted the money and it was placed in the redemption fund maintained as required by the statute. Not only are all of the equities in favor of compelling the city to use this money for the purpose for which it was collected and paid, all parties having acted in good faith up to that time, but there seems to be no hard and fast rule of law which compels something to the contrary to be done. Moreover, the Improvement Bond Act of 1915 (Sec. 12) requires the city, under circumstances which existed here, to become the real purchaser at the delinquent sales and to pay and transfer into the redemption fund the amounts of the delinquent assessment. This was never done and the city should not be allowed to take advantage of its own wrong and its own failure to comply with the law.

It makes little difference whether we consider the city a trustee here with respect to its receipt of this money, under these conditions, or whether it is considered merely as an obligation to be implied from an existing contractual relationship. In any event, under the unusual circumstances here appearing, it seems clear that this money having been paid and collected, transferred to the city and placed in this special fund, all for a distinct purpose under a valid law and to meet a just obligation, should be used for the purpose for which it was collected by the authorities and paid by the taxpayers. It seems even more clear that if any other result is conceivable the city is not now entitled to take and use this money for other purposes, as being a fund which is subject to no other claim. Under no theory could it be held that the city is entitled to take this money for general purposes.

[2, 3] The appellant further contends that since this was an action for declaratory relief it could not be dismissed on the sustaining of a demurrer, citing Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1052. While the amended cross-complainant was entitled as one for declaratory relief the prayer is for a judgment determining the respective claims of certain parties to the monies derived from the assessments referred to and necessarily placed in a special fund, and for an injunction against the city treasurer.

In practical effect, this is not a declaratory action but one to obtain certain specific money and to enjoin the city treasurer from paying it to someone else. Moreover, it appears that the city could not recover in any event and the case relied upon is not controlling. Vincent v. Security-First Nat. Bank, 67 Cal.App.2d 602, 155 P.2d 63; Simpson v. Security First Nat. Bank, 71 Cal.App.2d 154, 162 P.2d 494; Bogardus v. Santa Ana W. G. Ass'n, 41 Cal.App.2d 939, 108 P.2d 52.

The judgment appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

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72 Cal.App.2d 14

WOOD et al. v. KELLER.

Civ. 14980.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1945.

1. Trial 🔑404(2)

A finding of fact, including a finding with respect to damages, may be regarded as one of fact although mistakenly placed among conclusions of law.

2. Trial 🔑404(2)

Findings that plaintiff was entitled to general and special damages in stated amounts constituted findings of fact as to general and special damages suffered by plaintiff.

3. Death 🔑77

In action for wife's wrongful death, evidence sustained finding that husband suffered a pecuniary loss.

4. Death 🔑95(3)

In action for wife's wrongful death, tried to court without a jury, under evidence relating to pecuniary loss suffered by husband, amount of loss was to be determined by trial court in exercise of its sound discretion.

5. Death 🔑95(1, 3)

Where husband and wife had been married for nearly 30 years, wife performed household duties and attended to husband's business affairs during his absence, evidence sustained judgment for husband for $6500 general damages for wife's wrongful death.

6. Trial 🔑398

Where court makes general findings and specific findings as to a particular matter, specific findings control in a case of inconsistency.

7. Death 🔑105

Where plaintiff alleged $20,000 damages, finding that plaintiff's allegations were true was not irreconcilable with finding that plaintiff sustained $6,500 general damages.

8. Appeal and error 🔑295

Question whether damages are excessive as a matter of law cannot be raised for first time on appeal, and must be presented to trial court on motion for a new trial.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by John W. Wood and others against Joseph E. Keller, for the wrongful death of named plaintiff's wife, tried before court without a jury. From a judgment for named plaintiff, defendant appeals.

Judgment affirmed.

Sidney Sampson, of Los Angeles, for appellant.

Henry Brouillette, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff John W. Wood in the sum of (a) $6500 general damages and (b) $485 special damages, in an action to recover damages for the wrongful death of said plaintiff's wife after trial before the court without a jury, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

Plaintiff John W. Wood's wife, Mrs. Grace J. Wood, died as the result of injuries which she received due to the negligent operation of a motor vehicle by defendant.

Defendant urges reversal of the judgment on four propositions which will be stated and answered hereunder seriatim:

First: *The trial court failed to make any finding with respect to the damages suffered by plaintiff John W. Wood.*

This proposition is untenable and is governed by this pertinent rule of law:

A finding of fact may be regarded as one of fact although mistakenly placed among the conclusions of law. Grossman v. Grossman, 52 Cal.App.2d 184, 191, 126 P.2d 178; Bechtold v. Bishop & Co., 16 Cal.2d 285, 293, 105 P.2d 984; Kramer v. Watnick, 63 Cal.App.2d 308, 310, 146 P.2d 947.

In the instant case among the conclusions of law are the following findings of fact regarding the general and special damages suffered by plaintiff John W. Wood.

"IV

"That the plaintiff, John W. Wood, is entitled to a judgment for general damages against the defendant, Joseph E. Keller, in the amount of Six Thousand Five Hundred ($6500.00) Dollars.

"V

"That the plaintiff, John W. Wood, is entitled to special damages against the defendant, Joseph E. Keller, in the amount of Four Hundred Eighty-Five and no/100 ($485.00) Dollars, and for his costs herein."

[1, 2] Clearly the foregoing constitute findings of fact as to the general and special damages suffered by plaintiff John W. Wood and under the rule of law above stated are sufficient even though they are found among the conclusions of law instead of among the findings of fact.

Second: *The evidence fails to support the finding of the trial court that plaintiff John W. Wood sustained damages in the sum of $6500.*

[3-5] This proposition is also untenable. The evidence disclosed that plaintiff John W. Wood and decedent had been married for nearly thirty years; that the wife performed household duties for her husband, attended to his business affairs during the period when he was absent from the city in which their home was located, and that they were living together at the time of her death as husband and wife. It further disclosed that Mr. Wood was required after Mrs. Wood's death to employ others to perform the household and business services which Mrs. Wood had performed for him. Such evidence clearly sustains the trial court's finding that Mr. Wood had suffered a pecuniary loss as the result of the death of his wife. The amount of such loss was to be determined by the trial judge in the exercise of a sound discretion, which discretion in view of the foregoing evidence was not abused in the instant case. Bechtold v. Bishop & Co., supra, 16 Cal.2d at page 294 et seq., 105 P.2d 984; Williams v. McDowell, 32 Cal.App.2d 49, 54, 89 P.2d 155.

Third: *The findings of fact and conclusions of law are irreconcilable.*

This proposition is without merit. Paragraph IX in plaintiff John W. Wood's first cause of action alleged that he had been damaged in the sum of $20,000. This paragraph was incorporated in the second cause of action by reference. Paragraph VIII of the findings of fact found that the allegations contained in the second cause of action were true. Defendant contends that the foregoing constituted a finding that Mr. Wood had sustained damages in the sum of $20,000 as alleged in paragraph IX of the first cause of action of the complaint and is therefore irreconcilable with the finding of fact that he sustained general damages in the sum of $6500.

[6, 7] Such contention is not sound in view of the established rule that where the court in addition to general findings makes specific findings as to a particular matter the latter control in the case of inconsistency. Lobb v. Brown, 208 Cal. 476, 481, 281 P. 1010. See also 24 Cal.Jur., [1926], Trial, p. 974, sec. 206 and cases cited in note 14. Since the court specifically found that Mr. Wood's general damages were only $6500, such finding was controlling over the general finding contained in Paragraph VIII of the findings.

Fourth: *The damages are excessive as a matter of law.*

[8] This proposition will not be considered by us for the reason that the law is established in California that the point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the trial court on motion for a new trial before an appellate court will consider whether the damages are excessive or not. Springer v. Angeles Credit Co., Ltd., 44 Cal.App.2d 712, 716, 113 P.2d 7; Chiarini v. Rochon, 1 Cal. Unrep. 540, 541; Phœnix v. Gibson, 51 Cal.App. 148, 151, 196 P. 95; Clarke v. Fitch, 41 Cal. 472, 476.

In the instant case the defendant did not comply with the foregoing rule.

For the foregoing reasons the judgment is affirmed.

WILSON, J., concurs.

MOORE, Presiding Justice.

I concur: However, I think that in addition to the amounts of the general and special damages which are specified in the conclusions it should be pointed out that the court made a detailed finding of that which constitutes the sum total of plaintiffs' loss, namely: He and his wife had lived together since 1915; she had faithfully performed all of her wifely duties; that as the sole and proximate result of defendant's unlawful operation of his motor vehicle plaintiff suffered pecuniary damage in the loss of the comfort, assistance and companionship of his deceased wife. Such finding, taken together with the declarations of the damages in pecuniary terms as set forth in the conclusions, presents to this court all that is essential to a complete decision of the case.

72 Cal.App.2d 23

BILSLAND v. KENNEDY.
KENNEDY v. BILSLAND et al.

Civ. 15074.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1945.

Rehearing Denied Dec. 27, 1945.

Hearing Denied Jan. 31, 1946.

1. Deeds 🔑60

Where a deed is given to a third person to hold until happening of a contingency, transaction does not operate as a delivery to grantee until fulfillment of condition, and a delivery by depositary contrary to direction of grantor does not pass title.

2. Deeds 🔑60

Where grantor delivered deed to third person to be held by him on condition, and grantor died without contingency happening, the manual tradition of deed by third person to grantee did not constitute a delivery and was ineffectual to convey title and title passed to grantor's heirs at time of her death.

3. Quietng title 🔑14

In action to quiet title arising out of recordation of deed from plaintiff's decedent to defendant, which deed was given to defendant's deceased husband, during his lifetime, to hold pending a specified contingency which never occurred, evidence did not justify denial of relief on ground that plaintiff had not offered to restore to defendant a sum equivalent to alleged indebtedness from plaintiff's decedent to defendant's deceased husband.

4. Witnesses 🔑316

Where witness' testimony was highly conflicting and concededly false in several instances, trial judge was justified in disregarding testimony.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Margaret Bridgford against R. M. Kennedy and others to quiet title to realty. After plaintiff's death, Florence M. Bilsland, administratrix with will annexed of the estate of Margaret Bridgford, deceased, was substituted as a party plaintiff. Defendant Verda B. Kennedy, cross-complained against Florence M. Bilsland as administratrix and individually and against Ralph G. Walker, administrator of the estate of Elmer W. Little, deceased. Decree for plaintiff, and defendant Verda B. Kennedy appeals.

Affirmed.

Benjamin S. Crow, of Los Angeles, for appellant Kennedy.

Richard C. Fildew, of Los Angeles, for respondent Bilsland.

Musick, Burrell & Pinney, of Los Angeles, for respondent Walker.

McCOMB, Justice.

From a decree quieting title in plaintiff, defendant Verda B. Kennedy appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

Mrs. Margaret Bridgford owned a house and lot located at 1516 17th Street, Los Angeles. Her foster daughter, defendant Verda B. Kennedy, married defendant R. M. Kennedy prior to 1919. On July 1, 1937, Mrs. Bridgford accompanied her son-in-law on a short trip in Los Angeles to collect some rent from a tenant of Mr. Kennedy. While they were in the automobile Mrs. Bridgford said she wanted to give the property she lived in to Verda Kennedy, whereupon Mr. Kennedy told Mrs. Bridgford that "we might get a deed and a Notary right here if you want to transfer the property," whereupon they went into the office of Mr. Eisinger for a deed and a Notary. Neither one being available in Mr. Eisinger's office, he took them around the corner and introduced them to Mr. Rasmussen from whom they obtained a quitclaim deed which was executed by Mrs. Bridgford naming Verda Kennedy as grantee. The deed was then handed to Mr. Kennedy with instructions for him to keep the deed and to have it recorded only in the event that Mrs. Bridgford should move to Oregon or if she no longer had any use for the property.

July 3, 1943, Mr. Kennedy gave Mrs. Verda Kennedy an envelope containing the deed and asked her to have it recorded in the county recorder's office. Mrs. Kennedy did not know the contents of the document when she had it recorded pursuant to her husband's instruction. On August 26, 1943, Mrs. Bridgford, when preparing a will by which she left the property above-described to Mrs. Bilsland, learned for the first time the deed had been recorded and at such time said she had never signed such a deed. Thereafter she instructed her attorney to institute the present suit to quiet title to the property.

On February 22, 1944, Mrs. Bridgford died and Florence M. Bilsland, administratrix of her estate, was substituted as plaintiff in the present action. Defendant R. M. Kennedy also died before the case was tried and his evidence was received in the form of a deposition which had previously been taken.

This is the sole question necessary for us to determine:

Was there a delivery of the deed to Mrs. Verda B. Kennedy which Mrs. Bridgford had executed July 1, 1937?

This question must be answered in the negative and is governed by this rule:

[1] Where a deed is given to a third person to hold until the happening of a contingency it does not operate as a delivery to the grantee until the fulfillment of such condition, and a delivery by the depositary contrary to the direction of the grantor does not pass title. (Bank of Healdsburg v. Bailhache, 65 Cal. 327, 329 et seq., 4 P. 106; Whitney v. Sherman, 178 Cal. 435, 438, 173 P. 931; 26 C.J.S., Deeds, page 244, § 43, subsec. d. See also Gould v. Wise, 97 Cal. 532, 536, 32 P. 576, 33 P. 323.)

[2] Applying the foregoing rule to the facts in the instant case, it appears from the only evidence upon the subject, that of Mr. Kennedy which was received through his deposition,* that the deed was delivered to him to be held until Mrs. Bridgford moved to Oregon or some other place and then to be delivered to Mrs. Kennedy. Since it is conceded that Mrs. Bridgford never moved from her home the contingency never arose upon which the deed was to be delivered and therefore the manual tradition by Mr. Kennedy to Mrs. Kennedy did not constitute a legal delivery and was ineffectual to convey title to Mrs. Kennedy. The trial court properly found that, the deed not having been delivered, Mrs. Bridgford had not divested herself of title to the property in question and the same passed to her heirs at the time of her death.

[3, 4] There is no merit in defendant Verda Kennedy's contention that plaintiff was barred from relief because she had not offered to restore to defendant a sum equivalent to the alleged indebtedness from Mrs. Bridgford to Mr. Kennedy. Mr. Kennedy's testimony was highly conflicting and concededly false in several instances, with the result the trial judge was thoroughly justified in disregarding his evidence to the effect that the deed had been given to him partly in liquidation of an indebtedness owed by Mrs. Bridgford to him.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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* Mr. Kennedy's deposition relative to the condition under which he received the deed from Mrs. Bridgford read in part as follows:

"She could stay there as long as she could use the property. In other words, if she moved away to Oregon, or some place else, and left the property stand there she would no longer have it."

72 Cal.App.2d 18

FIELDING & SHEPLEY, Inc., v. DOW.

Civ. 14984.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1945.

1. Contracts 🔑322(3)

In subcontractor's action for balance due under cement subcontract, evidence sustained implied finding that lack of compressive strength was not due to subcontractor's fault.

2. Contracts 🔑316(4)

Even if subcontractor poured cement when temperature was below 40 degrees, contrary to specifications, subcontractor was not precluded from recovering balance due under subcontract where contractor knew that subcontractor was so doing and made no objection thereto.

3. Contracts 🔑316(4)

Subcontractor's failure to take slump tests did not preclude recovery of balance due under cement subcontract, where there was nothing in subcontract requiring subcontractor to take slump tests himself and evidence disclosed that slump tests were actually made and principal contractor did not object to fact that subcontractor did not take the tests himself or that tests were unsatisfactory.

4. Contracts 🔑316(1)

The fact that, contrary to specifications, calcium chloride was mixed with cement, did not preclude subcontractor from recovering balance due under cement subcontractor, where evidence disclosed that principal contractor gave permission to subcontractor to mix calcium chloride with cement.

5. Contracts 🔑296

Alleged fact that cement was poured during rain, contrary to specifications, did not preclude subcontractor from recovering balance due under cement subcontract where spots in the concrete caused by rain did not cause rejection of concrete work.

6. Contracts 🔑297

In subcontractor's action to recover balance due under cement subcontract, alleged fact that subcontractor did not do certain cleanup work of value of $475 was immaterial, where trial court allowed principal contractor a credit of that amount for subcontractor's failure to do the clean-up work.

7. Contracts 🔑322(3)

In subcontractor's action to recover balance due under cement subcontract, evidence justified finding that an excessive amount of water had not been used in mixing the cement.

8. Contracts 🔑282

Provision in cement subcontract that work should be done to satisfaction of principal contractor merely meant that work should be performed in such manner that it would be satisfactory to a reasonable person.

9. Contracts 🔑322(3)

In subcontractor's action for balance due under cement subcontract, evidence sustained finding that subcontractor had performed work in a manner satisfactory to principal contractor.

10. Contracts 🔑350(1)

Evidence supported finding that there was balance of $9,618 due subcontractor under cement subcontract from principal contractor.

11. Contracts 🔑322(3)

In subcontractor's action against principal contractor for balance due under cement subcontract, evidence supported finding that subcontractor completed work required under the subcontract in accordance with plans and specifications of the general contract prepared by the federal government.

12. Contracts 🔑322(3)

In subcontractor's action for balance due under cement subcontract against general contractor, evidence that defendant took possession of concrete and erected thereon government structures was sufficient to sustain finding that general contractor accepted the work.

13. Indemnity 🔑15(7)

In subcontractor's action against principal contractor for balance due under cement subcontract, evidence sustained finding that penalty assessed by government against principal contractor was not due to any fault of subcontractor.

14. Indemnity 🔑8

Where cement subcontract merely provided that subcontractor was liable to principal contractor for penalty assessed against principal contractor on account of the subcontractor's defective work, subcontractor was not liable to principal contractor for penalty assessed against principal contractor for any penalty that had to do with cement poured by subcontractor.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Durnell, Judge.

Action by Fielding & Shepley, Inc., against R. H. Dow, doing business as L. F. Dow Company, to recover an alleged balance due under a subcontract wherein defendant filed a crosscomplaint.

From an adverse judgment, defendant appeals.

Affirmed.

George Penney, of Los Angeles, for respondents.

John E. McCall, of Los Angeles, for appellant.

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $9618.00 after trial before the court without a jury in an action to recover an alleged balance due on a subcontract.

The stipulated facts are these:

"First: That the plaintiff, Fielding & Shepley, Inc., a corporation, poured 124,830 square yards of concrete at the project mentioned in the complaint at the contract price of 69¢ per square yard, or a total amount of $86,132.70; that $76,039.70 was paid by Dow or a credit given. That Dow claims two items of credit, namely, an item of $351.55 for repair of mixer, and $475.00 to clean the concrete from the site which plaintiff denies.

"Second: That the concrete was defective.

"Third: That the United States Government imposed a penalty of $23,700.00 on the defendant under his contract with the Government because of the defective concrete. That the penalty so imposed was in a reasonable amount, and is properly set forth in the percentages as set forth in the Bill of Particulars filed by the cross-complaint.

"Fourth: That Dow furnished all aggregates, weighed and batched the same and delivered the batched materials to the mixer hoppers of Fielding & Shepley, Inc. That Dow thereafter had nothing further to do with the concrete except to protect it against freezing."

Defendant relies for reversal of the judgment on four propositions which will be stated and answered hereunder seriatim:

First: *Plaintiff did not perform its subcontract according to its terms.*

[1] This proposition is untenable. Defendant claims that (1) the specifications required plaintiff to construct the concrete so that it would have a specific minimum compressive strength. Admitting that the compressive tests prepared by the government vary from the compressive strength required by the specifications, nevertheless there was substantial evidence that the difference in compressive strength resulted from impurities in the mix at defendant's batching plant and failure to protect the cement against freezing by application of salt to the cement, from which the trial court impliedly found that the lack of compressive strength was not due to plaintiff's fault.

[2] (2) Contrary to the specifications plaintiff poured cement when the temperature was below 40 degrees. Conceding this to be true there was substantial evidence that defendant knew that plaintiff was so doing and made no objection thereto.

[3] (3) Plaintiff failed to live up to specifications because he failed to take slump tests. There is nothing in the contract between plaintiff and defendant requiring plaintiff to take slump tests himself, while the evidence discloses that slump tests were actually made and defendant did not object to the fact that plaintiff did not take the tests himself or that the tests were unsatisfactory.

[4] (4) The specifications were violated in that calcium chloride was mixed with the cement. The evidence discloses that defendant gave permission to plaintiff to mix calcium chloride with the cement.

[5] (5) The cement was poured during the rain contrary to specifications. The evidence discloses that the spots in the concrete caused by the rain did not cause the government to reject such concrete but that in fact the government accepted it.

[6] (6) Plaintiff did not do certain cleanup work of the value of $475. Such point is immaterial here for the trial court allowed defendant a credit in the sum of

$475 on account of the failure of plaintiff to do cleanup work.

[7] (7) Plaintiff used too much water mixing the concrete. There was testimony given by several witnesses that the correct amount of water was used in the mixing of the concrete, and the trial court was thus justified in finding that an excessive amount of water had not been used in mixing the cement.

Daley v. Russ, 86 Cal. 114, 24 P. 867, and Kittle v. Davis, 8 Cal.App.2d 504, 47 P.2d 1089, cited by defendant, are factually distinguishable from the present case. The first case involved a point in pleading and was not decided on the basis of conflicting evidence. The second case involved an entirely different factual situation from that here presented, the contract in such case being a contract for the exploitation of a patent.

Second: *Plaintiff failed to allege or prove compliance with the conditions precedent in the contract which required that the work should be done to the satisfaction of the contractor and owner before final payment became due.*

[8, 9] This proposition is also untenable. The provision in the contract that the work should be done to the satisfaction of the defendant merely meant that the work should be performed in such a manner that it would be satisfactory to a reasonable person. (Haverty Co. v. Jones, 185 Cal. 285, 296, 197 P. 105; Bruner v. Hegyi, 42 Cal.App. 97, 99, 183 P. 369.) In the present case there was testimony that the work was done in a satisfactory manner. Predicated upon such testimony the trial court properly found that plaintiff had performed the work in a manner satisfactory to defendant.

Third: *There is not any substantial evidence to sustain the trial court's findings that (a) plaintiff performed services for defendant of the agreed value of $86,132.70; (b) there is now due and owing from defendant to plaintiff under the contract $9618.00 and that said sum should have been paid by defendant to plaintiff on December 31, 1942; (c) plaintiff completed the work required under the contract in accordance with the plans and specifications of the general contract prepared by the U.S. government; (d) the work was accepted by the defendant; and (e) the penalty of $23,700.00 imposed by the government was due to no fault in the work done by plaintiff.*

This proposition is likewise untenable.

[10] (a & b) The stipulated facts show that plaintiff poured 124,830 square yards of cement at the agreed price of 69 cents per square yard, which is equivalent to $86,132.70. It is further stipulated that defendant had paid plaintiff only $76,039.70 leaving a balance of $10,093 against which the trial court allowed defendant a credit of $475 making the balance of $9,618.

[11] (c) The discussion under point one, supra, shows that there was substantial evidence to sustain this finding.

[12] (d) Subsequent to the doing of the work by plaintiff, defendant took possession of the concrete and erected thereon government structures. Clearly such evidence was sufficient to sustain the trial court's finding that defendant had accepted the work.

[13] (e) There was evidence that the defective work was caused by the defendant's putting salt upon the concrete and driving trucks over it too soon after it had been poured. Such evidence clearly sustained the trial court's finding that the penalty assessed by the government was not due to any fault of plaintiff.

[14] Fourth: *Plaintiff was liable for any penalty assessed against defendant by the government that had to do with the cement poured by defendant.*

This proposition is likewise without merit. The contract merely provided that plaintiff was liable to defendant for the penalty assessed against defendant "*on account of the contractor's*" defective work.

From the foregoing discussion it is evident that the penalty was not assessed on account of the subcontractor's defective work and therefore plaintiff was not liable to defendant for the penalty assessed against him.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

LOCKHEED AIRCRAFT CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 15096.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1945.

Rehearing Denied Dec. 28, 1945.

Hearing Granted Feb. 4, 1946.

1. Workmen's compensation ⚷768

An accident happening during an uncompensated lunch period occurs when employee is outside scope and course of his employment and is therefore noncompensable.

2. Workmen's compensation ⚷768

Where employee, who used his motorcycle to travel between two of employer's plants was injured when his motorcycle collided with street car while employee was seeking his lunch outside his permissible route of travel, employee's injuries did not occur in "course of employment" so as to be compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

MOORE, P. J., dissenting.

◆

Proceeding under the Workmen's Compensation Law by Lockheed Aircraft Corporation, employer, and Associated Indemnity Corporation, insurer, to review an award of the Industrial Accident Commission granting compensation to Richard Janda, employee.

Award annulled.

Syril S. Tipton, of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco, and E. Sarkisian, of Los Angeles, for respondents.

McCOMB, Justice.

Petitioner seeks to annul an order of the Industrial Accident Commission on the ground that respondent Janda's (hereinafter referred to as applicant) injuries occurred during his uncompensated lunch hour.

The essential facts are:

On January 25, 1945, applicant was in the employ of petitioner Lockheed Aircraft Corporation (hereinafter referred to as Lockheed), which operated a plant at Seventh and Santa Fe Avenue in Los Angeles known as plant No. 2 and another plant in Maywood, County of Los Angeles, California, known as plant No. 4. Applicant's duties required him to travel either on his own motorcycle or in a car furnished by Lockheed between the two plants. Permissible routes of travel between the two plants had been discussed by applicant and his supervisor and several alternative routes had been designated as acceptable to Lockheed. One route permitted applicant to travel west on Slauson Avenue to Alameda Street, north on Alameda to Seventh, then east to plant No. 4.

Applicant's regular working hours were from 4 p.m. to 12:30 a.m. His lunch hour was from 8 p.m. to 8:30 p.m. Applicant was not paid during his lunch period and was permitted to eat his lunch along the way if enroute between the two plants. On January 25, 1945, shortly before 8 p.m., applicant started back to plant No. 2 from plant No. 4. It being his lunch period he decided that he would eat on his way back to plant No. 2. As he did not like any of the restaurants which were located along the route which he had used on the day in question to go to plant No. 4, he decided to go on another route, also permissible, which would take him west on Slauson Avenue to Alameda Street and north on Alameda Street. Although there were several restaurants open for business along the line of travel none of them appealed to applicant and consequently he did not stop at any of them along the road between plant No. 4 and Alameda Street.

Applicant being unfamiliar with the intersection of Alameda Street and Slauson Avenue passed this intersection before he knew it, although it had been his intention to turn north at this point. He continued west on Slauson Avenue outside of his permissible route and territory until he arrived at Vermont Avenue at which point he realized he had passed Alameda Street. Still seeking for a good place to eat, applicant decided to continue to look for a place appealing to him. He turned north on Vermont Avenue instead of going back on Slauson Avenue to Alameda Street, a permissible route. When applicant reached Vernon and Vermont Avenues he still had not located a suitable eating place. This point was three and one-half miles outside of his territory, and approximately a mile north of Slauson Avenue. At this intersection applicant collided with a street car, receiving injuries as the result of the collision upon which the present application for compensation is predicated.

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* Subsequent opinion 172 P.2d 1.

This is the sole question necessary for us to determine:

Did the injuries which applicant received occur while he was in the course of his employment?

This question must be answered in the negative and is governed by this rule:

[1] An accident happening during an uncompensated lunch period occurs when the employee is outside the scope and course of his employment and is therefore noncompensable. (California C. I. Exch. v. I. A. C., 190 Cal. 433, 435 et seq., 213 P. 257; California Highway Comm. v. I. A. C., 61 Cal.App. 284, 289 et seq., 214 P. 658).

[2] Applying the foregoing rule to the facts in the instant case, it is evident that applicant was injured at a time when he was seeking his lunch outside his permissible route of travel, and therefore not in the course of his employment, and thus the injuries did not result from his employment and therefore were noncompensable.

Tingey v. I. A. C., 22 Cal.2d 636, 140 P.2d 410, is inapplicable since it was conceded that the injury in such case arose out of and occurred in the course of the employment. The same distinction appears in Pacific Indemnity Company v. I. A. C., 202 Cal. 521, 261 P. 987, and Broecker v. Moxley, 136 Cal.App. 248, 28 P.2d 409.

For the foregoing reasons the order is annulled.

WILSON, J., concurs.

MOORE, Presiding Justice.

I dissent. The applicant was injured while in line of duty and his injuries are therefore compensable. He had been sent by the night supervisor from Plant 2 on Santa Fe Avenue in Los Angeles to Plant 4 in Maywood to deliver a gate pass to a company employee. He chose to return by way of Slauson and Alameda streets,, one of his allowable routes. He traveled west along Slauson, intending to turn north at Alameda. He had never before been in that vicinity. Due to his negligence or his inability to read the street name he did not recognize the intersection of Alameda. Having thus failed to recognize Alameda street he did not realize his whereabouts until he arrived at Vermont Avenue, about three miles to the west. It cannot be said that his travel along Slauson from Alameda to Vermont was not within the course of his employment. Neither can it be said that traveling north on Vermont from Slauson Avenue put him outside of the course of his employment. His primary purpose at all times was to return to the Santa Fe Avenue plant. That he scanned the horizon for a restaurant in which to take his evening meal as he proceeded north on Vermont did not take him from the course of his employment. He was at all times immediately prior to the accident attempting to reach his employer's plant. To stop for dinner was a minor consideration. To return to the plant was his major and controlling business. It is not shown that he lost a second or traveled a yard in search of a restaurant. He did not at any time commence to eat or to dismount from his motorcycle for the purpose of eating. He veered from his course solely by reason of his lack of familiarity with Slauson Avenue in the vicinity of its intersection with Alameda Street. Such a mistake as failing to recognize a point on his route is no more to his discredit than would have been his failure to observe a step-off on a factory floor and thereby to receive injuries.

The rule applicable to the instant case is that "the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do." Employers' Liability Assurance Corporation v. Industrial Accident Commission, 37 Cal.App.2d 567, 573, 99 P.2d 1089, 1092. The mistaken belief of an employee that he is in the path or on the route or in the place designated by his employer does not render his injuries noncompensable. The question to be determined is whether the employee was in good faith acting in the execution of his duties at the time he received his injuries. Pacific Indemnity Company v. Industrial Accident Commission, 202 Cal. 521, 261 P. 987. That the applicant in the present action was acting honestly and in good faith was a fact found by the commission. An adverse finding might have found support in the evidence, but the fact that he was acting in the course of his employment having been determined by the commission upon substantial evidence it is not within the province of this court to substitute its conclusion for that of the commission. Where an employee is engaged in a specific mission for the benefit of his employer and is negligent while in the pursuit of that mission the injuries thereby suffered do not become noncompensable. Broecker v. Moxley, 136 Cal. App. 248, 28 P.2d 409. And the employee is entitled to compensation after receiving injuries due to his own negligence while performing an act for his master even though at the same time he combines his own business with that of his employer. Ryan v. Farrell, 208 Cal. 200, 280 P. 945.

Applicant had been a unit in the world of industry and in the employ of Lockheed for almost five years. Having been injured while in the performance of his duties, in the course of his employment, compensation for his disability should be borne by industry. It should not be denied him on the hollow assertion that he was at the time of his collision with a street car in quest of a restaurant while the record discloses that he was at that time "heading for" Plant 2.

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71 Cal.App.2d 800

BOAT & BARGE CORPORATION v. BEVERLY FINANCE CO. et al.

Civ. 14890.

District Court of Appeal, Second District, Division 1, California.

Nov. 29, 1945.

Rehearing Denied Dec. 20, 1945.

Hearing Denied Jan. 24, 1946.

1. Contracts 🔑231(1)

Where agreement under which plaintiff's assignor was to cause boat company to complete construction of six boats under navy contract, construction of which was being supervised in part and financed by defendant company, contemplated an allocation of overhead expense of boat company during period when the six unfinished boats were being completed, and construction of ten other boats was progressing, provision in agreement regarding defendants' payment of $4,000 on overhead expense would not be construed as intending to establish such amount as limit of defendants' obligation, but as intending only to be an estimate.

2. Contracts 🔑169

Explanation of a contract by reference to circumstances under which it was made and matter to which it related was authorized by statute. Civ.Code, § 1647.

3. Contracts 🔑169

Where upon face of contract itself there is doubt, evidence of "surrounding circumstances" is admissible to dispel that doubt, not by showing that parties meant something other than what they said, but by showing what they meant by what they said. Civ.Code, § 1647.

4. Contracts 🔑231(1)

Where agreement under which plaintiff's assignor or his successor was to cause boat company to complete construction of six boats under navy contract, construction of which was being supervised in part and financed by defendant company, contemplated an allocation of "overhead expense" of boat company during period when the six unfinished boats were being completed and construction of ten other boats was progressing, social security taxes and state unemployment and old age benefits paid upon direct labor in finishing the six boats were direct expenses incurred in completion of the boat, and were not "overhead expenses".

5. Contracts 🔑231(1)

Under contract whereby plaintiff's assignor was to cause boat company to complete construction of six boats under navy contract, construction of which was being financed by defendant company, interest on moneys supplied by defendant company to boat company to complete the boats was not a cost of the boats, and was not, therefore, a charge against the boats.

6. Contracts 🔑231(1)

Amount of supervision fees expended by defendant company was not recoverable from plaintiff under contract entered into by defendant company with plaintiff's assignor, who thereafter assigned contract to plaintiff, under which plaintiff's assignor or successor was to cause boat company to complete construction of six boats under navy contract, construction of which was being supervised in part and financed by defendant company.

7. Contracts ⟹231(1)

The provision in contract under which plaintiff's assignor was to cause boat company to complete construction of six boats under navy contract, construction of which was being financed by defendant company, requiring plaintiff to pay defendant company for any portion of stock of parts, materials and supplies not used by boat company at close of certain date in completion of navy contract, did not require plaintiff, as successor to its assignor, to pay for all materials at boat company's yard regardless of their usability in completion of the boats after action of Navy Department in changing the original specifications.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Boat & Barge Corporation against Beverly Finance Company and another to recover moneys allegedly expended for use and benefit of defendants, pursuant to agreement for financing construction of boats being constructed under contract with United States Navy Department, wherein the defendants filed a cross-complaint against plaintiff and Lawrence B. Gibbs. From an adverse judgment, the defendants appeal.

Affirmed.

Overton, Lyman & Plumb and B. R. Ware, all of Los Angeles, for appellants.

Horace S. Wilson and Paul Overton, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment in favor of Boat and Barge Corporation, a corporation, plaintiff and cross-defendant, and Lawrence B. Gibbs, cross-defendant, and against the defendants and cross-complainants Beverly Finance Company, a corporation, and Stanley W. Smith.

By its complaint plaintiff alleged that on or about June 26, 1943, defendants entered into a written agreement with one Lawrence B. Gibbs; that on the same day Gibbs by an instrument in writing assigned said agreement to plaintiff, Boat and Barge Corporation; that said plaintiff and Gibbs fully performed all of the covenants and obligations under such agreement; that between the first day of June and the first day of December, 1943, plaintiff at the special instance and request of defendants paid and expended moneys aggregating the sum of $19,533.77 for the use and benefit of defendants pursuant to the provisions of the aforesaid agreement and particularly paragraph 3 thereof. It was then alleged that defendants orally promised to repay said moneys to plaintiff on demand, but notwithstanding repeated requests so to do have failed and refused to pay to plaintiff any part of the aforesaid sum.

All of the foregoing allegations contained in plaintiff's complaint, save and except the execution and assignment of the agreement, were denied and placed in issue by defendants' answer.

Defendants filed a cross-complaint against plaintiff and with leave of court joined Lawrence W. Gibbs therein as a cross-defendant. This pleading contained two causes of action, the first of which referred to the agreement mentioned in plaintiff's complaint as being assigned to it and then alleged that as a part of such assignment plaintiff Boat and Barge Corporation agreed to abide by and perform each and all of the terms, provisions and conditions thereof; that said agreement, among other things, contained the following terms and provisions: "It is understood that there is in the yard of North American certain unused stock of parts, materials and supplies which may be used to complete said contract No. NX ss 18759. It is agreed by and between the parties hereto that during the month of June, 1943, a full and complete inventory shall be taken covering all such stock of parts, materials and supplies, and that its value shall be determined upon the basis of its cost F.O.B. the yard of said North American and that any portion of said stock of parts, materials and supplies not used by North American as at the close of July 15, 1943, in the construction of the boats covered by said contract No. NX ss 18759 shall be paid for by Gibbs to Beverly at said inventory cost on or before the 25th day of July, 1943."

It is then alleged that at the time said agreement was executed and at all other pertinent times there was located in the yard of North American, referred to in the foregoing portion of the agreement, an unused stock of parts, materials and supplies; that a portion of such unused stock has not been and will not be used to complete contract No. NX ss 18759 referred to in said portion of the above-mentioned agreement; that in accordance with the terms and provisions of said portion of said agreement, a full and complete inventory of such unused stock was taken and that its value, based upon its cost F.O.B. the yard of North American, is and was at all times herein mentioned the sum of $21,671.82. It is then alleged that notwithstanding demand upon the named cross-defendants for payment of said sum of $21,671.82, the latter have refused payment and that the whole of said sum is due, owing and unpaid. Full, faithful and prompt observance and performance of each and all of the terms and provisions of said agreement enjoined upon them is then alleged by cross-complainants.

The second cause of action set forth in the cross-complaint alleges that between the first day of June and the 31st day of December, 1943, cross-complainants, at the special instance and request of cross-defendants, paid and expended varying sums of money aggregating $10,183.75 for the use and benefit of said cross-defendants in payment and discharge of the obligations assumed and agreed to be paid by them under and pursuant to the terms and provisions of the aforesaid agreement and the agreements referred to therein; that cross-defendants promised and agreed to repay said moneys on demand, but notwithstanding such demand have refused to pay said sum or any part thereof, and that the whole is now due, owing and unpaid.

The cross-defendants, in answer to the above-mentioned first cause of action, denied that a full and complete inventory of unused or any stock of parts was taken or that its value is or was the sum of $21,671.82, and in this connection alleged that under the terms and provisions of said agreement only such portion of the unused stock of parts that were usable in the completion of certain 45-foot picket boats would be paid for by cross-defendants and that the inventory value of such stock of parts is and was only the sum of $14,835.93, which said sum has been paid.

As to the second cause of action, the cross-defendants denied and placed in issue all the allegations thereof.

The cause proceeded to trial before the court sitting without a jury, and upon the completion thereof the court filed its findings of fact wherein it found that the heretofore mentioned allegations of plaintiff's complaint were true and found further that "between the first day of June and the first day of December, 1943, plaintiff, at the special instance and request of defendants, paid and expended for the use and benefit of defendants for and in the completion of certain 45-foot picket boats for the United States Navy, under contract No. NX ss 18759, moneys in the amounts and for the purposes as follows, to-wit:

"Materials	$12,774.74
Direct Labor	16,979.21
Social Security Taxes........	617.15
Overhead (Indirect Expense)	12,162.67
Aggregating the Total of	$42,533.77

"And during said period said defendants are entitled to credits against said expenditures as follows, to-wit:

Inventory Credit	$14,589.36
Cash paid by defendant, Beverly Finance Co. to plaintiff	5,000.00
Payments by defendant, Beverly Finance Co. for use and benefit of Plaintiff.........	3,410.64
Aggregating the total of	$23,000.00

"The net balance of moneys so expended by plaintiff for the use and benefit of defendants over and above said credits is the sum of $19,533.77."

The court further found that "plaintiff agreed to pay for all parts, materials and supplies at the yard of North American Shipbuilding Corporation that were usable in the completion of six 45-foot picket boats under contract No. NX ss 18759 and which were not used therefor at the inventory cost thereof f. o. b. the yard of North American Shipbuilding Corporation. The inventory cost of all said parts, materials and supplies so usable and not so used together with the freight or transportation charges thereon f. o. b. said yard is $14,589.36. Said sum was paid by plaintiff to defendants by giving defendants credit for said sum against moneys expended by plaintiff for the use and benefit of defendants."

The court also found that "each and every allegation contained in the cross-complaint on file herein is untrue, except as herein expressly found to be true."

Judgment accordingly was rendered in favor of plaintiff and against defendants for the sum of $19,533.77. Upon the cross-complaint judgment was entered for the cross-defendants. From such judgment defendants and cross-complainants prosecute this appeal.

At the trial no issue was made, nor is any raised here, with reference to that portion of the aforesaid findings wherein the court found that plaintiff had expended for the use and benefit of the defendants the sum of $12,774.74 for materials and the further sum of $16,979.21 for direct labor.

The question presented for determination on this appeal is the correctness of those findings and the judgment predicated thereon whereby the trial court awarded to plaintiff in accordance with its complaint the sums of $617.15 for social security and $12,162.67 for overhead (indirect expense), and denied to cross-complainants under their second cause of action the aggregate sum of $4,885.42 for interest, supervision fees, legal fees, state unemployment and old age benefits; and further denied any relief to cross-complainants under their first cause of action whereby they sought to recover an additional aggregate sum of $4,886.79, representing the alleged inventory value of a portion of the unused stock of parts located in the yard of North American Shipbuilding Corporation.

An epitome of the factual background which gave rise to this litigation will aid in a determination of the legal questions with which we are confronted. At the time of the Pearl Harbor attack upon our armed forces in December, 1941, A. M. Rambo was operating a boat-building business at Newport Beach in Orange County, California, under the noncorporate name of "A. M. Rambo Co." On February 17, 1942, he entered into a contract with the United States for the construction of certain boats and spare parts for the sum of $113,313.78, said contract being designated as "U. S. Government Contract No. 99017". On September 15, 1942, an additional contract was entered into, designated as Extension "A" of the above-mentioned contract, and under the terms of which A. M. Rambo Co. agreed to construct for the United States Navy Department eleven additional aircraft rescue boats for the total sum of $118,307. North American Shipbuilding Corporation was organized as a California corporation for the purpose of acquiring all of the assets and assuming all of the obligations of the above-mentioned A. M. Rambo Co.

On November 21, 1942, an agreement was entered into between North American Shipbuilding Corporation (hereinafter referred to as North American), Beverly Finance Company (hereinafter called Beverly, and of which corporation defendant Stanley W. Smith was president), and A. M. Rambo (hereinafter designated as Rambo), under the terms of which Rambo agreed to transfer to North American all of the assets of A. M. Rambo Co. and North American agreed to assume all of the obligations of A. M. Rambo Co. During the term of the agreement Beverly was to exercise complete supervision and management of the business of North American in carrying out the aforesaid Navy contract No. 99017 and extension "A" thereof, as well as any additional contracts entered into by North American "during the duration of the present war", with the further proviso that no additional contracts would be entered into by North American unless first approved by Beverly.

In consideration of the agreement on its part to arrange for and secure the necessary financing of North American, not exceeding the sum of $20,000, to be utilized for the liquidation of all unpaid necessary labor and materials furnished in connection with said contract No. 99017, "for the amount in the opinion of Beverly required for the payment of all necessary labor performed and material furnished in connection with said Extension 'A' to said contract No. 99017 and in connection with any additional contracts entered into by North American", and "for the money necessary to pay the cost of such of the overhead expense of North American as shall first be approved by Beverly", Beverly was to receive six per cent interest on all moneys so advanced; a management fee of $500 per month during the term of the agreement; thirty per cent (but not less than $2500) of the net profits earned by North American under extension "A" of said contract No. 99017; and thirty per cent of the net profits under any other contract.

Nine days later, under date of November 30, 1942, Rambo entered into another contract with the United States Government, designated as contract No. NX ss 18759, for the construction of six 45-foot aircraft rescue boats (later changed to picket boats, and which will be hereinafter referred to as the Beverly boats), for a total consideration of $150,000.

By a contract dated June 9, 1943, executed between the parties to the aforesaid agreement of November 21, 1942, the percentage of the net profits payable to Beverly and the manner of payment thereof were modified and changed. In the last-named contract of June 9 we find the following: "It is contemplated that this agreement shall be assigned by Beverly to Lawrence B. Gibbs (one of the cross-defendants herein), and thereafter may be assigned to a California corporation organized by him. Upon the execution of such assignment to Gibbs, Beverly shall ipso facto be released from any obligations to North American and Rambo under said agreement, excepting as to contracts designated as United States Government Contract No. 99017 and Extension 'A' thereof and contract No. NX ss 18759."

By an agreement dated June 26, 1943, the foregoing agreement dated November 21, 1942, as modified by the agreement of June 9, 1943, was assigned to Lawrence B. Gibbs. By consent of the parties this agreement became effective as of June 1, and the account books of North American were so set up. It is this agreement of June 26 which forms the basis of this litigation. It might here be noted that plaintiff Boat and Barge Corporation, of which the aforesaid assignee and cross-defendant Lawrence B. Gibbs was vice-president, assumed the obligations of Gibbs under the June 26 agreement.

By the terms of said agreement of June 26, 1943, it was provided that Gibbs or his successor would cause North American to complete the six 45-foot aircraft rescue boats (subsequently changed to picket boats) under contract No. NX ss 18759 dated November 30, 1942. This Navy contract for the just-mentioned six boats was the last and final contract supervised in part and financed by Beverly. Plaintiff Boat and Barge Corporation arranged for the financing of North American under the Navy contract of June 10, 1943, for ten boats, in a manner similar to that theretofore utilized by Beverly.

Manifestly, under the circumstances hereinbefore narrated, it became necessary for the parties to define, divide and allocate the overhead of North American between the six Beverly boats and the ten Boat and Barge Corporation boats then under construction. To effectuate this there was included in paragraph 4 of the agreement of June 26, 1943, the following provision:

"Beverly hereby agrees to loan, or cause to be loaned, to North American, in accordance with the provisions of said agreement of November 21, 1942, as subsequently modified by said agreement of June 9, 1943, the monies necessary to pay for all labor and materials required for the completion of said Contract Extension 'A' and said above mentioned contract No. NX ss 18759, and to pay to Gibbs the sum of $4,000.00, to be applied by him against the overhead of said North American incurred during the time required to complete the said two contracts hereinabove mentioned in this paragraph. Said sum of $4,000.00 shall be payable, $2,000.00 on or before July 5, 1943, and the balance on or before August 5, 1943. In computing profits in connection with contracts entered into by said North American, said $4,000.00 shall be chargeable as the entire additional overhead expense after June 1, 1943, charged against said contract No. NX ss 18759. All additional overhead after June 1, 1943, shall be charged to contracts entered into by North American after May 1, 1943. Said overhead shall consist of items which it has been the custom to charge to overhead expense since January 1, 1943, as shown by the books of North American."

From a consideration of the foregoing provisions of the agreement, it is at once apparent that the construction of the six Beverly boats theretofore financed by Beverly and the Union Bank through loans to North American had not been completed, and it was necessary that they be completed by North American under the supervision of Boat and Barge Corporation. Therefore the natural and obvious intention of the parties was to provide for an allocation of overhead expense during the period when the six unfinished boats were being completed and the construction of the ten Boat and Barge Corporation boats was commenced and progressed. To complete the six Beverly boats money was necessary, not only for labor and material (direct costs), but also for overhead, or indirect costs. The first-mentioned problem was easy of solution, requiring only an accounting record of the materials going into and the man-hours of labor employed upon the respective boats. However, the question of indirect costs, consisting as they did of general office expense, superintendence, taxes, etc., was not so simple.

It is the contention of appellants that under the terms of the foregoing paragraph 4 of the agreement the amount allocated as overhead was limited to $4,000. The trial court, however, awarded plaintiff Boat and Barge Corporation the sum of $12,162.67, which amount represents a percentage of the total overhead of North American for the months of June, July, August and September, basing the percentage for a particular month upon the proportionate amount of man-hours of direct labor expended on the Beverly boats. We deem it a fair statement, based on the record herein, to say that at the time the foregoing agreement was entered into the parties were of the opinion that the six boats would be completed by July 15, but in fact they were not finished for some sixty days or more thereafter, and it was evident that the delay in completion of the Beverly boats was not occasioned through any fault of Boat and Barge Corporation or cross-defendant Gibbs, nor through any fault of North American or its factory operations, but was attributable to the inability to get parts through the Navy Department.

[1] In their claim that $4,000 was the limit of overhead expense for which Beverly would be liable to complete its six unfinished boats, appellants place great reliance upon that portion of the foregoing paragraph 4 of the agreement reading as follows: "Said $4,000.00 shall be chargeable as the entire additional overhead expense after June 1, 1943, charged against said contract No. NX ss 18759". But there is also contained in the same paragraph the following: "* * * and to pay to Gibbs the sum of $4,000.00 *to be applied by him* against the overhead of said North American incurred during the time required to complete the said two contracts hereinabove mentioned in this paragraph". (Emphasis added.)

Furthermore, when neither of the $2,000 payments provided for in paragraph 4 were made, cross-defendant Gibbs communicated with defendant Smith, informing the latter that "* * * the contract was dragging out; that the overhead was increasing, and that we had to have some money to pay for this money which we were advancing, and on two occasions Mr. Smith said all we had to do was to look up his credit status and go ahead and get the boats finished, and he would pay the bills. * * *" Thereupon Smith sent a check for $5,000. Such conduct does not justify the inference that Smith regarded $4,000 as the limit of Beverly's obligations on account of overhead, but rather supports the inference arrived at by the trial court that he recognized that the $4,000 "to be applied on overhead" was an estimate, and that any other or all overhead costs would be paid upon completion of the six Beverly boats.

[2, 3] Over the objections of defendants the trial court permitted the cross-defendant Gibbs to testify as to the circumstances under which the agreement was made. We perceive no error in the court's ruling in this regard. Explanation of a contract by reference to the circumstances under which it was made and the matter to which it relates is authorized by section 1647 of the Civil Code. Evidence of "surrounding circumstances" is not admissible in connection with a written contract to add or take away anything from the agreement, but this rule of evidence is invoked in cases where upon the face of the contract itself there is doubt, "to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said." United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 84, 85, 141 P. 917, 920. The evidence was not admitted for the purpose, nor would it have the effect, of varying the terms of the contract. It was admitted for the purpose of interpretation. Neither was the challenged evidence received for the purpose of putting a different sense and construction upon the language of the contract from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used and applying such language according to the intention of the parties. From the facts and circumstances shown by the record herein it would appear that the court was justified in concluding that the most reasonable interpretation of that paragraph in question was that by its terms Beverly agreed to pay Boat and Barge Corporation such overhead expense as was incurred in completing the former's six unfinished boats, and that the $4,000 mentioned in the agreement was not in full and final payment of such overhead expense, but was, as stated in the contract, "to be

applied by him against the overhead of said North American incurred during the time required to complete the said two contracts. * * *" involving the six Beverly boats.

[4] Appellants next contend that the trial court committed error in giving judgment to plaintiff on its complaint for $617.15 for social security taxes, and also erred in refusing to give judgment in favor of cross-complainants under their cross-complaint for $1593.10 interest, $2,500 supervision fees, $250 attorney's fees, and $542.32 state unemployment and old age benefits. The first item represents the money paid by Gibbs as social security taxes upon the direct labor employed in finishing the Beverly boats. The trial court did not regard this item as an overhead charge, but as a direct charge against the Beverly boats; hence disallowed it. This was not error. Under the agreement of June 26, 1943, Beverly agreed to loan to North American "the monies necessary to pay for all labor and materials required for the completion" of the Beverly boats. The social security tax item was a direct charge, just as were labor and materials, against the Beverly boats. Such taxes are computed on a basis of a percentage of the direct labor payroll, and the social security taxes resulting from the labor performed on the Beverly boats could be definitely determined from time to time from the payroll covering labor expended in the construction of the Beverly boats. It was a simple matter of arithmetic. There was nothing indirect about it which would bring it into the category of overhead expense. In an effort to avoid such an interpretation appellants assert that under the terms of paragraph 4 of the above mentioned contract of June 26, 1943, the parties thereto defined the meaning of overhead expense when they provided "said overhead shall consist of items which it has been the custom to charge to overhead expense since January 1, 1943, as shown by the books of North American", and that the foregoing tax item was included as overhead on the books of North American during the months of January to May, inclusive, of 1943. From a careful reading of paragraph 4 of the June 26 agreement we are convinced that the above-quoted language upon which appellants rely has reference to the computation of profits, as stated in the contract, "entered into by North American". In other words, the language has to do with the relationship between plaintiffs Smith and Beverly with North American in connection with the division of profits between them. Furthermore, as we have heretofore pointed out, the trial court correctly determined that under the contract cross-defendants Gibbs and Boat and Barge Corporation were entitled to credit for all monies advanced to complete the Beverly boats, whether for direct or indirect costs, and the same was not limited to $4,000. The limitation of $4,000, we are convinced, referred only to the accounting arrangements in connection with the division of profits, and was intended to serve, as it would, to reduce Gibbs' profits, if any, under the contract which he had assumed the obligation of financing.

What we have just said concerning the social security tax is equally applicable to the item of $542.32 representing state employment and old age benefits. It also was a direct and not an indirect expense incurred in the completion of the Beverly boats. For the reasons hereinbefore advanced, it was not recoverable by Beverly under the theory that $4,000 was the agreed maximum overhead expense.

[5] The item of $1,593.10 represents interest on money supplied by Beverly to Rambo or the shipbuilding corporation to complete the Beverly boats pursuant to the agreement of November 21, 1942. Evidence was presented from which the court was warranted in concluding that interest on borrowed money is not a cost of a product—in this instance, the boats; that while it may affect the profit of the operations, it does not enter into the costs, and was not, therefore, a charge against the boats. Furthermore, the interest concerned only the relationship between defendants and the shipbuilding corporation in connection with their respective profits.

With reference to the item of $250, representing attorney's fees, respondents contend in their brief that as to this item no proof was offered in support of it as a charge "against anyone". In their reply brief appellants make no answer to this contention, and an examination of the record reveals no evidence in support of appellants' claim.

[6] The remaining item of $2,500 claimed as "supervision fees" must be regarded as a direct rather than an indirect cost, relating as it does solely to the Beverly boats. When the agreements between the

respective parties are read in their entirety it appears to us that this is another item which concerned only defendant Smith and the shipbuilding corporation when the occasion arrived for a division of profits earned under the so-called Smith or Beverly boat contract.

Finally, appellants assert that the trial court fell into error in refusing to award and credit to cross-complainants under the first cause of action of their cross-complaint the inventory value of two portions of the stock of parts not used as of the close of business July 15, 1943, the same being of the respective inventory values of $2,553.06 and $2,333.41. Appellants' claim is based upon the provision of paragraph 5 of the agreement of June 26, hereinbefore set forth.

[7] In its findings the trial court construed the foregoing provisions as requiring that Boat and Barge Corporation pay for any portions of the unused stock of parts which were similar to those parts used in the completion of the six Beverly boats or which might have been so usable. It is the contention of appellants that the phrase "which may be used to complete said contract", appearing in the foregoing provisions of the agreement, when read with the balance of the paragraph, must be held to mean that Boat and Barge Corporation was authorized and permitted to use, in the completion of the six Beverly boats, such stock of unused parts existing at the date of the execution of the agreement, and that thereafter, on July 15, 1943, when Boat and Barge would know what portion would be required in the completion of the six Beverly boats, to take an inventory of the stock and parts not used and pay for them. Respondents, on the contrary, contend that the intent and meaning of the above-mentioned phrase was that Boat and Barge Corporation was obligated to pay for only such of the materials and supplies in the yard as were usable either in the completion of the six Beverly boats or in the construction of the Boat and Barge Corporation ten boats, and the trial court so concluded. The materials and supplies on hand in the yard for which credit to cross-complainants was refused consisted of materials purchased for the aircraft rescue boats, and which materials were not usable after the Navy had changed the specifications on the six Beverly boats. It is noteworthy that because of the change in specifications a claim had been made against the Navy Department for the materials which were rendered unusable by reason of the change. Reading the foregoing provisions of paragraph 5 in the light of testimony received to show what the parties meant by what they said in the questioned paragraph, we are persuaded that the trial court was justified in holding that the phrase "any portion of said stock of parts, materials and supplies not used by North American as at the close of July 15, 1943, in the construction of said contract No. NX ss 18759" referred only to such materials as were usable in the completion of the Beverly boats and did not require that Boat and Barge Corporation pay for all materials at the yard regardless of their usability in the construction of the picket boats after the action of the Navy Department in changing the original specifications. It also appears that the Navy Department paid the sum of $1,700 for the unusable materials to defendant Smith or the Union Bank. In any event, the claim was recognized and approved by the Navy Department and payment thereunder was not made to Boat and Barge Corporation. Had it been the intention of the parties that the obligation of Boat and Barge Corporation was to pay Beverly for all materials in the yard, whether usable or unusable in the construction of the picket boats, obviously the phrase "which may be used to complete said contract No. NX ss 18759" would not have been employed.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

CALIFORNIA REPORTER

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SECOND SERIES

27 Cal.2d 322

ELLIS et al. v. BOARD OF EDUCATION OF SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

S. F. 17249.

Supreme Court of California, in Bank.
Nov. 27, 1945.

1. Schools and school districts 🔑72

In mandamus proceeding to compel board of education of unified school district to grant petitioner's application under Civic Center Act for permission to use high school auditorium for free public meeting, such act is controlling, and board's regulations or terms and conditions in conflict therewith are invalid. St.1943, pp. 344, 690, 691, §§ 2204, 19401, 19431–19439, 19433–19435, 19437, 19439.

2. Schools and school districts 🔑72

The fact that public meeting in school auditorium attracts people who otherwise would not enter school premises, thereby enlarging risk of injuries to persons attending, does not relieve school district of liability therefor as owner and manager of property, and it must assume expense of public liability insurance. St. 1941, pp. 690, 691, §§ 19401, 19439.

3. Schools and school districts 🔑72

A school district cannot require payment of rent for free meetings pursuant to Civic Center Act in school auditorium, nor require sponsors of such meetings to compensate district for ensuing costs of maintenance and management, but must bear burden of such costs. St. 1941, pp. 690, 691, §§ 19431–19439.

4. Schools and school districts 🔑72

The words "other necessary expenses", in section of Civic Center Act requiring that lighting, heating, janitor service, and other necessary expenses connected with use of school buildings be paid from school districts' special school funds, are not limited under ejusdem generis rule, to expenses for facilities and services similar to those enumerated, but cover all necessary expenses other than most common ones enumerated, so as to impose expense of public liability insurance, incident to use of buildings for free public meetings, on school districts, not sponsors of such meetings. St.1941, p. 691, § 19439.

See Words and Phrases, Permanent Edition, for all other definitions of "Other Necessary Expenses".

5. Schools and school districts 🔑72

A regulation, adopted by unified school district board of education, that parties requesting free use of school building auditoriums for public meetings, pursuant to Civic Center Act, furnish public liability insurance policies in district's name, was invalid. St.1941, pp. 344, 690, 691, §§ 2204, 19401, 19433–19435, 19437, 19439.

EDMONDS, J., dissenting.

Proceeding in mandamus by John B. Ellis and others to compel the Board of Education of the San Francisco Unified School District and others to permit petitioners to use the auditorium of the Evening High School of Commerce for a free public meeting without furnishing public liability insurance.

Writ granted.

Wayne M. Collins, of San Francisco, and J. Lamar Butler and Lawrence W. Allen, both of Los Angeles, for petitioners.

A. L. Wirin, of Los Angeles, amicus curiae on behalf of petitioners.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and Irving G. Breyer, all of San Francisco, for respondents.

TRAYNOR, Justice.

By this proceeding in mandamus petitioners seek to compel respondents to permit them to use the auditorium of the Evening High School of Commerce at San Francisco for a meeting open to the public without charge on Sunday afternoon, December 2, 1945, free of any requirement that they furnish public liability insurance.

In an earlier proceeding petitioners sought a writ of mandate to compel respondent board to grant them the use of the auditorium on an evening when regular classes were scheduled in the school building. This court denied their petition, holding that the board acted within its authority under Education Code, section 19433, St.1943, p. 691, in rejecting petitioners' application on the ground that the proposed meeting would interfere with scheduled school activities. Payroll Guarantee Association v. Board of Education, 27 Cal. 2d 197, 163 P.2d 433. Petitioners then requested permission to use the auditorium for the same purpose and with the same speaker on a Sunday afternoon, when there will be no school activities. Respondent board has granted their application on condition that petitioners furnish a public liability insurance policy in the name of the San Francisco Unified School District in the sum of $100,000 for each injured person and $400,000 for each accident. In the earlier proceeding, petitioners declared that they would meet that condition under protest. They now contend that such a condition would prevent them from holding the meeting, and have submitted affidavits to show that although they have applied to many insurance companies, none has been willing to issue them a policy.

On September 28, 1943, respondent board adopted the following resolution: "Resolved: That whenever the use of school property is granted to an outside organization under the provisions of Section 19431 of the California Education Code, no charge shall be made for heating, lighting, janitorial or other services, except as set forth under the provisions of section 19438 of the California Education Code,[1] and the cost of such services as noted shall be provided for out of school district funds. Further resolved: That when an auditorium or gymnasium is requested, a public liability insurance policy shall be furnished in the name of the San Francisco Unified School District in the sum of $100,000/$400,000, except that the requirement for said policy may be waived for organizations, clubs or associations organized for general character building, welfare purposes, or in connection with the national war effort. Further resolved: That all rules and regulations of this Board in conflict with the above are hereby repealed."

[1] Respondent board contends that this regulation is authorized by sections 2204, 19401, 19433, 19434, and 19435 of the Education Code, quoted in the margin.[2] Petitioners contend that the regulation is invalid on the grounds that it violates the basic purpose of the Civic Center Act (Education Code, §§ 19431–19439) and conflicts with sections 19437 and 19439 of the Education Code, quoted in the margin.[3] Petitioners have made their application under the Civic Center Act. That act is

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[1] This section authorizes a charge for the use of schoolhouses, property, and grounds for meetings at which admission fees are charged.

[2] "2204. The governing board of any school district shall: (a) Prescribe and enforce rules not inconsistent with the law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction."

"19401. The governing board of any school district may grant the use of school buildings or grounds for public, literary, scientific, recreational, or educational meetings, or for the discussion of matters of general or public interest upon such terms and conditions as the board deems proper, and subject to the limitations, requirements, and restrictions set forth in this chapter."

"19433. The use of any public school house and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes and shall in nowise interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State."

"19434. The management, direction, and control of the civic center is vested in the governing board of the school district."

"19435. The governing board of the school district shall make all needful rules and regulations for conducting the civic meetings and for such recreational activities as are provided for in this chapter and which aid, assist, and lend encouragement to the activities."

[3] "19437. The use of schoolhouses, property, and grounds pursuant to this chapter shall be granted free."

"19439. Lighting, heating, janitor service, and the services of the person when needed, and other necessary expenses, in controlling, and regulations or terms and conditions made by the board in conflict therewith are invalid. First Industrial Loan Co. v. Daugherty, 26 Cal.2d 545, 550, 159 P.2d 921; Whitcomb Hotel, Inc., v. California Emp. Comm., 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405; Boone v. Kingsbury, 206 Cal. 148, 161, 273 P. 797.

Respondents have stated that the district is generally not insured against public liability with respect to its school buildings and grounds, but that they deem such insurance necessary, with certain exceptions, when schools are used for the purposes specified in the Civic Center Act. We are here concerned, not with the board's authority to insure the district against such liability (see Education Code, § 1029) or with the exercise of its discretion in determining whether such insurance is necessary, but only with the question whether the board can require others to pay the costs of such insurance.

Any inquiry into the validity of the regulation must consider the nature of the insurance protection that respondent board requires petitioners to furnish. Respondent board states that claims might be made against it for injuries resulting from an alleged defective condition of the school building and its equipment or of the school grounds, or from alleged inadequate exits in case of fire or other emergency, or from an alleged failure to appoint custodians to maintain order in connection with the meeting. By way of illustration it has filed a policy recently furnished by another association in connection with an application for the use of the Galileo High School Auditorium. That policy names as the insured the "San Francisco Unified School District and/or Individual Members of San Francisco Board of Education while acting within the scope of their duties as such" and also the association. The board's regulation, however, requires only that the policy be furnished in the name of the school district. The coverage is defined as follows: "Coverage A—Bodily Injury Liability—To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the hazards hereinafter defined. Coverage B—Property Damage Liability—To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the hazards hereinafter defined." The hazards are defined as follows: "Division 1. Premises — Operations — The ownership, maintenance, or use, for the purposes stated in the declarations, of the premises, and all operations during the policy period which are necessary or incidental to such purposes. Division 2. Elevators—The ownership, maintenance, or use, for the purposes stated in the declarations, of any elevator therein designated." The company also agreed to "defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent."

[2] The policy required would not insure the school district against injury to the school building or other property of the district, or against liability for injuries resulting from conduct of those attending or protesting the meeting for which respondents would not be responsible. It would insure the district only against liability for injuries to others arising out of the hazards incident to the school district's ownership and management of the building, schoolgrounds, and equipment. Such hazards would arise from the failure of the district to maintain the premises and equipment in a reasonably safe condition or to fulfill its duties in managing the property. In effect respondents demand insurance protection against their liability to others in the event they fail to fulfill their own duties as owners or managers of the school property. The cost of that protection is a cost of maintenance and management. In the absence of insurance, damages to any one entitled to recover against the school district for its failure to fulfill its duties would be paid by the district and the district would also bear the cost of defending the actions brought against it. If a district

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connection with the use of public school buildings and grounds pursuant to this chapter, shall be provided for out of the county or special school funds of the respective school districts in the same manner and by the same authority as similar services are provided for."

provided for such risks by maintaining reserves to meet claims for injury as they arose, the current contributions to such reserve funds would be costs of maintenance and management just as would the costs of upkeep and repair to minimize the risk of injuries. Similarly, insurance premiums on a policy protecting the district against liability for failure to fulfill its duties as to maintenances and management of its property are part of the cost of such maintenance and management. If a public meeting in a school auditorium attracts people who otherwise would not enter the premises, and therefore enlarges the risk of injuries, the district is not thereby relieved of liability as owner and manager of the property. In that capacity it must assume the expense of insurance as it does the expense of lighting, heating, and janitorial service.

[3] Although such costs would enter into any rental, the school district cannot require the payment of rent for meetings pursuant to the Civic Center Act, if admission fees are not charged. Nor can it require the sponsors of a meeting to compensate the district in any other manner for costs of maintenance and management ensuing from the holding of a meeting in a school building. The district must bear the burden of costs attendant upon public meetings in school buildings for the purposes specified in the Civic Center Act, just as it bears the burden of costs of regular school activities. The Legislature, in the Civic Center Act, explicitly makes it the duty of the school district to grant "free" the use of schoolhouses, property, and grounds for the purposes stated in the act. § 19437 The use of such property would not be free if the school district required the sponsors of a meeting to share the costs of maintenance and management of the buildings and grounds or any part thereof. The Civic Center Act not only provides school buildings free of charge but facilitates the use of such property for the public purposes specified in the act, by providing in section 19439 that the school district shall bear the expenses attendant upon the public use of the property.

[4] If the right to use a school building unencumbered by expenses for public liability insurance were not already established by section 19437, it would follow from section 19439, whose purpose it is to relieve those who hold a meeting in a school building pursuant to the Civic Center Act of all expenses incident to the use of the building. Section 19439 charges the district not only with the expenses for the enumerated conveniences but with all "other necessary expenses, in connection with the use of public school buildings." Respondent board contends that under the ejusdem generis rule, the words "other necessary expenses" relate only to expenses for facilities and services similar to those enumerated. It seems clear, however, that the Legislature enumerated the expenses that most commonly occur, adding the accompanying phrase "other necessary expenses" to cover whatever necessary expenses might arise other than the most common ones. Its enumeration of the most common ones carries no implication that other necessary expenses should be borne by the users of a school building merely because they do not resemble the ones enumerated. The qualifying adjective "necessary" establishes the kinship between the expenses enumerated and other expenses, and therein lies the key to the Legislature's intention that all necessary expenses are to be borne by the district. The theory that "necessary" designates only those expenses that bear a resemblance as well as a kinship to those enumerated is hardly tenable, for it would lead to an imposition of necessary expenses upon the users of a school building that would in effect nullify their right to the free use of the building. The import of "other necessary expenses" is as broad as "all necessary expenses," Education Code, § 24410, which the district must bear if school property is used for community recreation pursuant to chapter 4, division 12 of the Education Code. The Legislature expressly provided in that chapter, § 24408, that the use of the school property for recreation shall not restrict or otherwise affect the use of the property under the Civic Center Act, thus making the first use subordinate to the second. Yet all necessary expenses incident to recreational uses of school property must be borne by the school district. Hence the Legislature could hardly have intended to impose on the sponsors of a meeting in a school building under the Civic Center Act any of the necessary expenses incident to the use of the building for that meeting. If the expense of public liability insurance is necessary to such a meeting, it must be borne by the school district under section 19439.

[5] This construction of the Civic Center Act is compelled not only by its wording but by the purpose of the Legislature to make school buildings centers of free public assembly insofar as such assembly does not encroach upon the educational activities, which constitute the primary purpose of the schools. The purpose of the Legislature would be frustrated if petitioners' right to the free use of the school auditorium were nullified by the requirement that they furnish public liability insurance. It follows that the regulation adopted by respondent board is invalid.

Since the board cannot require the furnishing of a policy of public liability insurance as a condition for the use of a school auditorium under the Civic Center Act, it is unnecessary to consider petitioners' arguments that the exemptions authorized in the regulation are unreasonably discriminatory and would enable the board to act as a censor by imposing the requirement arbitrarily upon those groups whose views it disapproves.

Let the peremptory writ issue forthwith.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the views expressed in the opinion prepared by Mr. Justice TRAYNOR, but I am also of the opinion that the writ should issue compelling the board of education to grant the permit for the use of the auditorium without the requirement that petitioner furnish to said board a policy of public liability insurance, for the reason, that in my opinion, the attempted classification of organizations contained in the resolution adopted by said board on September 28, 1943, constitutes an unreasonable and discriminatory regulation which purports to repose in said board unlimited discretion to determine which "organizations, clubs or associations," are "organized for general character building, welfare purposes, or in connection with the national war effort," and thus may be exempted from the requirement of furnishing such a policy. Hence, the power to censor is thus lodged in the members of the board. This opens the door to permit the board to discriminate in favor of organizations and groups which they like and against those they do not like. Such discrimination is in direct violation of the constitutional guarantees of freedom of speech and assembly. The constitutional mandate which confers these rights contemplates that they should be exercised without discrimination. It does not mean that they may be exercised freely by some and that others may exercise them only after complying with burdensome restrictions, even if such restrictions are such that may be complied with. On the right to give expression to ideas there should be no restrictions except when elements of clear and present danger exist.

It may be true that the Legislature was under no constitutional obligation to dedicate school buildings as civic centers in which citizens and groups may hold public meetings, but once the Legislature made that dedication, the use to be made by the people in conducting public meetings at such civic centers may not be subject either to censorship, arbitrary action or unconstitutional restrictions by the governing boards of education.

The constitutionality of a regulation having the tendency to abridge freedom of speech or assembly should be judged by the opportunities for censorship and discrimination inherent in it, and not alone by the regulation in actual administration. In Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352, in discussing the provisions of a statute regulating the solicitation of funds by religious organizations, the Supreme Court said:

> "But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

See, also, Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; and Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81.

When the case of Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, was pending before the Supreme Court of the United States, the American Bar Association's Special Committee on the Bill of Rights filed an amici curiae brief in support of the contention of the Committee for Industrial Organization. A summary of this brief is contained in 25 American Bar Association Journal commencing at page 7. After analyzing the decisions relative to the right of cities and public boards to exercise control over public property, the brief contains the following discussion which is applicable to the problem here involved. I quote from page 74 of said Journal:

"The true analogy to government ownership of parks and other property dedicated to public uses is furnished by a public utility, which must give service to all so long as this is consistent with the performance of its functions. It can regulate, but not discriminate. It can refuse to deal with those who interfere with its functions or with other users of its service, or when the available services are exhausted. We already recognize this principle as applied to governmental substitutes for private utilities. Thus a municipal street railway can eject 'drunks' and set a limit on overcrowding, but nobody contends that it can refuse to transport members of unpopular groups even if other passengers express a dislike for them.

"In the same way, the parks can be regulated in a manner consistent with their purposes, one of the most important of which is the right of free assembly therein for public discussion at reasonable times and places. Disorderly persons can be excluded, because they interfere with peaceable users of the parks like drunks in the municipal trolley car. Open-air meetings can be assigned to a particular park or a particular area, just as passengers can be assigned to particular seats or told to move away from the door. If all the available space is occupied and there is no more room for meetings, permits can stop, just as a full municipal street car can refuse to take on passengers. But we submit that law-abiding Democrats or Republicans or Communists or unionists or members of the American Civil Liberties Union can no more be constitutionally kept out of empty park spaces reasonably suitable for open-air meetings than they can be ejected from an empty municipal trolley car, or be refused current from a municipal power plant.

"In sum, a city is required to furnish its municipal services to all, subject only to reasonable rules. Surely this principle is no less applicable when those services include the making available of space for open-air meetings, in pursuance of the right of assembly that is guaranteed by the Constitution of the United States.

"The basis of the right of assembly is the substitution of the expression of opinion and belief by talk rather than force; and this means talk for all and by all. * * *"

The First Amendment to the Constitution of the United States was adopted because of the fear of the people that those in power might attempt by law to prohibit the free exercise of the right to worship or abridge "freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The people of that generation had witnessed the abuse of power by many of those in whom it was reposed. Washington knew, as few men did, that the inherent danger which threatened the overthrow of constitutional liberties was, as he said., "the love of power and proneness to abuse it, which predominates in the human heart," ever attempting the administrators of law and justice to override the constitutional guarantees of human rights. It finally required the adoption of the Fourteenth Amendment to extend to the people of the several states the rights guaranteed by the First Ten Amendments. But still the abuse of power continued and will continue so long as those who are permitted to exercise it are swayed by considerations other than those of justice, fairness and equality.

It has been said that: "Power is a bell which prevents those who set it pealing from hearing any other sound." In the last analysis it is for the courts to declare the extent to which administrative power may be exercised in the light of the constitutional and statutory provisions fixing the limits of such power.

EDMONDS, Justice.

Considering the record in this proceeding, I find no basis for the conclusion that the court is not concerned "with the board's authority to insure the district against * * * [public liability with respect to its school buildings and grounds when used for purposes specified in the Civic Center Act] (see Education Code, § 1029) or with the exercise of its discretion in determining whether such insurance is necessary, but only with the question whether the board can require others to pay the costs of such insurance." In connection with the demands of the petitioner for the use of the auditorium, there had been filed with the Board of Education an affidavit made by Paul Schnur in behalf of various organizations affiliated with the San Francisco

Industrial Union Council and 13 others, including the San Francisco Federation of Voters Leagues and the National Association for the Advancement of the Colored People. There is wide-spread conviction among the thousands of members in these organizations, the affiant declared, that the program of Gerald L. K. Smith is intended "to incite to violence by setting race against race, religion against religion, white against black, in an atmosphere of hatred and violence * * * all in order to create riots, terror and chaos * * *." According to the affidavit of Schnur, the people represented by him "have read of the riots which followed close upon * * * [the] public meetings and speeches [of Smith] in such cities as Detroit, New York and Los Angeles; * * * [and] will not allow Smith to conduct a campaign of terror and violence without protest * * *."

With this affidavit before it, the Board of Education was confronted with the question as to its liability for injury to persons or property in the event that it granted the application for the use of the school auditorium and there was a riot or other violence. Mr. Justice TRAYNOR discusses that liability solely from the standpoint of responsibility for negligence in connection with the maintenance or use of the building. But there may be liability without fault. The doctrine is applicable, it is said, "where, even though the defendant's conduct is socially desirable, the danger which it threatens to others is unusually great, and will be great even though the enterprise is conducted with every possible precaution. Because of the unusual gravity of the risk, he is held liable for acts which in themselves are regarded as reasonable. The basis of liability is his intentional behavior in exposing the community to such a risk. The conduct which is dealt with here occupies a middle ground; it is conduct which has so much social utility that it will not be treated as wrongful in itself, and will not be prohibited or enjoined in advance, but not so much that the defendant may be allowed to carry it on without liability at the expense of actual damage to his neighbors." Prosser on Torts, p. 429.

The application of the organization sponsoring Smith to use the school property came to the Board of Education with at least a prima facie showing that there had been riots at meetings of a similar character held in other cities and the consequent possibility of suits for damages in the event of violence at a meeting addressed by Smith in the Commerce High School. Under these circumstances, the requirement of the board for public liability insurance is not an unreasonable one. A majority of the court impliedly, if not directly, so hold, but they say that if such insurance is necessary, the premium for the policy must be paid by the school district as an expense specified in section 19439 of the Education Code. However, the Board of Education has no authority to procure public liability insurance with full coverage against responsibility for injuries to persons or property. Under the Education Code the district may only insure its liability and the personal liability of the members of the board "for damages by reason of death, or injury to person or property, as the result of any *negligent* act." (Italics added). § 1029. Accordingly, by the decision of this court, the Board of Education is required to allow the use of school property for a meeting which, there is reasonable ground to believe, may result in violence or riot, but it cannot protect its members or the district with liability insurance for the benefit of the public except as a private undertaking at private expense.

No one has an absolute right to hold a meeting in a public school, and the Legislature has declared that the use of any public school house and grounds "is subject to such reasonable rules and regulations as the governing board of the district prescribes." Education Code, § 19433. Free speech is one of our most cherished constitutional rights but it is subject to certain limitations. For example, as Mr. Justice Holmes laconically stated, the right of free speech does not permit one falsely to cry "Fire" in a crowded theatre. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470.

For these reasons, in my opinion, the writ of mandate should be denied.

27 Cal.2d 349

HERZOG v. CAPITAL CO. et al.

L. A. 19172.

Supreme Court of California, in Bank.
Dec. 11, 1945.

1. Limitation of actions ⇨100(6)

Where fraud in corporation's local manager's representations that dwelling house sold by corporation was in perfect condition was not discovered by purchaser, because of absence of hard rains disclosing leaks due to structural defects, until less than three years before filing of purchaser's action against corporation for fraud, action was not barred by limitations.

2. Fraud ⇨58(2)

In action for fraud in sale of dwelling house to plaintiff, evidence warranted conclusion that defendant corporation's local manager made positive representations that although there had been some leaks, house had been repaired and was "in perfect condition in all respects," with actual knowledge of their falsity or in a manner not warranted by information he possessed.

3. Fraud ⇨11(1)

Fraudulent representations of corporate vendor's local manager that a dwelling house was "in perfect condition in all respects" were actionable as against contention that such representations were mere "sales talk".

4. Principal and agent ⇨148(4), 156

A defrauded purchaser is not precluded by provision in agreement of sale that there were no understandings excepting those contained therein from rescinding and pursuing innocent vendor far enough to secure a return of consideration, but such a provision will relieve honest vendor from liability for damages arising from fraudulent representations of his negotiating agent.

5. Principal and agent ⇨156

The rule that a provision in agreement of sale that there were no understandings excepting those contained therein will relieve an honest vendor from liability for damages arising from fraudulent representations of his negotiating agent applies only to recovery of damages based upon misrepresentations of agent and does not exempt vendor from liability for his own conduct.

6. Principal and agent ⇨178(1)

Where vendors' agent knew of defective condition of house and was acting within scope of his authority when he caused house to be refinished and newly painted thereby concealing from purchaser structural defects causing leaks, vendors were charged with agent's knowledge, since knowledge of agent which he is under duty to disclose to his principal is to be imputed to the principal.

7. Fraud ⇨17

Where contract for sale of house provided that there were no understandings excepting those contained therein, but vendors were charged with agent's knowledge that refinishing and painting effectually concealed structural defects from purchaser, vendors' failure to reveal hidden and material facts concealed by their agent of which they had knowledge, constituted fraud. Civ.Code, § 1572, subd. 3.

8. Fraud ⇨17

A principal under positive duty to make disclosure cannot escape liability for failure to do so by relying on contract provision to effect that there are no other representations except those contained in written agreement.

9. Fraud ⇨59(1)

In action for fraud in sale of dwelling house, court properly considered reasonable market value of the house in determining its actual value and fixed damages accordingly notwithstanding reasonable market value is not necessarily actual value. Civ. Code, § 3343.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Arthur L. Herzog against the Capital Company and another for fraud and deceit in the sale of a dwelling-house to plaintiff. From a judgment for plaintiff, defendants appeal.

Affirmed.

Prior opinion, 150 P.2d 218.

Louis Ferrari, of San Francisco, and Edmund Nelson, G. L. Berrey, and Hugo A. Steinmeyer, all of Los Angeles, for appellants.

Monroe & McInnis and C. Rupert Linley, all of San Diego, for respondent.

GIBSON, Chief Justice.

In June, 1938, defendants, acting through their local agent, Yakel, sold plaintiff a house in San Diego for $9,500, representing that it was in "sound condition" and "perfectly intact." The house began to leak badly during a heavy rain in January, 1940, and a subsequent inspection disclosed that the leakage was due to the use of defective materials and improper bracing. This action for damages for alleged fraud in the sale of the house resulted in a judgment in favor of plaintiff in the sum of $3,500.

[1] Defendants list several grounds which they contend require a reversal of the judgment. First, they claim that the action is barred by the statute of limitations because it was not commenced within three years after the date of the sale and that the pleading and proof as to the discovery of the fraud within the statutory period is insufficient. The sale was made in June, 1938, and the fraud is alleged to have been discovered in January, 1940. The action was filed within three years thereafter. The complaint alleged that when plaintiff inspected the house, it had been freshly painted thereby concealing from him, or anyone else making a reasonable inspection of the premises, the defective condition which caused the leaks, and that since there were no heavy rains until January, 1940, he did not sooner discover that the house leaked. It was further alleged that during the heavy rains in 1940, the house commenced to leak and that plaintiff thereupon made an investigation and discovered that the house was not in sound condition as represented. The facts pleaded relative to the time and circumstances of the discovery of the fraud are clearly sufficient. The allegations were amply supported by the evidence, and the court was justified in finding that the statute of limitations had not run. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 436-444, 159 P.2d 958; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809.

[2] It is also argued that the representations, which were made by Yakel, local agent for defendants, were not fraudulent as there is no evidence to support the finding that he had knowledge of the defective condition of the house. The house was built in 1926 and sold by I. M. Schulman to defendants in 1937. Schulman testified that during the ten years he occupied the premises, he constantly had trouble with water coming into the house during rainstorms and that although he had spent several thousand dollars to prevent the leaks he had been unable to do so. At the time the sale was made to defendants Schulman informed Yakel that the house leaked and the sale was made "as is" with the express understanding that there should be no "come back" on Schulman by reason of the defective condition of the house. After defendants obtained possession, Yakel employed a contractor to make certain repairs. While the work was in progress, there was a heavy rain and the house leaked badly. It thus appears that Yakel had knowledge of the prior history of the house and knew of its defective condition. When Yakel conducted plaintiff through the house in June, 1938, it had been newly painted inside and outside. Plaintiff noticed marks of plaster patches and on inquiry was informed by Yakel that there had been some leaks but that the house had been repaired and was "in perfect condition in all respects." Yakel either made these positive representations with actual knowledge of their falsity or in a manner not warranted by the information he possessed.

[3] Defendants' assertion that the representations were mere "sales talk," and therefore not actionable, is obviously without merit.

[4, 5] It is claimed, however, that the trial court erred in holding defendants liable because the agreement of sale expressly provided that there were no promises, representations, verbal understandings or agreements excepting those contained therein.

A defrauded purchaser is not precluded by a provision of this kind from rescinding and pursuing the innocent seller far enough to secure a return of the consideration paid. Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760; Lozier v. Janss Investment Co., 1 Cal.2d 666, 669, 36 P.2d 620; Greenberg v. DuBain Realty Corporation, 2 Cal.2d 628, 629, 42 P.2d 628; Graham v. Los Angeles First N. T. & S. Bank, 3 Cal.2d 37, 43, 43 P.2d 543; Weiner v. Roof, 10 Cal.2d 450, 452, 453, 74 P.2d 736; Rest., Agency, §§ 259, 260. Such a provision, however, will relieve an honest seller from liability for *damages* arising from the fraudulent representations of his negotiating agent. Harnischfeger Sales Corporation v. Coats, 4 Cal.2d 319, 320, 321, 48 P.2d 662; Schroeder v. Dickinson & Gillespie Corporation, 6 Cal.App.2d 175, 179, 44 P.2d 425; see Speck v. Wylie, 1 Cal.2d 625, 627, 628, 36 P.2d 618, 95 A.L.R. 760; Gridley v. Tilson, 202 Cal. 748, 262 P. 322; Rest., Agency, § 260. This rule, of course, applies only to recovery of damages based upon the misrepresentations of the agent, and it does not exempt the principal from liability for his own conduct.

[6-8] Although plaintiff was notified by the contract provision that Yakel had no authority to make representations or enter into verbal understandings in connection with the sale of the property, it is clear that Yakel knew of the defective condition of the house and that he was acting within the scope of his authority when he caused it to be refinished and newly painted, thereby effectually concealing the structural defects. The knowledge of an agent, which he is under a duty to disclose to his principal, is to be imputed to the principal (Rest., Agency, § 275), and accordingly, defendants are charged with Yakel's knowledge. Under these circumstances they had a duty to reveal the hidden and material facts concealed by their agent and of which they had knowledge, and their failure to disclose them constituted fraud. Civ.Code, § 1572, subd. 3; Rothstein v. Janss Investment Corporation, 45 Cal.App.2d 64, 113 P.2d 465; Clauser v. Taylor, 44 Cal.App.2d 453, 454, 112 P.2d 661; Kretzschmar v. Janss Investment Co., 126 Cal.App. 698, 702, 14 P.2d 1069; see Rest., Torts, § 550; Rest., Contracts, § 472, subd. (b) and comment b. With respect to this positive duty of disclosure plaintiff could rely on Yakel's actual as well as ostensible authority, for the provision in the contract related only to the exclusion of liability for representations and verbal understandings. A principal under a positive duty to make a disclosure cannot escape liability for failure to do so by relying on a contract provision to the effect that there are no other representations except those contained in the written agreement. Rothstein v. Janss Investment Corporation, 45 Cal.App.2d 64, 113 P.2d 465.

[9] Finally, defendants claim that there was no proof of the *actual* value of the property and that therefore there was no evidence to support the findings on damages. Plaintiff was entitled to recover the difference between what he paid for the property and its actual value, together with any additional damages arising from the particular transaction. Civ. Code, § 3343. There was testimony that the reasonable market value of the property was $4,500. While reasonable market value is not necessarily actual value, it is not improper for the court to consider the former in determining the latter. The court found the property was worth less than $6,000 and fixed the damages in accordance with the measure set forth in the statute.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

27 Cal.2d 354

Ex parte DE LA ROI.

Cr. 4558.

Supreme Court of California, in Bank.

Dec. 11, 1945.

1. Appeal and error ⊂⇒1017

The Supreme Court is not bound by findings of fact made by a referee, but the referee's conclusions are entitled to more consideration than the mere testimony of a witness.

2. Habeas corpus ⊂⇒85(1)

In original habeas corpus proceedings on ground that conviction of murder was obtained by perjured testimony, evidence sustained referee's findings that no such perjury was committed.

3. Habeas corpus ⊂⇒85(1)

One seeking release on habeas corpus must prove his case by a preponderance of the substantial credible evidence.

◆

Original proceeding in the matter of Wilson De La Roi on habeas corpus.

Writ discharged and petitioner remanded to custody.

Alphonse Matthews, of Los Angeles, and Rosalie S. Asher, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., John Q. Brown, Dist. Atty., of Sacramento, and Albert H. Mundt, Deputy Dist. Atty., of Represa, for respondent.

EDMONDS, Justice.

Wilson De La Roi was found guilty of the murder of William Deal and the judgment of conviction imposing the death penalty was affirmed. People v. De La Roi, 23 Cal.2d 692, 146 P.2d 225, 151 P.2d 837. Later, upon a petition in behalf of De La Roi asserting that his conviction was obtained upon perjured testimony offered by the State with the knowledge that it was false, this court issued a writ of habeas corpus. After the filing of the return to the writ, a referee was appointed to take testimony upon the issues of fact presented by these pleadings. The petitioner has excepted to the referee's findings, which are adverse to him in every particular, and the question now presented for decision concerns the sufficiency of the evidence to support the charge concerning the violation of constitutional rights.

The allegations of the petition are that "said perjured testimony was that of James Allen and Stanley Robinson, who appeared * * * as material witnesses for the * * * State of California; that said false testimony was procured by Stephen B. Nowakowski, then * * * Secretary to the Warden of Folsom State Prison, by means of promises of special privileges and immunities to said James Allen and Stanley Robinson; that said testimony was known by Stephen B. Nowakowski, acting as said Secretary and as a representative of the People of the State of California, to be false. * * * That applicant did not know, and could not with due diligence have ascertained, the facts hereinabove set out concerning the knowing use of said perjured testimony at the time that his appeal was taken to this Honorable Court." As a part of the petition, there are supporting affidavits by Allen and Robinson.

The killing of Deal occurred in the State Prison at Folsom, where he and De La Roi were fellow convicts. With the exception of Lawrence C. Roosevelt, laundry superintendent, who did not see the stabbing, each of the persons who testified at the trial of De La Roi concerning the circumstances under which the crime was committed was an inmate of the prison. As a witness for the State, Allen declared that he was playing a game of checkers with Robert M. Trauger in the laundry, where both men were employed. He saw De La Roi walk into the room and step over to Deal, who was making coffee. No one else was near. As Deal bent down, De La Roi "sliced" him with a knife. The witness recounted Deal's last acts, and the departure of his assailant from the laundry.

Allen's testimony was corroborated substantially by the testimony of Trauger. According to Trauger, he and Allen were playing checkers when the latter said, "Oh, look." Trauger turned and saw Deal coming towards them; De La Roi was close behind. De La Roi had a knife in his hand, and it appeared as though he was striking Deal, who fell near their feet.

Allen's account of the fatal stabbing is now quite different from that which he gave to the jury. In his affidavit he asserted: "I was in the laundry playing checkers with Robert M. Trauger, also known as Dutch. When William Deal was stabbed I did not see it. Steve Nowakowski called me into his office. At first I told him I did not see it. Then he let me go. The second time I went up there he told me he was going to charge me with a subpoena. So I said, 'All right I will testify against De La Roi.' Then he showed the maps and how it happened. He told me to tell the Court the story of the fight that he had given me. He told me how De La Roi was supposed to have gone through the door and how he was supposed to have held the knife. He says after the court we will protect you all we can and we will give you a break. The first time I saw William Deal was when he was being carried out. After this I talked to Dutch. He told me he knew nothing about it any more than I did but that he had talked to Nowakowski and was going to go along and tell any story that Nowakowski wanted. The map that Nowakowski showed me was a large one like they had in court."

At the referee's hearing, Allen declared that he was in the laundry playing checkers with Trauger at the time of the killing, that the assault took place about 10 to 15 feet in front of him, and that Deal fell at a point about four feet from the table at which he was playing checkers, but he denied hearing any unusual noise. He also said that he did not see De La Roi in the laundry. He explained that, "when a man is playing checkers he will watch his game," and he did not hear any noise because "it was all done quietly." He did not see Deal until some inmates turned him over.

Allen was then confronted with several statements made to the prison authorities which were in accordance with his testimony at the trial. He admitted making the statements, but told the referee that Nowakowski by means of threats and promises, had induced him to falsely accuse De La Roi of the crime.

Admittedly, after Deal was stabbed, Allen, Robinson and Trauger were removed from the cell block and given quarters at the sewer plant on the penitentiary grounds where they received special privileges, People v. De La Roi, supra, 23 Cal.2d at p. 696, 146 P.2d 225, 151 P.2d 837. After he was living at the sewer plant, Allen told the referee, Nowakowski questioned him about the crime. When he said he knew nothing, Allen declared, Nowakowski threatened to subpoena him and offered him a "break" if he would testify against De La Roi. Not knowing what Nowakowski meant by "subpoena," he was put in fear because he "thought maybe it was the same thing as being locked up forever." Accordingly, Allen testified, he agreed to be a witness against De La Roi, and testify in the manner suggested by Nowakowski. Also, Allen told the referee, since the trial neither De La Roi nor his brother, or any of their friends, has threatened him in any way. He said he recanted his testimony because of the treatment of the prison officials after the trial: "they threw me in the tower like a pig. They gave me plenty of hell down there * * * in that hole. * * * That is why I am doing it. When they promise you anything, they should keep their promise."

On cross-examination Allen admitted that since giving his testimony he has had bad treatment from both the inmates and the officers. He has been in fear, he said; "anybody would be." He admitted that after the referee was appointed, at an interview in the office of the Captain of the Guard at San Quentin Prison, when asked, "[the inmates have] made it kind of tough on you since you have testified, haven't they?" he replied affirmatively and added: "I don't want to go through anything like that again." His life in prison since he testified for the State has been worse than unpleasant, he said; "it has been hell."

It appears that this interrogation was occasioned by his affidavit which is attached to the De La Roi petition. He made the affidavit recanting his prior testimony, he told authorities at the San Quentin interview, because of a desire to avoid harm which might come to him as a result of his testimony.

Robinson testified at the trial of De La Roi that just before the killing of Deal he was standing at a drinking fountain two to three feet from the east wall of the laundry building. The fountain was close to "pretty good sized windows," covered with wire screen having a mesh of three-quarters or one inch. He saw De La Roi and one Eddie Walker, whom he had heard talking in loud voices with some other inmates a short time before, enter the laundry. Suddenly he heard a scuffling of feet and looking through the window, he saw De La Roi with a knife in his hand, stabbing "at this other fellow." Robinson left and went to the baseball diamond. In a few minutes De La Roi came out of the laundry with a bundle in his hand, which he dropped into a barrel located about eight feet from where the witness was then sitting. Eddie Walker met De La Roi there and they seemed excited. Robinson also testified that his treatment had been no different from the time of the killing than before; that he occupied the same quarters in Number One Building.

In his affidavit which is attached to the petition for a writ of habeas corpus Robinson said: "I stopped by the laundry to get a drink of water. After I got my drink I saw some men running out of the laundry. Immediately I judged there was some trouble, but at that time I did not know exactly what the trouble was, but I was told there was a stabbing and I wanted to get out of the way, so I left the fountain and returned to the chapel. I watched from the chapel and saw a man being carried out of the laundry. For the first time I realized that a murder had been committed while I was at the drinking fountain * * * as a matter of fact no one could see into the laundry through these windows when the sun shines on them, even when the sun is not shining on them it was hard to see through because there were two screens in front of the glass. At this particular time of the day the sun was shining on them, which made it that much harder to see inside the laundry."

Robinson alleged in his affidavit that he continued to deny that he had witnessed the killing despite Nowakowski's threat that if he "didn't come clean" he "would be forced to testify anyway." He was taken to the sewage plant and given quarters there. Five days later, Nowakowski came to the plant and said that "he would fix that up and instruct me and what I said would be coached by him." According to the affidavit Robinson related in detail how Nowakowski told him to testify. The reason why he perjured himself, said Robinson, is that Nowakowski "promised he would help out in getting a year good time" and that Nowakowski used "some word, I think it was 'subpoena' * * * and this scared me. * * *" Robinson, in conclusion, declared that he did not witness the homicide and that he could not have seen it from the position where he was standing.

In an interview at San Quentin Prison before the referee's hearing, Robinson gave a different reason for the change in his testimony. Nowakowski did not use the word "subpoena," said Robinson, but informed him that if he would not testify to what he had seen while standing at the drinking fountain, "they would put a perjury and force me in the court"; that he testified to seeing De La Roi stab Deal for the additional reason that he was promised "some kind of credits or something." Yet Robinson admitted that nothing had ever been done for him because of his testimony; he had been granted a parole prior to the killing and he was a "short timer."

After he testified against De La Roi, Robinson told the officials who were interrogating him, prison life was quite different than before. Some of the inmates would say of him, "There goes the man that put the finger on the man in the death row." That made him feel quite concerned and upset. Also, he said, he "had a little fear, like going in a show or something like that, maybe I thought they would try to bring some harm to me, or something like that. * * * When the man is still on Death Row, why shouldn't I have fear?"

As to the occurrences at the time Deal was stabbed, Robinson asserted that he was standing at the fountain "when it happened"; that he heard scuffling and looked towards the window, but could not see anything because the sun was shining on the glass; he said one could not see into the laundry from the position he occupied when the sun was shining on the window. He stated that after he heard the scuffling some men ran out of the building, and "when they ran past me I went with them."

Robinson's testimony before the referee is that he went from the chapel to the fountain. "When I got a drink I heard some scuffling, and naturally I looked up right away, and I noticed that there was either some trouble, or something, that occurred, so I left, and got out of the way, and went on back to the chapel." He denied seeing anyone stab Deal. On cross-examination, he testified that the windows of the laundry face east, and that as the sun was shining on the window glass, he could not see into the building. He gave false testimony at the trial, he said, because he was told that if he didn't appear in court, they would serve a subpoena and force him to go to court, and he thought it might affect him." Also, he declared, he was "promised some good time" in case he "would go and take the witness stand." On cross-examination he explained that he used the word "perjury" in his interview at San Quentin because he could not remember the word "subpoena."

He has changed his testimony, he told the referee, in order to clear his troubled conscience. It appears that after the trial of De La Roi he was released from prison but is now an inmate of San Quentin because of a violation of the conditions of his parole. He explained that upon his return to prison, he told Johnny De La Roi, the petitioner's brother, and an inmate of San Quentin, that he had testified falsely at the trial, and asked if he could do anything "to clarify" himself. He denied being afraid of Johnny De La Roi, or that the latter had threatened him after they met at San Quentin. He explained: "all the time that I was here, I didn't feel right. I couldn't sleep and I had little fear in several ways, and I had a fellow go up and talk to Johnny first—that is, to see would he permit me to come up and talk to him." This was not fear of Johnny De La Roi but "fear generally," said Robinson. "I figured I didn't feel right and just about the statements I had made, and I figured some day I would be out and probably I would meet with friends, and sooner or later, it would hurt me. * * * I have lost quite a considerable number of friends so far by going to court." But, the witness maintained that he had no fear of anyone in particular; he changed his story because he wanted to clear his conscience.

On redirect examination Robinson was more specific. "* * * I got up in court and made an untrue statement, and I knew that, sooner or later, I would meet either his brothers or some of his friends—I make friends with mostly anyone,—Yes; I had fear in certain ways,—in a lot of ways—that I may meet him on the street—I may meet him in shows, or anywhere. I may meet some of his friends outside. It is hard to explain just where I might meet a person. And then, again, harm could come to some of my people as revenge, or something like that, and I wanted to come back and clarify myself, so as to take the blame as my own. If there was anyone to be blamed or to be hurt in any way, I would rather take it on my own than to have any of my people, or anyone else, harmed in any way in that matter; and I also thought of the boy that was on the death row—that by him being on the death row, and had he died in the gas chamber, I would be guilty of it,—of such statements that I made in court."

William J. Ryan, Captain of the Guard at Folsom Prison at the time of the killing, testified at the referee's hearing that the windows of the laundry are covered by a one-half inch mesh screen. As was the custom during the summer months, on the day Deal was stabbed those windows were open. It was possible to stand outside the windows and look into the laundry; he had done so "quite often." In any event, said he, at the time of day the homicide occurred, the sun could not cast a reflection on the windows.

As a witness in his own behalf before the referee, De La Roi described the procedure followed by the inmates in making coffee. He said that they used a boiler which was about a foot from the window near the fountain. The "fellows outside would close those windows to keep from getting the steam on them," and "they would leave them closed that afternoon."

Directly contradicting the affidavits and testimony of Allen and Robinson, Nowakowski told the referee that he did not make any promises to either of them in connection with their testimony at the trial of De La Roi; that he did not tell them how or what to testify to, nor threaten them in any way. Refreshing his memory from his records, Nowakowski declared that the first time he ever spoke to Robinson was when the convict was being interviewed by prison officials, a number of whom were present. That was more than three months after the homicide and after Robinson had given the warden a signed statement in which De La Roi was charged with the crime. Through a window in the laundry, Robinson related in this statement, he "saw De La Roi swinging at Deal with a knife."

Continuing his testimony, Nowakowski said that following the interview he may have talked to Robinson at the sewer plant, but at no time did they have any private conversation. Although he "did go to the sewer plant occasionally and talk to Allen and Trauger and Knapp, and the boys down there," he never saw "a map of the laundry prior to the time of the trial." He had nothing to do with placing inmates at the sewer plant, and he went there only for the purpose of ascertaining whether the prisoners were getting proper food.

The referee, after considering all of the evidence presented to him, found that the testimony of Robinson at the trial of De La Roi was logical, convincing and consistent; it was corroborated by that of Sam Kellum, Earl McAllister, and Anthony Roundtree, none of whom is charged with perjury, and it was not induced by anyone. On the contrary, the testimony given at the referee's hearing is false, and it is uncorroborated by and inconsistent with the testimony given by other witnesses. Moreover, the statements now made by Robinson as to window glare obstructing his view of the laundry is false and opposed to meteorological law.

Considering the various accounts of the homicide given by Allen, the referee found that his testimony before the jury "was not perjured * * * but was truthful, logical, corroborated by and consistent with [that] * * * of other witnesses [and] was corroborated in almost every detail by witness Robert M. Trauger * * * [whose testimony] is not in any way attacked as false or perjured." Also, the referee found, the testimony of Allen was corroborated in minor detail by the witnesses Kellum, McAllister and Roundtree. It is inconceivable that Allen, playing checkers within ten feet of the point where Deal was stabbed, heard nothing and saw nothing in connection with the assault although Deal fell to the floor and died almost within arm's reach of the table where the game was going on.

The findings upon other evidence are to the effect that the statements of Nowakowski at the trial and before the referee are consistent with and point to the truth of the testimony of both Robinson and Allen before the jury. Likewise the testimony of Ryan "points unerringly and clearly to the conclusion that the testimony given by witnesses Robinson and Allen at the original trial * * * was the truth, and that testimony of each of those witnesses was logical and consistent with the acts and facts testified to by other witnesses."

Turning to the issue as to the motive actuating Robinson and Allen to change their testimony, the referee declared that they abandoned the accounts of the homicide given at the trial and testified falsely before him because of their fear of vindictive friends of the petitioner. Neither Robinson nor Allen was threatened nor was any promise or any inducement made to either of them for testifying at the trial. Neither one was instructed or coached by Nowakowski or by any other person; each gave his testimony freely and voluntarily. Neither of them believed that a "subpoena" was an instrument of torture or weapon; nor was he misled by the use of that word.

In a general summation of these findings the referee concluded "that no witness who testified against Wilson De La Roi at the trial which resulted in the judgment of conviction * * * committed perjury as defined in the Penal Code of the State of California; and that no witness testified to any material matter which he knew to be false * * * there being no perjury committed at the time of the trial, no representative of the State of California caused or suffered any testimony to be introduced knowing that such testimony as given was perjured."

To these findings, counsel for De La Roi filed exceptions which challenge the determination that the testimony of other witnesses at the trial corroborates the testimony given by Allen and Robinson before the jury and point to certain discrepancies in the various accounts of the crime. It is also said that some of the findings are not supported by the evidence; and the petitioner particularly criticizes the referee's determination that Allen and Robinson have changed their testimony because of the fear of vengeance at the hands of De La Roi's friends.

[1, 2] Although this court is not bound by the findings of fact made by a referee (see, In re Mooney, 10 Cal.2d 1, 17, 73 P.2d 554), his conclusions are entitled to more consideration than the bare testimony of the witnesses. He had an opportunity to observe the demeanor of those who appeared before him and to weigh what they said in connection with their manner on the witness stand. In the present case, the evidence not only fully justifies the findings adverse to the petitioner but compels them. One cannot read the transcript of the interviews of Allen and Robinson at San Quentin Prison shortly after the commencement of this proceeding and their testimony before the referee without reaching the conclusion that each of them is now motivated by great fear of vengeance on the part of fellow convicts or others. Moreover, the accounts they now give as to the occurrences at the time Deal was stabbed are, to say the least, unconvincing. Allen stated to the referee, as he did at the trial, that he was facing the parties and within a few feet of the place where the assault occurred. But he did not see the stabbing, according to his latest account of the homicide, because it was "quietly done." Robinson still places himself outside of the laundry and near the windows which are not far from the point at which Deal was killed but he denies his statement to the jury that he saw De La Roi strike Deal with a knife.

Of particular significance in measuring the testimony of Allen as given at the trial and before the referee is a statement which he made to the prison officials shortly after the stabbing and before he was removed to the sewer plant. He then stated that De La Roi killed Deal and he described the occurrences in connection with the homicide just as he related them when he was a witness for the State. Allen now claims that Nowakowski, at interviews which took place at the sewer plant, induced him to falsely charge De La Roi with the crime, but his first statement concerning the crime cannot be reconciled with his present account of what transpired and it is also consistent with Robinson's testimony at the trial.

[3] Although there are certain inconsistencies in the testimony of the witnesses who, the referee found corroborated the accounts of the crime given by Allen and Robinson before the jury, the verdict impliedly determined that Deal was stabbed by De La Roi while the two men were in the laundry. The differences in the various versions of the stabbing concern minor details and do not have any bearing upon the issue presented by the testimony of De La Roi and the witnesses who testified on his behalf. The evidence relied upon by De La Roi in support of his plea of innocence is to the effect that he was not in the laundry when Deal was stabbed but near the handball court on the prison grounds. Under these circumstances, the record clearly shows that the petitioner has not established by that preponderance of substantial, credible evidence which the law requires, the charges upon which the writ of habeas corpus issued. In re Mooney, supra, 10 Cal.2d at page 15, 73 P.2d 554.

Evidence received in behalf of the petitioner at the hearings held by the referee for the purpose of allowing the presentation of additional evidence does not change these conclusions. After the findings were filed, the petitioner was granted leave to offer the testimony of certain prison inmates. One of them, Harold La Combe, told the referee that after the petitioner was convicted, he became acquainted with Allen and Johnny De La Roi. They worked under him in caring for the warden's garden and "seemed to be very friendly." In answer to the question, "Did James Allen ever express to you the thought that he was in fear of either John De La Roi or friends of John De La Roi or Wilson De La Roi?," the witness replied, "No." Over the objection of the attorney general, La Combe testified that Allen told him "he was sorry that he had went down on the trial; that he perjured himself and that he didn't fear anything as he was a friend of Johnny De La Roi." La Combe also declared that on the day of the stabbing, immediately after lunch, he was running the domino game in number one building. McAllister, Bernard Thomas, Moore, and a convict called "Dutch" were playing. According to La Combe, from where they were playing it was impossible to see the door of the laundry.

Ernest Wilson told the referee that he was in the laundry at the time of the stabbing. About five minutes after it happened Trauger came into the room and said, "it was a dirty trick and that if he knew who did it he would bust him over the head with a chair." When asked if Trauger testified truthfully about playing checkers in the laundry with Allen, Wilson said, "I would say it was untrue." As Wilson related the circumstances in connection with the crime, immediately prior to the killing of De La Roi, Eddie Walker and a third man came into the laundry. The three walked over to Deal and either De La Roi or Walker stabbed Deal. However, Wilson admitted that shortly after the crime, in the office of the warden, he stated that he saw De La Roi stab Deal.

Another witness was Bernard Thomas, who told the referee that on the day of the crime he started playing dominos about 12:30 p.m. McAllister and Moore were also playing; La Combe was running the game. But in answer to the question as to whether he knew McAllister was present at the domino game from shortly after lunch until all went to the Captain's lineup, he replied, "I wouldn't swear to it; I wouldn't say I was positive."

Deal was murdered by Eddie Walker, according to Frank O'Neal, who told the referee that he saw De La Roi and Walker come out of the building. Norman Austin also charged Walker with crime. Austin testified that he was inside the laundry talking with Deal when the stabbing occurred. Walker and De La Roi came in, and "Walker stabbed Bill Deal in the back and he screamed, and when he came around he stuck him in the chest or front with a knife, and Bill Deal started to run." When asked if Allen was in the laundry at that time, the witness replied, "I didn't see him if he was." Austin does not remember seeing Trauger in the laundry. But he admitted having made a statement shortly before the referee's hearing to the effect that on the day Deal was killed he was down at the back gate and that neither De La Roi nor Eddie Walker were at the laundry.

A former cell mate of Trauger said that he had just finished playing handball and was standing against the screen running from the old morgue back to the wall when he heard Deal scream. This witness, James Morgan, said that he was resting after playing with the petitioner and his brother. Trauger was "sitting back against the rock wall" in the laundry yard playing checkers; petitioner "was standing in the handball court."

The last witness to testify before the referee was Homer W. Haslam. He said that on the day of the homicide his job was to try to keep out of the laundry building the "fellows who didn't belong" there. He left his post to get a drink of water and upon his return he heard a "holler." He did not see anyone chasing Deal, nor did he see anyone playing checkers in the immediate area. He did not know the petitioner and he did not see either Eddie Walker, Allen or Trauger there, but both Trauger and Allen worked in the laundry.

Upon the supplemental evidence the referee found that nothing had been presented to change the determination stated in his first report to the court. "The credibility of the testimony of both Trauger and Allen when they testified at the trial remains unimpeached * * * they were playing checkers at the laundry at the time of the assault and * * * the testimony given at the trial was logical, consistent and reasonable."

Although at the trial of De La Roi there was a direct conflict between the evidence offered by the State and that relied upon in defense of the charge, the testimony now being considered does not present the same difficulties. The accounts of the homicide related to the jury by Allen and Robinson agree with their statements made to prison authorities soon after the crime was committed and, except for minor and immaterial inconsistencies were corroborated by other witnesses. As against the claim that both Allen and Robinson were induced by Nowakowski falsely to accuse De La Roi of the stabbing stands the testimony of Nowakowski, which is substantiated by some documentary proof, to the contrary. But the determination of the referee that the facts which Allen and Robinson stated to the jury are true finds convincing support in the accounts given by them as to their life in prison since the trial and the very frank statement which each of them made in regard to his fear of harm which may come to him because of his testimony as a witness for the State. Their fear is quite understandable, and unquestionably it is the motivating factor in the present proceeding.

The writ is discharged and Wilson De La Roi is remanded to custody.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

WEST KEY NUMBER SYSTEM

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72 Cal.App.2d 60

TAYLOR v. SIMS et al.

Civ. 14939.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1945.

1. Appeal and error 🔑930(1)

On appeal, the evidence must be viewed in the light most favorable to respondent.

2. Automobiles 🔑171(4)

Where plaintiff motorist first entered intersection in accordance with green signal and thereafter defendant bus driver drove bus into the intersection against the red signal and collided with plaintiff's automobile, the bus driver was negligent. Vehicle Code, § 476(c) 1, St.1939, p. 1607.

3. Negligence 🔑6

Violation of a statutory requirement is negligence as a matter of law.

4. Automobiles 🔑208

A motorist who entered intersection prior to the time that bus entered intersection was not required to yield right of way. Vehicle Code, § 550, St.1937, p. 619.

5. Automobiles 🔑206

Where intersection was controlled by an electric traffic signal, plaintiff motorist was not required to look into cross streets before entering the intersection on the green light.

6. Automobiles 🔑171(4), 208

Where intersection is controlled by signalling devices, whether one driver or another is responsible for the collision depends primarily upon which one was operating in conformity with signals.

7. Automobiles 🔑206

Where intersection is controlled by electric traffic signals, the driver proceeding pursuant to the go signal is not to be deemed negligent because he fails to maintain a lookout for a vehicle which might enter the intersection in violation of the signal.

8. Automobiles 🔑208

Where intersection in business district was controlled by electric signalling devices and evidence showed that plaintiff motorist entered intersection at a speed not to exceed 20 miles an hour, he was not guilty of negligence. Vehicle Code, § 511 (a) 4, (b) 1, St.1941, p. 2717.

9. Trial 🔑267(3)

In action for a collision in intersection which was controlled by electric signalling devices, court properly struck out a definition of intersection as given in Vehicle Code which related to intersections not controlled by traffic signals. Vehicle Code, § 86, St.1935, p. 99.

10. Damages 🔑216(4)

Where evidence showed a congenital condition of back unrelated to collision, court properly instructed jury that if negligence of defendant was the proximate cause of aggravating a previously exisitng disability suffered by plaintiff, that effect should be considered in fixing damages if decision on question of liability requires fixing of damages.

11. Damages ⚷33

Damages may be recovered for aggravation of a pre-existing condition, even though the condition was not disabling before the accident.

12. Automobiles ⚷246(14)

In action for injuries resulting from collision in intersection controlled by electric signalling devices an instruction based on provision of Vehicle Code relating to intersection not controlled by signalling devices was properly refused. Vehicle Code § 86, St.1935, p. 99.

13. Appeal and error ⚷1004(1)

A jury's verdict will not be set aside on appeal on ground that damages awarded are excessive unless the verdict is so outrageously excessive as to suggest at first blush, passion or prejudice.

14. Damages ⚷130(1)

$5,600 was not excessive where evidence showed that plaintiff's loss of earnings, medical bills and repairs to automobiles amounted to $2,015.96.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Kurly C. Taylor against G. J. Sims, Pacific Greyhound Lines and another, to recover damages for personal injuries received in motor vehicle accident. From a judgment for plaintiff for $5,600, the defendants appeal.

Judgment affirmed.

Bryce P. Gibbs and Kenneth K. Scott, both of Los Angeles, for appellants.

Katz, Gallagher & Margolis and John T. McTernan, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries received in a motor vehicle accident as the result of defendants' negligence, defendant Pacific Greyhound Lines appeals.

[1] The evidence being viewed in the light most favorable to plaintiff (respondent), and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

On January 23, 1944, at about 11 a. m., defendant Sims was operating a bus, owned by his co-defendant, in a southerly direction on San Pedro Street, just north of where it intersects Adams Boulevard, in Los Angeles. About the same time plaintiff was driving his Chevrolet sedan in an easterly direction on Adams Boulevard just west of San Pedro Street. The intersection is controlled by electrically operated traffic signals which were in operation at the time of the collision. There were also marked crosswalks at the intersection. Both vehicles were moving at a speed of approximately 20 miles per hour. Plaintiff entered the intersection in accordance with the green signal permitting east and west traffic. Thereafter defendant Sims drove his bus into the intersection against the red signal which required north and south bound traffic to stop. The two vehicles collided slightly to the south and to the east of the center point of the intersection. As a result of the accident plaintiff received injuries and was damaged in the sum of $5,600 according to the verdict of the jury.

Defendant relies for reversal of the judgment on six propositions which will be stated and answered hereunder seriatim:

First: *Defendant Sims was not negligent in the operation of the bus he was driving.*

[2] This proposition is untenable and is governed by the following pertinent rules of law:

[3] 1) Violation of a statutory requirement is negligence as a matter of law. (Clinkscales v. Carver, 22 Cal.2d 72, 75 et seq., 132 P.2d 777.)

2) Vehicular traffic facing a "Red" or a "Stop" signal must stop before entering the nearest crosswalk at an intersection or at such other point as may be indicated by a clearly visible line, and shall remain standing until a "Green" or "Go" is shown alone. (Vehicle Code, sec. 476(c) 1, St. 1939, p. 1607.*)

In the instant case plaintiff testified that when he entered the intersection it was with a green light indicating that it was open for east and west traffic. Witness Christopher testified that when defendant Sims drove through the intersection it was against a "Stop" light prohibiting north and south traffic on San Pedro Street. Therefore it is clear that defendants by violating rule 2 above were guilty of negligence as a matter of law.

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* None of the exceptions to this requirement provided in the Vehicle Code were pleaded or proven by defendants.

Second: *Plaintiff was guilty of contributory negligence as a matter of law.*

This proposition is likewise untenable. Defendants' argument is based on the assumption that plaintiff was negligent because he failed to (a) yield the right of way to defendants' bus which had entered the intersection first; (b) look to his left or right as he approached the intersection; and (c) operate his automobile at a proper speed.

[4] a) Plaintiff was not required to yield the right of way to defendants since the evidence discloses that plaintiff entered the intersection prior to the time that the bus operated by defendants entered the intersection; hence section 550 of the Vehicle Code, St.1937, p. 619, is inapplicable to the facts in the instant case.

[5-7] b) Since the intersection here involved was controlled by an electric traffic signal plaintiff was not required to look into the cross streets before entering the intersection. The signal permitted him to move in an easterly and westerly direction. The rule being that where the intersection movement of traffic is governed by signaling devices the determination of the question as to whether the one driver or the other is responsible for a collision at the intersection depends primarily upon the showing as to whether one vehicle or the other was being operated in conformity with the signal. The driver proceeding pursuant to the "Go" signal is not to be deemed negligent because he fails to maintain a lookout for a vehicle which might enter the intersection in violation of the signal. (Travis v. Eisenlord, 256 Mich. 264, 239 N.W. 304; Church v. Shaffer, 162 Wash. 126, 297 P. 1097, 1098; cf. Randall v. Evans, 4 Cal.App.2d 575, 576, 41 P.2d 561.)

c) There is no merit in defendants' contention that plaintiff was guilty of contributory negligence because he operated his automobile at an excessive speed. Section 511(b) 1 of the Vehicle Code, St. 1941, p. 2717, permits a speed of 25 miles per hour in any business or residence district. This provision is subject to section 511(a) 4 of the Vehicle Code which requires that the speed be reduced to 15 miles per hour when entering an intersection where the driver does not, for the last 100 feet in his approach to the intersection, have a clear and unobstructed view of such intersection. However, the limitation in section 511(a) 4 makes unnecessary a speed of less than 25 miles per hour "at a traffic-controlled intersection."

[8] In the present case it is conceded that the intersection of San Pedro Street and Adams Boulevard was an electric traffic controlled intersection in a business district, and since the testimony discloses that plaintiff entered it at a speed not to exceed 20 miles per hour he was not guilty of negligence as a matter of law because of the speed at which he was operating his automobile.

Third: *The trial court erred in modifying the following instruction before giving it by striking therefrom the second paragraph.*

[1] *"The intersection of a public highway is defined by California Vehicle Code as follows:*

"'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." § 86.

[2] *"You are instructed that if the defendant, Pacific Greyhound Lines bus entered the intersection as said intersection is defined in these instructions before the plaintiff Kurly Taylor's automobile entered said intersection, then the driver of defendant's bus had the right to assume, unless he had knowledge to the contrary, that the plaintiff would yield the bus the right of way and would not attempt to cross said intersection in front of the bus and said defendant was not guilty of negligence if the driver of the bus was otherwise in the exercise of ordinary care in thus assuming and continuing to move the bus forward through said intersection."*

[9] This proposition is untenable. The trial court properly modified the foregoing instruction. The matter contained in the

portion stricken has reference to drivers entering an intersection which is not controlled by a traffic signal. In the instant case the movement of traffic in the intersection was controlled by traffic signals. Hence the rights of the parties were to be determined pursuant to section 476 of the Vehicle Code and not pursuant to the provisions of section 550(a) of the Vehicle Code. See discussion of this subject under the second paragraph (b), supra.

Fourth: *The trial court erred in instructing the jury as follows:*

"If negligence on the part of the defendant has been a proximate cause of aggravating a previously existing disability suffered by plaintiff, that effect should be considered by you in fixing damages, if your decision on the question of liability requires you to fix damages."

[10] The trial court properly gave the foregoing instruction to the jury. The evidence discloses that plaintiff's lumbo sacral joint had become fused or "sacrolized," giving plaintiff a potentially weak back; that this was a congenital condition unrelated to the collision; that as a result of the collision plaintiff suffered a severe sprain and wrenching of the back muscles and ligaments; and that the injuries received from the accident would disable him for a long time and were serious.

[11] Predicated upon the foregoing evidence the plaintiff was entitled to the above instruction. The law is established in California that damages may be recovered for aggravation of a pre-existing condition even though the condition was not disabling before the accident. (Perry v. McLaughlin, 212 Cal. 1-11, 297 P. 554.)

Fifth: *The trial court erred in refusing to give the following instructions:*

[a] *"You are instructed that where a motor vehicle has actually entered an intersection before the other motor vehicle approaches it the driver of the first motor vehicle has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of a collision."*

[12] The trial court's refusal to give the instruction was correct for the reasons set forth under the third proposition, supra.

[b] *"Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all of the surrounding circumstances, as shown by the evidence."*

The trial court did not err in refusing to give the foregoing instruction. In fact, such instruction was given. The record discloses that the trial court instructed the jury as follows:

"Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence."

Sixth: *The damages awarded by the jury are so excessive as to appear to have been given under the influence of passion or prejudice.*

[13] This proposition is without merit. The law is established in California that a jury's verdict will not be set aside upon appeal on the ground the damages are excessive, unless the verdict is so outrageously excessive as to suggest, at first blush, passion or prejudice. (Junge v. Midland Counties, etc., Corporation, 38 Cal.App.2d 154, 160, 100 P.2d 1073.)

[14] In the instant case the amount of the award $5,600 does not fall in this category. The evidence discloses that plaintiff's loss of earnings, medical bills and repairs to his car amounted to $2,015.96, leaving a balance of $3,584.04 which the jury awarded for pain and suffering and for loss of earning power until plaintiff could fully recover from his injuries. Clearly such sum was not in excess of the amount that would compensate plaintiff for the damages he had suffered.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

72 Cal.App.2d 138

WALTER v. LIBBY.

Civ. 7177.

District Court of Appeal, Third District, California.

Dec. 7, 1945.

1. Brokers ⚿82(1)

Complaint, seeking recovery of commissions under written contract giving broker exclusive right to sell ranch until owner should give at least ten days' written notice of cancellation, was not demurrable for failure to allege, either that contract was in full effect when ranch was sold by owner, or that purchaser was procured by broker.

2. Principal and agent ⚿19

Where a principal and agent relationship is shown to have been created to exist for an indefinite length of time, there is a presumption in favor of continuation of the relationship.

3. Brokers ⚿46

Where broker is given an exclusive right to sell, as distinguished merely from a sole or exclusive agency, he is entitled to be compensated when a sale is made by principal, even though broker was not the procuring cause of sale.

4. Brokers ⚿78

Action by broker having exclusive right to sell realty to recover commission on sale by principal was on the contract giving broker exclusive right to sell, regardless of whether recovery be predicated on theory of damages for wrongful prevention of performance or on theory of enforcement of contract provision for payment of a commission in any event.

5. Brokers ⚿86(3)

Under the usual printed form of listing agreement giving broker exclusive right to sell realty for a specified period, proof that formal sale was actually consummated during such period was not necessary to entitle broker to commission on sale to which owner agreed during such period.

6. Brokers ⚿86(1)

Evidence sustained finding that owner agreed to sell ranch on specified date within meaning of usual printed form of listing agreement by which broker was given exclusive right to sell the ranch and owner agreed to pay usual 5 per cent. commission should he sell ranch while agreement was in force.

7. Brokers ⚿88(14)

In action by broker having exclusive right to sell realty to recover commission on sale thereof by owner, whether finding that owner agreed to sell on specified date was supported by evidence was immaterial where court also found that sale was consummated before termination of agency.

8. Appeal and error ⚿1071(3)

The insufficiency of evidence to support a finding becomes material only if judgment rests upon such finding, and complaint may not be made of an unsupported finding which had it been made the other way would not have affected the judgment.

9. Brokers ⚿8(3)

Conflicting evidence was sufficient to establish contents of written contract, the original duplicate copies of which had been destroyed by owner, giving broker exclusive right to sell realty.

10. Appeal and error ⚿1011(1)

Where testimony is in conflict, it is for the trier of facts to determine what witnesses are most entitled to credit.

11. Brokers ⚿46

Where owner agreed to pay commissions should owner sell realty while contract giving broker exclusive right to sell was in effect, broker, having diligently sought a purchaser, was not precluded from recovering commission on sale by owner on ground that broker had failed to perform services contemplated by contract.

12. Pleading ⚿166, 182

New matter by way of avoidance set up in answer is deemed controverted, and on issue so made plaintiff may adduce evidence to negative asserted defense.

13. Brokers ⚿82(4)

Where owner alleged cancellation of agency contract as a defense to action to recover broker's commissions on sale of realty, broker was entitled to adduce evidence of fraud in inducing him to cancel contract as rendering such cancellation nugatory, though fraud was not pleaded.

14. Brokers ⚿86(1)

Evidence that owner, in obtaining broker's consent to cancellation of contract giving broker exclusive right to sell ranch, misrepresented his present intention with respect to sale of ranch and suppressed vital fact that he was about to dispose of ranch through his own efforts, justified finding that consent to cancellation was obtained through fraud.

15. Brokers ⚿44

Owner could not take advantage of broker's consent to cancellation of contract giving broker exclusive right to sell realty to defeat action by broker to recover commission on sale of realty by owner where consent was procured through fraud. Civ. Code, §§ 1709, 1710.

16. Principal and agent ⚿47

The doctrine of full disclosure between principal and agent applies to principal as well as agent.

17. Principal and agent ⚿33

While principal may revoke agency in accordance with terms of agreement, revocation must be made in good faith and not for the purpose of defeating agent's rights.

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Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by E. L. Walter against Elmer Libby to recover commissions allegedly due by reason of sale of defendant's ranch property. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Wm. N. Graybiel, of Turlock, for appellant.

C. Ray Robinson and Samuel V. Cornell, both of Merced, for respondent.

PEEK, Justice.

By his complaint plaintiff and respondent sought to recover from defendant and appellant certain commissions alleged to be due by reason of the sale of appellant's ranch property.

On November 2, 1944, the parties executed a written agreement relative to the sale of the property. Plaintiff promptly proceeded to advertise the property for sale and interviewed numerous prospective customers. On the afternoon of December 8, 1944, appellant called upon respondent at the latter's office, stating that he wanted to take the property off the market; that he had decided that it was not a good time to sell; that if he waited until the trees were in bloom and the vines were leafed out, he could sell it for more money, and when that time arrived undoubtedly he would again list the property with respondent. Thereupon respondent agreed to consider the contract at an end and surrendered to appellant the instruments evidencing it. On the following morning appellant deposited in escrow a conveyance of said property to one William Eck, receiving therefor the full amount of the purchase price. He refused to pay respondent any part of the commission as provided in the contract.

At the conclusion of the hearing the trial court found that on November 2, 1944, under the contract between the parties respondent was given the exclusive right to sell certain designated property belonging to appellant for a minimum term of thirty days but to be continuous thereafter until "I [appellant] shall have given written notice to E. L. Walter, stating when, (not less than ten days thereafter), to cancel this authorization," and the contract also provided: "I further agree that should I sell or dispose of said property or any part thereof, while this agreement is in force, or sell at any time to a person or persons introduced or sent by said E. L. Walter, I agree to pay said E. L. Walter a commission of 5 per cent upon the purchase price received for said property."

The court further found that the contract was in full force and effect at the time of the sale by appellant to Eck, and that respondent's consent to the surrender thereof and the termination of the agency was induced by the fraud of appellant, and gave judgment for respondent in the amount of $400, representing a commission of five per cent on the sale price of the property together with the costs of suit.

The appellant admitted that he had destroyed the original copies of the contract, executed in duplicate, as he considered the agreement no longer operative, and the contents thereof were established by secondary evidence.

Although appellant attacks the validity of the complaint and the order overruling his demurrer, the principal issues he has raised relate to the sufficiency of the evidence to sustain the findings and the alleged error of the trial court in overruling his general demurrer.

[1, 2] We find no merit in the first contention wherein it is charged that as the complaint neither alleged that the contract

was in full force and effect at the time the property was sold or that plaintiff was the procurer of the purchaser, it therefore is fatally defective. While the complaint does not allege in so many words the existence of the contract at that time, it does set out the terms of the agreement from which it appears that the relation of principal and agent had been created between the parties for an indefinite time. It is well established that the rule is "When a principal and agent relationship has been shown to have been created to exist for an indefinite length of time there is a presumption in favor of the continuance of the relationship." Gudger v. Manton, 21 Cal.2d 537, 552, 134 P.2d 217, 226. See also Knox v. Modern Garage etc. Shop, 68 Cal.App. 583, 587, 229 P. 880.

[3, 4] It is evident that appellant misconceives the nature and effect of the contract. Where, as here, the agent or broker is given an exclusive right to sell, as distinguished merely from a sole or exclusive agency (such as that which engaged the attention of the court in Dreyfus v. Richardson, 20 Cal.App. 800, 130 P. 161, strongly relied upon by appellant), he is entitled to be compensated when a sale is made by the principal, and it is immaterial that he was not the procuring cause thereof. Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 78 A.L.R. 585; Gregory v. Bonney, 135 Cal. 589, 67 P. 1038; Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067; Justy v. Erro, 16 Cal.App. 519, 117 P. 575; 9 C.J., p. 622, § 101, 12 C.J.S., Brokers, pages 219–221, § 94. Also as shown by the cited cases it is immaterial whether the recovery be predicated on the theory of damages for wrongful prevention of performance or on the theory of enforcement of the provision for payment of a commission in any event. In either case the action is on the contract.

On the question of the sufficiency of the evidence to sustain the findings, appellant first complains that the finding, that the sale of the property was made on the morning of December 8, 1944, is not supported by the evidence and that it is in direct conflict with the uncontradicted testimony that no sale took place until appellant and the purchaser met at the bank on December 9th when final terms were agreed upon and reduced to writing.

From such contention it is evident that again appellant has misconceived the nature and effect of the contract in relation to this question. An examination of the record shows testimony by the purchaser that after learning the property was for sale he went to the ranch on several occasions; that he talked to appellant's wife telling her his purpose; that on the morning of December 8th, he talked with appellant as he was leaving the ranch; that they discussed his possible purchase of the ranch, and that it was agreed between appellant and himself that they would meet at the bank the following morning for the purpose of opening an escrow.

[5, 6] It was not necessary for plaintiff to show that a formal sale was actually consummated at the morning conference on December 8th. The word "sale" must be construed in the light of its use in the contract which was merely a printed form agreement between a vendor and a broker listing with the broker a particular property for a specified term and providing that should the broker or the owner secure a purchaser within said term the owner would pay to the broker the usual commission of five per cent. The contract did not state that the broker's commission would be paid only upon actual consummation of the sale and transfer of title. It merely provided that the agent "shall have for his services in obtaining a purchaser" a commission of 5% of the purchase price. Such a contract is but the usual contract between a broker and his client and must be construed as such. Purcell v. Firth, 175 Cal. 746, 749, 167 P. 379; Frank Meline Co. v. Kleinberger, 77 Cal.App. 193, 246 P. 136. Hence the evidence was amply sufficient to support the finding of the trial court that the "defendant herein agreed to sell" the ranch to Eck on the forenoon of December 8, 1944.

[7, 8] But even if the finding in question was not warranted, this would not affect respondent's right to a recovery, for there is another finding to the effect that the sale had been consummated prior to the termination of the agency agreement; and under the theory that the so-called cancellation or annulment was nugatory as having been induced by fraud, the contract must be held to have been in full force and effect without regard to the precise time at which the sale was concluded, and respondent would still be entitled to the amount of the commission. See Frank Meline Co. v. Kleinberger, 77 Cal.App. 193, 199, 200, 246 P. 136; Justy v. Erro, 16 Cal.App. 519, 531, 117 P. 575. "It is

only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding becomes material; complaint may not be made of an unsupported finding which, had it been made the other way, would not have affected the judgment." 24 Cal.Jur., pp. 993, 994, sec. 217.

[9, 10] Appellant's contention that the evidence was insufficient to establish the contents of the written contract, and particularly the provision imposing liability for a sale made by appellant himself, likewise is without merit. Respondent testified that he used printed forms, that they were the only ones he had in the office, and that they all contained the provision in question. Appellant did not deny that printed forms were used nor specifically assert that such a provision had been deleted therefrom, but contented himself with the bare statement that said provision was not a part of the contract. His testimony being contradictory to that of respondent merely presented a conflict in the testimony as to the contents of the instrument. Under such circumstances "it is for the trier of the fact to determine what witnesses are most entitled to credit." 16 Cal.Jur., p. 703, sec. 13.

[11] Appellant advances the further argument that respondent should not have been awarded a recovery, because he failed to perform the services contemplated by the contract. This, in another form, is the same contention previously made which, as we have pointed out, is based on a misconception of the character and extent of the rights created by the contract. Under the agreement, respondent was not required to do more than obtain a purchaser; and this, the evidence shows, he did with due diligence and in the full performance of his duties. As stated in Kimmell v. Skelly, 130 Cal. 555, 559, 560, 62 P. 1067, 1068: "The consideration for her [the seller's] promise to pay the money if the sale was made by her was the performance of services by the brokers in seeking a purchaser."

[12, 13] Likewise without merit is the contention that the trial court improperly found the existence of fraud because fraud was not pleaded. It is elementary under our system of code pleading that where the answer sets up new matter by way of avoidance (in this case the alleged cancellation and annulment of the contract), such an allegation is deemed to be controverted, and on the issue so made the plaintiff is at liberty to adduce evidence of fraud to negative the asserted defense. Bancroft's Code Pleading, Vol. 1, page 682, sec. 473.

[14, 15] Nor is there any foundation for the assertion that the evidence was insufficient to justify the finding of fraud. Appellant's misrepresentation as to his present intention, and his suppression of the vital fact that he was about to dispose of the ranch through his own efforts were obviously calculated to and did induce respondent to give his consent to the revocation of the agency and to surrender the instruments evidencing it. Appellant could not take advantage of respondent's consent thus procured. Washburn v. Speer, 206 Cal. 414, 420, 274 P. 519; Civil Code, §§ 1709, 1710.

[16, 17] While the duty to make full disclosure as between principal and agent is more often emphasized with respect to the conduct of the agent, the doctrine is by no means one-sided. The principal may revoke the agency in accordance with the terms of his agreement but he may not do so in bad faith and merely for the purpose of depriving the agent of rights he otherwise would have. The rule is that "the revocation must be made in good faith and not for the purpose of defeating the agent's rights." Elms v. Merryman Fruit etc. Co., 207 Cal. 747, 751, 279 P. 781, 783. See also Blumenthal v. Goodall, 89 Cal. 251, 255, 26 P. 906; 3 C.J.S., Agency, p. 64, § 174; Mechem upon the Law of Agency, section 209.

Likewise there is no force to appellant's argument that his motion for nonsuit should have been granted on the ground that the proof was insufficient to establish the contents of the lost or destroyed instruments, which alone could disclose the terms of the contract on which this suit is based. In Pryor v. McGuire, 59 Cal.App. 234, 237, 210 P. 532, as in the present case, it was contended that the trial court should have followed the seller's version as to the terms of the contract. However, there, as in the case at bar, the seller obtained the contract from the agent through fraudulent representations and the court held that as the contract was last known to have been in possession of the seller, if the contract contained the clause he claimed it did, "there was no reason for the diligence exercised by the defendant in taking the contract out of the hands of the plaintiff."

In the case at bar if the contract did not contain the clause which respondent claims it did, there was no reason for the diligence exercised by appellant in taking the contract out of the hands of respondent.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

72 Cal.App.2d 120

In re BYNUM'S ESTATE et al.

McVALE v. BYNUM et al.

Civ. 15112.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1945.

1. Guardian and ward 🔑10

In selecting general guardian of minors court must be guided by what appears to be best for minors' temporal, mental and moral welfare. Probate Code, § 1406.

2. Guardian and ward 🔑10

A parent is entitled to be first in order of those available to serve as his minor child's guardian but if parent is unfit or lives in environment not conducive to child's welfare court must be guided by child's best interests in designating guardian. Probate Code, § 1406.

3. Guardian and ward 🔑13(4)

Evidence supported superior court's order denying petitions of motherless five and three-year-old children's grandmother and father for letters of guardianship because of father's unfitness and unsuitability of environment in which grandmother lives and appointing a stranger to children's blood, as guardian. Probate Code, § 1406.

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge pro tempore.

In the matter of the estate and guardianship of George Bynum and Angie Bynum, minors. From an order denying the petitions of Minnie McVale and Marcus Bynum and granting the petition of Elmo Field for appointment as the minors' guardian, petitioners McVale and Bynum appeal.

Affirmed.

Elmo L. Morris, of San Francisco, and Henry W. Wyatt, of Los Angeles, for Marcus Bynum, petitioner, respondent and appellant, and Elmo Field, respondent.

Paul R. Matthews, of Los Angeles, for appellant Minnie McVale.

MOORE, Presiding Justice.

Minnie McVale is the maternal grandmother of George and Angie Bynum, five and three years of age respectively. From an order denying her petition to be appointed as their guardian she appeals on the ground that the court below abused its discretion by such denial and in appointing a stranger to the blood of the two infants. Contestant Marcus Bynum, father of the twain, also appeals from that part of the order denying his petition for letters of guardianship. The mother of the bairns was Rosie Bynum who deceased August 27, 1944. She was survived by contestant, her two sisters, Rose Couch and Rebecca Avolos, her father, and petitioner. The latter and contestant by their respective pleadings mutually accused each other of being unfit to have the custody.

After a prolonged trial in which many witnesses testified the court found the father unfit in that he drinks excessively, becomes frequently inebriated, swears in the presence of the children, and has committed homosexual acts upon the person of little George; also that he presently resides in restricted bachelor quarters on the premises of the dairy where he is employed, the sanitary facilities of which are inadequate.

The findings as to petitioner are that on the premises on which she resides there are several houses and that the common sanitary facilities are overcrowded and inadequate; that while Angie lived with petitioner the child was ill-kept, dirty, ill-clothed, underfed and underweight; that when she was delivered to the guardian appointed at the trial her arm was in a cast; the bandage and cast were filthy and unsanitary and her scalp and body had scales and sores which required many days to heal; also, Rose and Rebecca, who are at times in their mother's home, have low standards of morals, engage in conversations unfit for little children to hear and have contracted sundry purported marriages. That petitioner caused dissensions between contestant and his deceased wife likewise did not impress the court that it is for the best interests of the children to be reared by their grandmother. The court concluded that contestant is unfit to have the custody, and that while petitioner is a fit and proper person to be guardian of the children yet the conditions in which she lives render it contrary to the best interests of the minors for her to be appointed.

[1, 2] In selecting a general guardian the court must be guided by what appears to be best for the temporal, mental and moral welfare of the infant. Probate Code, § 1406. A parent is entitled to be first in the order of those available to serve (Guardianship of De Ruff, 38 Cal.App.2d 529, 101 P.2d 521; Stever v. Stever, 6 Cal.2d 166, 169, 56 P.2d 1229), but if a parent is unfit or lives in an environment that is not conducive to child welfare then in designating a guardian the court must be guided by what is for the best interests of the child. Probate Code, sec. 1406; Dellow's Estate, 1 Cal.App. 529, 531, 82 P. 558; Allen's Estate, 162 Cal. 625, 629, 124 P. 237.

[3] The record is teeming with evidence in support of the court's findings. There was testimony that contestant drinks alcoholic beverages to excess, had gonorrhea during the lifetime of his wife, had been convicted and sentenced for his failure to provide for his children and had committed acts of sex perversion upon both his son and his wife. The testimony of contestant concerning the home conditions of petitioner was substantially included in the language of the findings. Jesse Bynum gave testimony of similar import, while the guardian appointed by the court testified that when he took Angie from petitioner her head and body were covered with sores.

The Court appointed Elmo Field as guardian, who has since the trial adopted Angie. He is chief of police of Gardena; maintains a spacious, decent home on one and one-fourth acres; is 39 years of age; has no family but his wife who is a registered nurse. While they are of a different faith they are willing to rear the children in the Catholic church in which the children were baptized.

A review of the record discloses that the court below exercised an earnest zeal to determine the rights of the litigants as well as the best interests of the children.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

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72 Cal.App.2d 123

MILSTEIN v. SUPERIOR COURT IN AND FOR VENTURA COUNTY et al.

Civ. 15159.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1945.

1. Execution 🔑158(1)

Where no appeal was taken from order issuing execution, to enforce a judgment more than five years after its entry, on motion of judgment creditor accompanied by affidavit setting forth reasons for failure to proceed earlier, and no stay bond had been filed, court could not stay enforcement of execution for a period longer than 30 days. Code Civ.Proc. §§ 681a, 685.

2. Mandamus 🔑172

Judgment debtor's contentions that judgment creditor's affidavit for order issuing execution to enforce judgment more than five years after its entry was defective and that judgment debtor was not served with notice of judgment creditor's motion for such order were unavailing in judgment creditor's proceedings in mandamus to compel superior court to vacate order staying execution. Code Civ.Proc. §§ 681a, 685.

◆

Mandamus proceeding by M. M. Milstein to compel the Superior Court of the State of California, in and for the County of Ventura, and Honorable Louis C. Drapeau, Judge thereof, to vacate an order staying execution on the ground that the court had no jurisdiction to make the order complained of.

Peremptory writ issued.

Joe Wapner, of Los Angeles, for petitioner.

Don R. Holt, of Ventura, for respondents.

MOORE, Presiding Justice.

Petitioner seeks by writ of mandate to compel the superior court to vacate an order staying execution after his ineffectual attempt to induce the court to set it aside. His contention is that the court had no jurisdiction to make the order complained of. He had procured the execution to be issued pursuant to section 685, Code Civil Procedure,[1] which requires the judgment creditor to accompany his application for an order to enforce a judgment more than five years after its entry with an affidavit setting forth the reasons for his failure to proceed prior to the expiration of the five years. The court may grant or deny the application in the exercise of a sound discretion.

On August 7, 1945, petitioner, as assignee of the judgment, served notice on defendant that on August 20th he would move the court for the order. Three days thereafter defendant's counsel in the city of Eureka telephoned petitioner's counsel in Ventura that the defendant had received the affidavit and notice and requested further information, to which petitioner replied. On August 20th petitioner appeared before respondent court and presented his motion for the order which was granted and execution was issued directed to the sheriff of Humboldt county. On August 27th defendant's counsel at Eureka stated that he thought the matter might be compromised and requested petitioner's counsel to do nothing further with reference to the levy. On September 19th petitioner's counsel was served with a notice of defendant's motion through her Eureka counsel, joined by attorney Don R. Holt of Ventura, to set aside the order of August 20th on the ground of the insufficiency of the motion and of the affidavit on which it was predicated. At the same time petitioner's counsel was served with a copy of the order issued by the Honorable Louis C. Drapeau, judge of respondent court, staying the execution issued on August 20th until after the decision on defendant's motion to set aside the order directing its issuance.

Thereafter on October 1st, the time designated in defendant's notice of motion to set aside the order of August 20th, petitioner appeared before respondent court for a hearing upon that motion. After ascertaining that defendant would require several hours to present his application Judge Drapeau fixed the date for the hearing of her motion for January 7, 1946. Thereupon petitioner's counsel moved the court to dissolve the order staying the execution, which motion was by the court denied.

In their return respondents contend that petitioner's affidavit for the order of August 20th was defective and insufficient in many specified respects; that the court has power temporarily to stay executions on its judgments whenever it is necessary to accomplish the ends of justice (citing 35 C.J.S., Executions, § 139, p. 312); that the exercise of its discretion will not be controlled by mandate except in case of palpable abuse (citing Realty Const. & Mortg. Company v. Superior Court, 165 Cal. 543, 132 P. 1048); and that she was not served with notice of petitioner's motion for the order of August 20th.

[1] These contentions and all of the recitals pertaining thereto would have been pertinent at the hearing of August 20th or on an appeal from the order of that date. However, the ex parte order of September 19th staying the execution and the subsequent order of October 1st, together with the order fixing January 7, 1946, as the date for the trial of defendant's motion, constitute an unauthorized attempt to nullify the order of August 20th. The latter was a valid order, made after notice and hearing. No appeal having been taken therefrom and no stay bond having been filed, the court was powerless to stay the enforcement of the execution issued pursuant thereto for a period longer than 30 days. Code Civil Proc. § 681a.

[2] In appropriate proceedings re-

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[1] "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion. * * *"

spondent might have urged the contentions she makes here but they are unavailing in this proceeding to test the efficacy of section 681a.

It is therefore ordered that the peremptory writ of mandate be forthwith issued.

McCOMB and WILSON, JJ., concur.

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71 Cal.App.2d 831

PEOPLE v. OWENS.*

Cr. 3916, 3917.

District Court of Appeal, Second District, Division 1, California.

Nov. 30, 1945.

As Modified on Denial of Rehearing Dec. 13, 1945.

Hearing Granted Dec. 27, 1945.

1. Criminal law 🔑1131(1)

A mere oral announcement in court by district attorney of intention to withdraw appeal from order granting defendant's motion in arrest of judgment was a nullity. Pen.Code, § 1239(a) (1).

2. Criminal law 🔑1083

Fact that record on people's appeal from order granting defendant's motion in arrest of judgment had not been lodged in District Court of Appeal was not determinative of that court's jurisdiction of the case. Pen.Code, § 1239(a) (1).

3. Criminal law 🔑1083

Where appeal was pending from order granting defendant's motion in arrest of judgment, a second trial on "new" information charging same offenses as were charged in original information was void because superior court was without jurisdiction to retry defendant until appeal was properly disposed of. Pen.Code, § 1239(a) (1).

4. Indictment and Information 🔑125(4)

Where statute enumerates a series of acts, any of which separately, or all together, constitute the crime, any one of the series may be charged, but all of them may also be charged, and although each act standing by itself may constitute the offense, all of them taken together do no more, but simply constitute one and the same crime.

5. Criminal law 🔑507(1)

An "accomplice" is one who knowingly, voluntarily, and with common intent with principal offender unites in commission of the crime. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice"

6. Criminal law 🔑507(8), 510

In prosecution for "receiving and holding" money to be wagered on result of a horse race in violation of statute, persons furnishing money to defendant, though they neither "received or held" such money, were "accomplices" of defendants, and their testimony, unless corroborated, would not support conviction of defendant. Pen.Code, §§ 337a, subd. 3, Pen.Code, § 1111.

7. Criminal law 🔑511(1)

In prosecution for "receiving and holding" money to be wagered on result of horse race in violation of statute, testimony of persons who furnished money to defendant was not sufficiently corroborated by other evidence to sustain conviction. Pen.Code, § 337a, subd. 3, § 1111.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

John Owens was convicted on two separate charges of violating Penal Code, § 337a, subdivision 3, and he appeals.

Reversed.

Cantillon & Glover, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This appeal involves two prosecutions instituted against the same defendant in the Superior Court of Los Angeles County and the validity of proceedings, judgments and orders made therein. Although the cases were separately tried in the superior court, they are by stipulation consolidated on appeal and presented on one set of briefs.

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* Subsequent opinion 168 P.2d 945.

The First Case

In this prosecution, instituted by information No. 50759 filed by the district attorney on December 28, 1932, the defendant was accused in five counts of the crime of violating subdivision 3 of section 337a of the Penal Code. Following the entry of not guilty pleas to all counts, the case proceeded to trial before a jury on April 17, 1933, resulting in the conviction of defendant of each of the five counts. On April 24, 1933, which was the time fixed for pronouncing judgment, the defendant interposed a motion in arrest of judgment which was argued and submitted. The clerk's transcript reflects that on the next day the following proceedings occurred:

"Defendant's motion for an arrested judgment on the grounds that the information fails to state facts sufficient to constitute a public offense is granted.

"Defendant is discharged.

"The District Attorney gives oral notice of appeal."

On the next day, April 26, the district attorney, without the presence of the defendant, appeared in court, and the following proceedings ensued as shown by the clerk's transcript:

"The District Attorney withdraws the oral notice of appeal made on April 25, 1933. On motion of District Attorney, a new information is filed.

"Bench warrant is ordered issued for the appearance of this defendant * * *."

It should here be noted that the "new" information charged the same offenses as were charged in the original information as to which the motion in arrest of judgment was granted.

After the entry of pleas of not guilty and once in jeopardy to the second information, the trial was set for June 14, 1933, but when the case was called for trial the defendant failed to appear and a bench warrant was issued for his apprehension. Finally, on December 15, 1944, the case proceeded to trial before the court sitting without a jury, again resulting in the conviction of the defendant on all counts of the information. On the plea of once in jeopardy the court found for the people. Defendant interposed a motion for a new trial, which was denied. From the judgment and the order denying his motion for a new trial defendant prosecutes this appeal.

[1-3] The first question presented to us on this appeal is that of jurisdiction of the superior court to try this cause a second time and enter the judgment complained of. This for the reason that immediately following the trial court's order granting defendant's motion in arrest of judgment following the first trial, the people, pursuant to the provisions of subdivision (a) (1) of section 1239 of the Penal Code, announced in open court that an appeal was taken from such order. On the day following the district attorney appeared in court and announced that the people "withdraw the oral notice of appeal". On that date, April 26, 1933, rule 38 of the Rules on Appeal adopted by the Judicial Council on March 30, 1943, was not in effect. And even if it were, there was no compliance therewith because there was no abandonment of the appeal signed by the district attorney and filed with the court.

Therefore, an appeal from the order granting defendant's motion in arrest of judgment having been duly and regularly taken by the people, jurisdiction of the subject matter thereof was removed from the superior court. While the appeal was pending the superior court had no jurisdiction to proceed with a second trial. The attempted withdrawal of the appeal by the district attorney was a nullity. The fact that the record had not been lodged in the District Court of Appeal is not determinative of that court's jurisdiction. Until the appeal was disposed of by remittitur of the appellate tribunal after decision thereon or by dismissal thereof by either appellant or respondent on proper grounds or by stipulation, the jurisdiction of the subject matter of the order arresting judgment is vested in the appellate court. The notice of appeal invested the District Court of Appeal with jurisdiction thereof and deprived the trial court of power or authority "to move in conflict with such jurisdiction." People v. Sonoqui, 1 Cal.2d 364, 367, 35 P.2d 123, 125. Upon the authority and for the reasons stated in the case just cited as well as the cases of In Re Johannes, 213 Cal. 125, 129, 130, 1 P.2d 984, and People v. Workman, 7 Cal.2d 176, 59 P.2d 1005, it must be held that an appeal was pending at the time the present or second trial took place and the court below was without jurisdiction to retry the defendant until such appeal was properly and legally disposed of. A reversal of the judgment and order denying a new trial being required on this ground, it becomes unnecessary to determine the other issues raised by the defendant.

The Second Case

In this prosecution, commenced by the filing of information No. 52433 on May 18, 1933, the defendant was accused in two counts of violation of subdivision 3 of section 337a of the Penal Code, in that he did "willfully, unlawfully and feloniously * * * receive and hold certain monies * * * to be wagered upon the result of a * * * horse race." On November 16, 1944, some eleven years after the information was filed, the defendant appeared in court, entered pleas of not guilty to both counts, waived a jury, and on December 15, 1944, the cause proceeded to trial before the court, resulting in the conviction of the defendant on both counts. Following the denial of defendant's motion for a new trial judgment was pronounced, from which, as well as from the order denying his motion for a new trial, defendant prosecutes this appeal.

In urging a reversal, appellant relies solely and alone upon the ground that the two, and only, witnesses produced by the prosecution were accomplices, and that their testimony was not corroborated as required by section 1111 of the Penal Code. It therefore becomes necessary to epitomize the evidence produced at the trial. In that regard the record reveals that the defendant called upon the aforesaid two witnesses, stating that he had been sent to them by some friends of theirs. Defendant stated he was a jockey; that each year there was a jockey race which gave the jockeys a chance to make some money; that this jockey race was to be held at Tanforan and he was collecting money and would share his winnings with them. The two witnesses each gave defendant a check for $100, which checks were later cashed by the banks upon which they were drawn. Defendant wrote the name of the horse on a piece of paper and signed his name at the bottom of the page. Defendant stated that he was going to telephone the bet to the track. The checks were given to defendant on April 26, 1933, and three or four days later defendant returned to the office of the witnesses and told them that the horse had bolted the barrier, jumped around, and consequently did not win the race. As one witness recalled from the conversation had with the defendant at that time, the latter was going to give them another horse on another date without their putting up any more money, so as to make up for what they had lost, but no further negotiations were had between them. Defendant did not testify or offer any evidence in his defense.

It should here be noted that at the time of the transaction with which we are here concerned (April 26, 1933) the California Horse Racing Act, as amended in 1935, Deering's Gen. Laws, Act 3421, now Div. 8, Ch. 4, Business and Prof. Code, St.1941, p. 659, had not been enacted. The Horse Racing Act created certain exceptions to the general prohibitions contained in section 337a of the Penal Code when the conditions laid down by the act are followed. In re Goddard, 24 Cal.App.2d 132, 74 P.2d 818; In re Walker, 11 Cal.2d 464, 80 P.2d 990, 117 A.L.R. 825. Obviously, therefore, at the time here pertinent all forms of betting or registering of bets on horse races were prohibited by the provisions of section 337a of the Penal Code.

Appellant contends that under the evidence just narrated both witnesses for the prosecution must be classified as accomplices of the defendant and he as an accomplice of theirs, while respondent earnestly urges that the defendant was specifically charged with "receiving and holding" certain money to be wagered upon the result of a horse race; that the prosecution witnesses neither "received or held" any such money; that such witnesses therefore were not accomplices, within the meaning of section 1111 of the Penal Code, which defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

While, as contended by the respondent, the defendant was not on trial for the offense of "forwarding" money to be wagered on the result of a horse race, nevertheless the section of the Penal Code under which this prosecution was brought makes it a crime for any one to "forward" any such money or thing of value.

[4] The rule in this jurisdiction has long been established that where a statute enumerates a series of acts, as does section 337a of the Penal Code, either of which separately, or all together, constitute the crime, any one of the series may be charged, but all of them may also be charged; and although each act standing by itself may

constitute the offense, all of them taken together do no more, but simply constitutes one and the same crime. Bealmear v. So. Cal. Edison Co., 22 Cal.2d 337, 340, 341, 342, 139 P.2d 20. If respondent's theory is adopted, namely, that the witnesses in question did not "receive" the wage, then in any case where a statute enumerates a series of acts as constituting a particular and single offense the prosecution could charge a defendant with the commission of any one of these acts and then present as witnesses others who admittedly, in concert and agreement with the defendant, had committed one or more acts also denounced by the same statute other than the act charged against the defendant, thereby circumventing and avoiding the provisions of section 1111 of the Penal Code; and this notwithstanding both the witnesses and the defendant were principals in the single offense stated by the statute under which the indictment or information was filed against the defendant.

[5, 6] Furthermore, we are convinced that the evidence in this case brings it within the exception to the foregoing general rule prescribing the test by which it is determined whether one is an accomplice, i.e., where the parties conspire together in a pre-arranged plan to commit a substantive offense. People v. Lima, 25 Cal.2d 573, 577, 154 P.2d 698. In the case just cited our Supreme Court, 25 Cal.2d at page 578, 154 P.2d at page 701 says: "An accomplice has been defined as one 'who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime.'" In the instant case we see no escape from the conclusion that there existed between the two prosecution witnesses and the defendant a conspiracy and agreement pursuant to which the prosecution witnesses were to and did furnish certain monies for the purpose of wagering upon the result of a horse race and the defendant was to forward the same or by telephone to arrange for the wagering of such monies upon the result of a horse race and then divide the winnings, if any, between each of the parties to the agreement. As was said in People v. Lima, supra, 25 Cal.2d at page 578, 154 P.2d at page 701, "It is both logical and reasonable to hold that they are accomplices in the offense or offenses resulting from the execution of such plan." To ignore the mutual agreement or conspiracy element and thereby eliminate the accomplice relationship would serve only to provide ways and means for circumventing the salutary rule requiring that accomplice witnesses be corroborated, for as stated in People v. Coffey, 161 Cal. 433, 438, 119 P. 901, 903, 39 L.R.A.,N.S., 704, "Time has not changed the value of such evidence." As was so cogently said by Associate Justice Schauer in a strong and exceptionally well reasoned dissenting opinion in the case of People v. Clapp, 24 Cal.2d 835, 847, 151 P.2d 237, 244, "If exemptions in such laws (as to the corroboration of accomplices) are to be created, they should come from the Legislature and not be innovated by the courts. This court should be ever vigilant to protect, rather than to whittle away, the safeguards which the people through the Legislature have thrown around their liberty. However righteous the zeal to punish the guilty, the result of a salutary law struck down may well be more unrighteous than for two (or any number of) guilty individuals to escape punishment for a particular offense."

[7] We therefore conclude that both witnesses for the prosecution, in view of their testimony, and under the circumstances established by the evidence, must be held to be accomplices, and that defendant's conviction is not legally supported unless their testimony was corroborated. It is not here contended by respondent that the record discloses any evidence other than that of the accomplices tending to connect the defendant with the commission of the crime charged against him, and an examination by us of the record discloses no such corroborative evidence.

For the foregoing reasons the judgments and the orders denying defendant's motions for a new trial in both cases are, and each is, reversed.

YORK, P. J., and DORAN, J., concur.

72 Cal.App.2d 101

WUEST v. WUEST (two cases).

Civ. 14946.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1945.

As Amended Dec. 18, 1945.

Rehearing Denied Jan. 2, 1946.

Hearing Denied Feb. 4, 1946.

1. Appeal and error ⟹1010(1)

Findings and judgment supported by substantial evidence will not be disturbed on appeal.

2. Appeal and error ⟹717

Trial judge's remarks made in course of trial or in final opinion of court are ineffective to override decision embraced in findings and conclusions.

3. Divorce ⟹184(4)

Judgment for plaintiff awarding divorce for cruelty having followed a waiver of findings, it is presumed that evidence supported such findings.

4. Evidence ⟹317(2)

In action to vacate interlocutory judgment of divorce granted to plaintiff, plaintiff's testimony that plaintiff's attorney told plaintiff that judge had told attorney that divorce might not be granted unless plaintiff signed stipulation, was inadmissible as hearsay.

5. Divorce ⟹167

In action to vacate interlocutory judgment of divorce by reason of requirement of trial court that plaintiff sign stipulation relating to division of community property as prerequisite to granting of judgment for plaintiff and that findings be waived so that no appeal could be taken, plaintiff's testimony that judge stated in plaintiff's presence that court wanted plaintiff to sign the document so that there would be no appeal, was competent.

6. Divorce ⟹167

Evidence in action to vacate interlocutory judgment of divorce sustained findings that trial court entering interlocutory judgment had required plaintiff to sign stipulation relating to division of community property as prerequisite to granting of judgment for plaintiff and that findings should be waived so that no appeal could be taken.

7. Appeal and error ⟹931(1)

Every substantial conflict in evidence must be resolved in favor of findings, and of two conflicting inferences fairly deducible from evidence on appeal, that must be accepted which supports the judgment and where different inferences may be drawn, reviewing court will not draw from facts any inferences contrary to such as might have been drawn by trial court.

8. Divorce ⟹167

In determining whether plaintiff was entitled to vacate interlocutory judgment of divorce granted to plaintiff, finding that judge's remarks in open court caused plaintiff honestly to believe that divorce would be denied her unless plaintiff joined in stipulation relating to division of community property, was tantamount to finding of a fraud.

9. Divorce ⟹167

Findings that plaintiff seeking divorce on ground of husband's cruelty had not been informed before signing stipulation regarding division of community property, that plaintiff would thereby be deprived of right to apply for modification of judgment with reference to property rights, and that plaintiff was never informed within six months after divorce decree that she might apply to court for relief, supported judgment modifying divorce decree to extent that it provided for division of community property by payment to plaintiff of a monthly sum during her life expectancy. Code Civ.Proc. § 473.

10. Divorce ⟹252

Wife who obtained divorce on ground of extreme cruelty was entitled to more than the share awarded to husband from community property. Civ.Code, § 146.

11. Divorce ⟹286

The statute authorizing appellate court to revise trial court's disposition of community property between divorced spouses, could not be construed as authorization that appellate court must necessarily interfere with decision upon issue which is committed to sound discretion of trial judge. Civ. Code, § 148.

12. Divorce ⟹286

In determining correctness of judgment which did not divide in kind community property between divorced spouses, it must be presumed that before making division, trial court considered health of both parties, their capabilities and all other factors that weigh in determination whether it is necessary to make a partition in kind or by sale. Civ.Code, § 147.

13. Divorce ⟹252

Where wife had no experience in managing community property and was so ill as to require denial to her of custody of children and wife obtained divorce on ground of extreme cruelty, trial court did not abuse its discretion in not dividing the property in kind, but requiring husband to make payments to wife. Civ.Code, §§ 146–148.

14. Divorce ⟹252

In divorce cases, courts usually divide community estate between spouses and award nonoffending party support money in lieu of a share of property or in addition thereto. Civ.Code, §§ 146–148.

15. Husband and wife ⟹262(1)

The presumption that title to property standing in name of wife is her separate property is rebuttable. Civ.Code, § 164.

16. Husband and wife ⟹264

Evidence including showing that lot was purchased on contract after marriage with spouses' earnings, that prior to maturity of contract husband assigned lot to wife who thereafter took title in her name and at husband's suggestion declared a homestead thereon, which was thereafter abandoned and that spouses later joined in executing a mortgage upon the lot, which was discharged with their joint earnings sustained finding that lot was community property. Civ.Code, § 164.

17. Divorce ⟹167

In action to vacate and modify interlocutory judgment of divorce, evidence supported finding of value of community property involved.

18. Appeal and error ⟹1011(1)

A determination of fact upon conflicting evidence is the peculiar function of trier of facts.

19. Interest ⟹39(2)

A judgment bears interest from its date unless the contrary appears. Code Civ.Proc. § 1033.

20. Divorce ⟹254

Where interlocutory judgment of divorce provided for payment by husband to wife of a sum of money as her share of community property to be paid in monthly installments, judgment should have allowed interest on entire sum from date when judgment was entered. Code Civ.Proc. § 1033.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Lois E. Wuest against William O. Wuest to vacate and modify in part a judgment entered in an action for divorce. From a judgment, defendant appeals and plaintiff cross-appeals.

Modified, and as modified, affirmed.

Newby, Holder & Newby, of Los Angeles, for plaintiff-appellant.

F. Murray Keslar, of Los Angeles, for defendant-appellant.

MOORE, Presiding Justice.

[1] Defendant appeals from a judgment of department 33 of the Superior Court of Los Angeles County which modifies the interlocutory decree of divorce rendered in department 21 of the same court by Judge Bullock. He grounds his appeal on the insufficiency of the findings to support the judgment and the insufficiency of the evidence to support the findings. While we cannot enthusiastically agree that the evidence in the record preponderates in favor of plaintiff on the issue of fraud in connection with the divorce judgment, yet our doubts as to the wisdom of the findings are without potency under the guidance of the familiar rule that the power of the reviewing court begins and ends with its determination that there is substantial evidence which will support the findings and judgment. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693.

Plaintiff is also dissatisfied with certain provisions of the current judgment and likewise appeals. A clear understanding of the issues necessitates a full narrative of the two trials and the causes of the controversies.

Resume of Past Events and Decisions.

Acting through counsel other than those currently appearing plaintiff filed her action for separate maintenance on August 18, 1939. At that time she was under observation in a psychopathic ward on the complaint of defendant. She was discharged in the following October and the insanity accusation dismissed. Upon a hearing of the order to show cause the court awarded plaintiff alimony but awarded custody of the two children to defendant. The case came on for trial in February, 1940, when evidence was taken, and again on April 24 when two physicians filed their reports declaring plaintiff to be sane but extremely nervous. Two days later plaintiff by leave filed her amended complaint alleging extreme cruelty, praying for custody of the children and a "reasonable division of the itemized community property," support and maintenance and attorney's fees. Defendant thereupon filed his answer and cross-complaint for divorce. Other sessions were held. On May 22 a stipulation signed by the parties and their counsel was approved by the court and on May 31, 1940, the interlocutory decree was entered whereby plaintiff was awarded the right to a divorce, her share of the community property "in accordance with the aforementioned stipulation," and the children were committed to the care of defendant.

The Stipulation.

Since the stipulation is the storm center of this controversy an outline of its terms will serve to illuminate our discussion. It was executed during the progress of the divorce trial on May 22, 1940. It established (1) the present net value of the community property to be $34,165.25; (2) one half thereof is to be paid Lois in full settlement of her community property rights, at the rate of $50 monthly in two equal installments over a period not to exceed 23.73 years; (3) after her share shall have been wholly paid all her rights shall then be satisfied and William shall own as his separate estate all the property free and clear of any claims of Lois; (4) all of such monthly payments shall be in addition to alimony to be payable to Lois; (5) the $17,082.62 shall be a lien on the three parcels of realty described; (6) the parties will execute all documents necessary to effectuate the stipulation; (7) William will pay all indebtedness against the properties; (8) the parties shall divide the home furnishings as previously agreed; (9) the balance of $550 attorney's fees shall be paid directly to plaintiff's counsel in monthly installments; and (10) William shall furnish Lois annually a certified copy of his income tax return made to the federal government.

The Interlocutory Decree.

In addition to the divorce and award of the $17,082.62 plaintiff was granted an allowance of $75 monthly to be paid in two equal installments and defendant was enjoined from encumbering or disposing of the real property prior to a full compliance with the stipulation.

Having unsuccessfully attempted in April 1941 to cause the divorce decree to be modified with respect to its disposition of the community property, on May 27, 1941, plaintiff through her counsel herein appearing filed the instant action demanding that the divorce decree be set aside insofar as it affects the property rights of the parties; that plaintiff's share of $17,082.62 less the amounts already applied thereon be paid forthwith to plaintiff and that in the event of default of such payment the property described in the divorce decree be sold for the purpose of enforcing the lien thereof.

The Attack on the Divorce Decree.

The alleged bases of plaintiff's attack upon the divorce decree are as follows: (1) Plaintiff had suffered from numerous physical assaults upon her by defendant for several years preceding the commencement of the divorce action; (2) such assaults, coupled with the fact of plaintiff's passing through a change of life, caused her to be in a highly nervous condition at all times during the pendency of the divorce litigation; (3) her health was in such a precarious condition that she was subjected, during the trial, to investigation by court assistants and and psychiatrists; (4) plaintiff was informed by her own attorney that the judge of department 21 had stated that plaintiff might not be awarded a decree of divorce if she should refuse to sign the stipulation so that neither party could appeal; (5) the judge stated in open court before the stipulation was signed that she did not think the evidence sufficient to sustain a cause of action for separate maintenance or divorce and demanded that the agreement of the parties be put in writing because they might change their minds; (7) plaintiff signed the stipulation because of such representations, her weakened mind, her menopause, and the assaults upon her by defendant.

The complaint also alleged that plaintiff had not been informed before she signed the stipulation that she would thereby be deprived of applying for a modification of the judgment with reference to her property rights; that she was never informed within six months after the divorce decree that she might apply to the court for relief under section 473, Code of Civil Procedure; that during the trial of the divorce action the judge in chambers informed the attorneys that the court would not divide the property in kind for fear that plaintiff because of her unstable condition might not be able to hold her property or the proceeds of a sale thereof, and that plaintiff's share "should be based upon her life expectancy" and paid to her in monthly installments; that plaintiff had no knowledge of those conferences until about May 27, 1941; that she never authorized her attorney to waive written findings.

A general demurrer to the complaint herein was sustained without leave to amend. From a judgment of dismissal plaintiff appealed, resulting in a reversal with a declaration that if a trial judge is convinced by the evidence that a plaintiff is entitled to recover, judgment should accordingly be entered, leaving plaintiff free to appeal from such portion thereof as may be deemed unjust. Wuest v. Wuest, 53 Cal.App.2d 339, 345, 127 P.2d 934.

The cause was tried in October 1944 after which the court made findings that all of the substantial allegations of the complaint are true. The court concluded and adjudged that the divorce decree be revised only in the following particulars: (1) It is void as to the division of the community property; (2) in lieu of such division plaintiff shall recover $17,082.62, the value of her share as of May 31, 1940, less the sum of $3,150 which had been paid since the latter date; (3) provided that prior to the expiration of 30 days after entry of judgment defendant may execute his promissory note for the sum awarded in favor of plaintiff, maturing in ten years, bearing interest at six per cent per annum from its date, and other customary stipulations of such documents, such note to be secured by a first mortgage upon the three parcels of real property constituting substantially the corpus of the community estate; (4) upon his payment in full of the amount due under the judgment then the title to the three parcels shall vest in defendant as his own separate estate; (5) this judgment is not intended to affect the provisions of the interlocutory decree of divorce or its order for alimony.

[2] In his effort to demonstrate his theses defendant invokes the statements of the trial judge made in the course of his colloquies with counsel. In this he must fail. Remarks of the trial judge made in the course of trial or in a final opinion of the court are ineffective to override the decision embraced in the findings and conclusions. DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444; Lord v. Katz, 54 Cal.App.2d 363, 128 P.2d 907; In re Lasker, 51 Cal.App.2d 120, 124, 124 P.2d 72.

The Evidence Supports the Findings.

[3] Plaintiff's right of recovery arises out of a combination of facts. The first is that she had suffered extreme cruelties at the hands of defendant. The judgment roll in the divorce action was received in evidence. It established detailed allegations of extreme cruelty. Judgment for plaintiff awarding divorce for cruelty having followed a waiver of findings it is presumed that sufficient evidence was received in support of such findings. Geneusz v. Harrington, 218 Cal. 760, 762, 25 P.2d 4; Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 680, 22 P.2d 5. Also the charge of defendant's extreme cruelty was adjudicated in the divorce action and no appeal was taken therefrom. Moreover, at the trial of this action plaintiff testified that he was so abusive she could not go back to him.

That plaintiff was suffering a high degree of nervousness was established by the facts that defendant had in a legal proceeding accused her of insanity and that she was undergoing examinations by specialists appointed by the court and found to be highly nervous at the divorce trial.

[4, 5] While plaintiff's testimony that her own attorney told her that the judge told him that a divorce might not be granted unless she signed the stipulation was hearsay and should have been rejected, yet her testimony that the judge stated in her presence that the court wanted her to sign the document so that there would be no appeal was competent evidence. Since it was believed by the court and all contradictory evidence was rejected, we have the fact established that the sick woman, fearing that she would be required to go back to a husband who had mistreated her, was required to sign an agreement the full import of which she did not comprehend and which operated to her disadvantage.

[6, 7] The findings are sustained not only by the testimony of Mrs. Wuest but also by all inferences which might reasonably have been drawn by the trial court. Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429; Hotaling v. Hotaling, 193 Cal. 368, 379, 224 P.

455, 56 A.L.R. 734; Morse v. Custis, 38 Cal.App.2d 573, 576, 101 P.2d 702. These cases hold that every substantial conflict in the evidence must be resolved in favor of the finding; that of two conflicting inferences fairly deducible from the evidence on appeal that must be accepted which supports the judgment; that in a case where different inferences may be drawn the reviewing court will not draw from the facts any inferences contrary to such as might have been drawn by the trial court. In view of the eagerness of Judge Bullock to protect plaintiff against herself it was not an unreasonable inference that in her zeal to confer a benefit upon the unfortunate women the judge approved of a division of the community property which was violative of plaintiff's legal rights.

The Findings Support the Judgment.

[8-10] To defendant's contention that the findings do not support the judgment it will be noted that in addition to the finding of the execution of the stipulation by the parties and their counsel and the entry of the judgment in pursuance thereof the court found true all of the substantial allegations of the complaint. The finding that the judge's remark in open court caused plaintiff honestly to believe that a divorce would be denied her unless she joined in the stipulation is tantamount to the finding of a fraud. Plaintiff was at the time under surveillance and her memory of the psychopathic ward was not mollified by either her existing nervous condition or her simultaneous examinations by the psychiatrists. From these findings the conclusions and judgment logically follow, since upon obtaining a divorce on the ground of extreme cruelty she was entitled to more than the share awarded to defendant who was at fault. Civil Code, sec. 146; Tipton v. Tipton, 209 Cal. 443, 288 P. 65.

Plaintiff Not Entitled to a Division in Kind

[11-14] But plaintiff presents her grievances against the decision to which we now advert. Her first attack is upon the failure to make a division in kind. The provision that the appellate court is authorized to revise the trial court's disposition of community property (Civil Code, sec. 148) is not to be construed as an authorization that we must necessarily interfere with a decision upon an issue which is committed to the sound discretion of the trial judge. Whether valuable properties should be transferred to a woman who demonstrates no special genius for management of business affairs, who is ill and so extremely nervous as to require a denial to her of custody of her children necessitates a most careful scrutiny by the court before whom she presents her cause. It is presumed that before making a division of community properties upon a dissolution of the marriage the trial court considered the health of both parties, their capabilities and all other factors that weigh in a determination of whether it is necessary to make a partition in kind or by sale. Civil Code, sec. 147. While we have reviewed the evidence we find no good reason for altering the judgment upon that score. Both judges before whom plaintiff appeared concluded that her interest in the properties would be best conserved by having them operated by the defendant. The "particular circumstances" which plaintiff asserts must exist in order to justify a cash payment instead of a division in kind did appear in bold outline at both trials.

Two of the parcels are revenue-producing properties. No overpowering reason is suggested why their operation should not be committed to defendant. His business experience as well as plaintiff's lack of it and her precarious health argues sternly for defendant's retention of control of those properties. While it is true that a wife and mother should as a general rule retain possession of the home, yet where the husband has the care of the children with the aid of an employed housekeeper and is required to pay the wife moneys with which to hire a home, it cannot be said that the court below did not exercise a sound discretion in awarding money to plaintiff for her interest in that property. Where one spouse at the time of divorce is ill and the other is capable of caring for the minor children and of operating the community property, it is a wise policy to award the unfortunate partner in the community his share in money in lieu of a specific interest and award title and possession of the properties to that one who is able therewith to maintain a home and provide for the progeny. Bailey v. Bailey, 142 Wash. 359, 253 P. 121. It is the settled practice for the courts to divide the community estate between the spouses and to award the non-offending party support money in lieu of a share of the property or in addition thereto. Webster v. Webster, 216 Cal. 485, 14 P.2d 522; 3 Cal.Jur. 669.

Parcel 1 Was Community Property.

[15, 16] The finding that parcel 1 was community property is amply supported. The lot was purchased on contract after marriage with the earnings of the parties. About a year prior to the maturity of the contract defendant assigned it to plaintiff who on September 15, 1919, took title in her name and at defendant's suggestion declared a homestead thereon. Three years later the homestead was abandoned and subsequently they joined in executing a mortgage upon the lot which was discharged with their joint earnings. Another loan was secured by a trust deed which was likewise paid with community earnings and a reconveyance was made in the usual form. Nine years thereafter defendant obtained a loan of $5,000 on the business lot (parcel 2) which fund he expended in improving the home. That loan having become defendant's obligation by virtue of the divorce decree was thereafter repaid by him. Finally, when plaintiff filed her first complaint for separate maintenance in her amended complaint she alleged that parcel 1 was community property.

All lands or personalty acquired after marriage by either husband or wife with earnings of either is community in character. Civil Code, sec. 164. While the fact that title to property standing in the name of the wife is presumed to be her separate property, that is a rebuttable presumption. Whatever may have occasioned the placing of the title in her name, the other facts above mentioned and reasonable inferences fairly deducible therefrom warrant the finding that parcel 1 was community property. Plaintiff cites many authorities holding that the husband may make gifts of community property to his wife. Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360; Yoakam v. Kingery, 126 Cal. 30, 58 P. 324; Miller v. Brode, 186 Cal. 409, 199 P. 531. But none of these or any other decision prevents the trial court from deciding upon substantial evidence that the conveyance of a community asset to the wife was not intended as a gift thereof to be her separate estate.

The Evidence Supports the Finding of Value

[17, 18] Plaintiff contends that the court adopted the values established in the divorce action and that it exercised no independent judgment to derive a determination of that issue. She argues that because her expert witness Rees called in the latter stages of the trial testified the value of parcel 2 to be $22,800, the court had no alternative but to adopt that appraisal rather than $15,000. Plaintiff overlooks the fact that the court received in evidence the files in the divorce action which show an appraiser of the Department of Water and Power of the City of Los Angeles, to be $15,000 on parcel 2. No good reason appears why the court should have adopted the valuation fixed by Mr. Rees rather than that by Mr. Elkins. Moreover, by stipulation of the parties the court appointed an appraiser for his own "guidance." At any rate, a determination of a fact upon conflicting evidence is the peculiar function of the trier of facts. Patten & Davies Lumber Co. v. McConville, supra.

Plaintiff Entitled to Interest

[19, 20] Finally, plaintiff assigns as error the court's refusal to allow her interest on the value of her share from May 31, 1940. On this issue she must prevail. When plaintiff's share of the community estate was transferred to defendant for a specified sum on May 31, 1940, she was entitled to the $17,082.62 at that time. That defendant was granted the privilege of discharging his debt by meager installments should not be interpreted to mean that he was to be relieved of the obligation to pay interest. By such a construction plaintiff received much less than one half of the value of the properties, contrary to law and to the intention of the judge who signed the divorce decree. A judgment bears interest from its date unless the contrary appears. Code Civ.Proc. sec. 1033; McNabb v. McNabb, 47 Cal.App.2d 623, 627, 118 P.2d 869. It follows that the original judgment for $17,082.62 bore interest from May 31, 1940, to October 26, 1944, in the sum of $5,260.32, making the amount thereof $22,342.94. Deducting therefrom the total payments theretofore made, towit, $3,150 and interest on the installments after payment in the sum of $357, leaves $18,835.94 as the amount for which the revised judgment should have been entered.

It is therefore ordered that the judgment herein be modified by substituting $18,835.94 in place and instead of $13,932.62 and as thus modified it is affirmed.

McCOMB and WILSON, JJ., concur.

72 Cal.App.2d 112

STORE PROPERTIES, Inc., v. NEAL et al.

Civ. 15041.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1945.

1. Specific performance ⟹28(1)

An agreement cannot be specifically enforced if its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Civ.Code, § 3390.

2. Specific performance ⟹31

Equity will not specifically enforce that which is only the basis for an agreement. Civ.Code, § 3390.

3. Specific performance ⟹28(1), 121(4)

To be specifically enforceable, an agreement must be definite in its terms and party seeking specific performance must establish by clear and satisfactory proof the existence of the contract alleged. Civ. Code, § 3390.

4. Specific performance ⟹28(1)

If the things mentioned in agreement are the subject of future ascertainment, agreement is not final but is indefinite and cannot be specifically enforced in equity. Civ.Code, § 3390.

5. Specific performance ⟹28(1)

A contract may be too broad to warrant its specific performance, though sufficient to constitute basis of an action for damages. Civ.Code, § 3390.

6. Specific performance ⟹31

Where contract appears to be a preliminary agreement embodying only the spirit of a contemplated supplementary contract and it is clear that minds of the parties never met upon the details, contract is not specifically enforceable. Civ.Code, § 3390.

7. Contracts ⟹32

Where it is understood that terms of a contract are to be reduced to writing and signed by the parties, it does not become a completed contract until assent to its terms is evidenced by a writing subscribed by all the parties.

8. Landlord and tenant ⟹22(2)

Where only the principal provisions of a lease are agreed upon, leaving the details and conditions to be expressed in a writing to be executed by the parties and such writing is never signed by those to be charged, it never becomes a binding obligation upon either.

9. Specific performance ⟹31

Written offer by owners accepted in writing by offeree to lease premises to offeree for 99 years provided that if lease upon specified terms should not be executed within 30 days either party could terminate offer at any time thereafter before execution of lease and that terms of lease not specified in offer should be subject to approval of both parties and containing other language implying that parties contemplated execution of formal lease as prerequisite to culmination of transaction, did not constitute a contract for 99 year lease enforceable in equity. Civ.Code, § 3390.

10. Frauds, statute of ⟹115(1)
Specific performance ⟹31

Submission by owners of unsigned formal lease 5 days after written offer to lease premises to offeree for 99 years was ineffective as against statute requiring lease of realty for more than one year to be subscribed by owner and did not complete a contract for 99 year lease enforceable in equity. Civ.Code, §§ 1091, 3390; Code Civ. Proc. § 1971.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Store Properties, Incorporated, against John W. Neal and another for specific performance of a contract to lease designated premises to plaintiff for 99 years. From a judgment of dismissal entered pursuant to an order sustaining a demurrer to its second amended complaint, plaintiff appeals.

Judgment affirmed.

Maurice Rose and Theodore Weisman, both of Los Angeles, for appellant.

Sanner, Fleming & Irwin, of Los Angeles, for respondents.

MOORE, Presiding Justice.

From a judgment of dismissal entered pursuant to an order sustaining a demurrer to its second amended complaint plaintiff appeals. The action is one for the specific performance of a contract which plaintiff contends was created by its acceptance of the offer of defendants as follows:

"Coldwell, Banker & Company,
"523 West Sixth Street L
"Los Angeles 14, California

"Gentlemen:

"We, as lessors, propose to lease to Store Properties, Inc., as lessee, the property at the southeasterly corner of Brighton Way and Beverly Drive in Beverly Hills, California, lot size 100′ by 150′, upon the following terms and conditions:

"(1) The lease shall run for a term of 99 years, commencing on the first day of November, 1944.

"(2) The rental for said term shall be at the rate of $750.00 monthly for the first 15 years of the lease; $800.00 monthly for the following 10 years; $850.00 monthly for the following 24 years; $1,000.00 monthly for the following 50 years.

"Upon execution and delivery of the lease the lessee shall pay to the lessor the sum of $18,000.00, $9,000.00 of which shall be as consideration for the execution of the lease, and the remaining $9,000.00 shall cover the first year's rental.

"(3) In addition to the above rental, Lessee will pay all taxes, assessments, insurance, and maintenance; in other words, the above rental will be net to the lessor.

"(4) Upon execution and delivery of the lease, the lessee will place in trust or escrow the sum of $30,000.00 as a guarantee that the lessee will make building improvements or alterations at a total cost of not less than $30,000.00. Said sum of $30,000.00 shall be released to the lessee when such improvements or alterations are completed.

"(5) The lessor shall furnish at the expense of the lessor at the time of execution and delivery of lease, a leasehold policy of title insurance with liability of $39,000.00 showing title to said property vested in the lessor, free and clear of any and all liens, except taxes not delinquent, and such conditions, restrictions, reservations, easements, rights and rights of way of record as the purchaser may approve, and insuring the leasehold interest of the lessee under said lease.

"(6) The property shall be delivered to the lessee subject to presently existing leases and such month-to-month tenancies as may exist at the date of commencement of lease, and all written leases shall be subject to the approval of the lessee, and the lessor's interest therein shall be assigned to the lessee.

"(7) Taxes, rents and insurance shall be prorated as of the date of execution of the lease.

"(8) Terms and conditions of the lease not covered by this proposal shall be subject to the approval of both parties.

"(9) Lessee shall deposit with Coldwell, Banker & Company the sum of $5,000.00 as evidence of good faith. If this offer is accepted by the lessee of said property and a lease is prepared and mutually agreed upon, the lessee shall, upon execution and delivery of said lease, pay to the lessor of said property this sum of $5,000.00 to apply on the first payment under said lease. If a lease upon the above terms and conditions has not been executed within thirty (30) days from date hereof, both parties reserve the right at any time thereafter, but prior to the execution of such a lease, to terminate this offer and the above sum of $5,000.00 shall thereupon be returned to the lessee upon demand.

"(10) This proposal shall become null and void unless accepted in writing by the lessee on or before 12 o'clock noon October 23d, 1944.

"John W. Neal
"Clara B. Neal

"October 20, 1944

"We agree to enter into a lease on the above described property on the terms as set forth above.

"Store Properties, Inc.
"Samuel Genis
"President."

By appropriate allegations plaintiff declared that the offer and acceptance constitute a valid, binding contract for a 99-year lease. The complaint includes many formal allegations, alleges plaintiff's deposit of $5,000, the reasonable value of the leasehold, its agreement to deposit $30,000 as a guaranty that the improvements and alterations would be completed, its receipt from defendants of a form of formal lease, and its execution thereof at the request of defendants. The pleading includes a number of argumentative allegations which cannot add to the value of the factual declarations relative to the alleged contract. The offer and acceptance are attached as Exhibit A and the proposed formal lease as Exhibit B.

Defendants contend that by reason of its indefiniteness and uncertainty the writing is not an enforcible contract; that it lacks mutuality; that even though Exhibit B be considered as one of a series of acts with Exhibit A still there is no contract susceptible of enforcement; that Exhibit B is ineffectual in that it contravenes the statute of frauds. On the other hand, plaintiff argues: (1) That defendants' proposal to execute a lease incorporated all the terms necessary to constitute a valid instrument; (2) that defendants' offer having been accepted in writing and the acceptance of such offer having been delivered to defendants, the result is a binding contract to lease on the terms specified in the offer; (3) that defendants cannot maintain uncertainty in the contract with reference to the improvements to be made for the reason that they left the nature of such improvements to the judgment of plaintiff, which was to enjoy their exclusive use; (4) that Exhibit A contains no clause reserving to defendants the right to refuse to sign a proper form of lease after its acceptance by plaintiff.

Inasmuch as we have concluded that the offer and acceptance do not constitute an enforcible contract, we confine our discussion to that attack upon the sufficiency of the pleading.

[1-8] An agreement cannot be specifically enforced if its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Civil Code, § 3390. A court of equity will not specifically enforce that which is only the basis for an agreement. An instrument which is the subject of such an action must be complete and certain. Los Angeles Immigration & Land Co-operative Association v. Phillip, 56 Cal. 539, 547. While it is a cardinal principle of natural justice that a person shall perform his agreement, yet in order for it to be enforcible it must be definite and certain in its terms and he who demands specific performance must establish by clear and satisfactory proof the existence of the contract alleged. If the things mentioned in the agreement are the subject of future ascertainment, then the agreement is not final but is indefinite and uncertain in its terms and cannot be enforced in equity. Magee v. McManus, 70 Cal. 553, 557, 12 P. 451. Even though a contract expressed in general terms might not be void and although it might be the basis of an action for damages, yet it may be entirely too loose and inexact to warrant a decree for specific performance. Stanton v. Singleton and Mooers, 126 Cal. 657, 664, 59 P. 146, 47 L.R.A. 334. Where a contract appears to be a preliminary agreement "embodying only the spirit of a contemplated supplementary contract * * * and it is perfectly clear * * * that the minds of the parties never met upon the details," then it is not enforcible. Warson v. Talpey-Arnold Syndicate, 202 Cal. 656, 659, 262 P. 716, 717. When it is the understanding that the terms of a contract are to be reduced to writing and signed by the parties, assent to its terms must be evidenced by a writing subscribed by all of them; otherwise it does not become a completed contract. Spinney v. Downing, 108 Cal. 666, 668, 41 P. 797; Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077. When only the principal provisions of a lease are agreed upon, leaving the details and conditions to be expressed in a writing to be executed by the parties, and such writing is never signed by those to be charged, it never becomes a binding obligation upon either. Linnard v. Sonnenschein, 94 Cal. App. 729, 733, 272 P. 315. If parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed. I Williston on Contracts, 59. If a writing is viewed as the consummation of the negotiations there is no contract until the written draft is finally signed. Mississippi & Dominion Steamship Co., Ltd., v. Swift, 86 Me. 248, 29 A. 1063, 41 Am.St.Rep. 545. To be finally settled an agreement must comprise all the material terms and conditions which the parties intend to introduce. In their absence there is no completed contract. Schenectady Stove Co. v. Holbrook, 101 N.Y. 45, 4 N.E. 4; Monahan v. Allen 47 Mont. 75, 80, 130 P. 768.

[9] Under the principles established by the foregoing decisions it is clear that no agreement enforcible at equity was made by the parties herein. There was a promise by defendants to lease their property to plaintiff for 99 years provided that if "a lease upon the above terms and conditions has not been executed within 30 days from date hereof, both parties reserve the right at anytime thereafter, but prior to the execution of such a lease, to terminate this offer." The proposal also provides that the terms and conditions of the lease not specified therein shall be subject to the approval of both parties; that "upon ex-

ecution and delivery of the lease, the lessee shall pay" etc.; that "upon execution and delivery of the lease, the lessee will place in escrow the sum of $30,000"; that "taxes, rents and insurance shall be prorated as of the date of the execution of the lease"; that if this offer is accepted * * * and a lease is prepared and mutually agreed upon, the lessee shall upon execution and delivery of said lease, pay. * * *" Such language clearly implies that the parties contemplated the execution of a formal lease as a necessary act towards the culmination of their proposed transaction. Moreover, the provision in paragraph 9 of the offer is a definite reservation of each party to be released from every obligation under the contract if the lease shall not have been executed within 30 days from the date of the offer.

It was evidently the numerous provisions contemplated as indispensable to a competent 99-year lease that caused defendants to include those provisions in paragraphs 8 and 9, providing for their own approval of the lease thereafter to be prepared and for their reservation of the right to terminate the offer if a lease should not be executed within 30 days after the offer.

Further to demonstrate the soundness of our thesis that the parties must have intended the execution of a lease as a condition precedent to the consummation of the negotiations we return to a consideration of the covenants that should be agreed upon before it can be said that the minds of the parties have met upon all of the essentials of a contract of such importance as a 99-year lease. Absent from Exhibit A are provisions for (1) the kind of a building and the nature of its construction; (2) the nature of its foundation; (3) the type of its roof, its conformance with restrictions, zoning ordinances and other legal requirements pertaining to a permanent structure; (4) methods for preventing an abandonment and of enforcing the obligations of the lease in event of lessee's insolvency and means of determining the extent or nature of repairs; and (5) the character and financial responsibility of an assignee. Covenants bearing upon these and many other subjects must be agreed upon before it can be said that a contract for a 99-year lease has been made. But in this case in order to determine that the offer is not enforcible it is unnecessary to go further than paragraphs 8 and 9 to observe that the offer merely adumbrates the instrument contemplated. It is merely one step in the negotiations for a lease. The offer, which was addressed to a broker, indicates that the parties contemplated further study and conferences with reference to the terms of the lease. It cannot be said, therefore, that the parties contracted for a 99-year lease.

In support of its contention that the offer and its acceptance constitute a valid contract for a 99-year lease plaintiff relies largely upon Levin v. Saroff, 54 Cal. App. 285, 201 P. 961. That decision is not authority here. Those parties acted upon a mutual construction of their agreement. Saroff had agreed in writing to lease from Levin at a definite rental for five years and was granted an option of renewal. On the very day of their contract Levin surrendered possession, made the repairs called for by the contract and Saroff took possession. He paid four months' rent in advance and subsequent rentals in advance as provided. After further negotiations for the formal lease, to the discredit of Levin he refused to execute a lease containing all of the provisions of their original memorandum and others which Levin himself had proposed. He was unsuccessful in his attempt to oust Saroff because the "agreement has been acted upon and the defendant has gone into the possession * * *. Such agreement was in full force and effect until superseded by a formal writing in accordance therewith." 54 Cal.App. at page 291, 201 P. at page 963. The other authorities cited by plaintiff (Magee v Magee, 174 Cal. 276, 162 P. 1023; Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 P. 917; Fleishman v. Woods, 135 Cal. 256, 67 P. 276; Flickinger v. Heck, 187 Cal. 111, 200 P. 1045; McCowen v. Pew, 18 Cal.App. 302, 123 P. 191) are readily distinguishable. The facts in none of them are similar to those alleged in the complaint before us. None is authority here.

[10] The submission of the unsigned formal lease by defendants five days after the original offer does not serve to complete a contract for a 99-year lease. That act was likewise but another step in the negotiations. Not having been signed by the owner, it was no more than so much conversation. It was ineffective as against the statute which requires that a lease of real property for a term exceeding one year must be subscribed by the owner. Civil Code, sec. 1091; Code Civil Proc. § 1971;

Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L.R.A.,N.S., 689, 134 Am.St.Rep. 124.

The judgment is affirmed.

WILSON, Justice (concurring).

I concur in the judgment on the ground that neither Exhibit A nor Exhibit B referred to in the opinion of the Presiding Justice nor the two documents together constitute a valid agreement which may be enforced in an action for specific performance. See Harper v. Goldschmidt, 156 Cal. 245, 246 et seq., 104 P. 451, 28 L.R.A.,N.S., 689, 134 Am.St.Rep. 124. I do not express any opinion as to whether either or both documents may form the basis of an action for damages for nonperformance.

McCOMB, J., concurs.

PUISSECUR v. YARBROUGH et al. *

Civ. 14972.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1945.

Rehearing Denied Dec. 21, 1945.

Hearing Granted Jan. 31, 1946.

1. Execution 🔑115

An execution, levied on bank by sheriff's delivery thereto of copy of writ and notice of attachment of trust deed and note, executed in judgment debtor's favor and placed in bank's possession for collection, constituted a lien on note and trust deed, though they were not delivered to sheriff by bank until after judgment debtor assigned note to another. Code Civ.Proc., § 542, subd. 6.

2. Attachment 🔑164

Debts, credits, and other personalty incapable of manual delivery are attached by leaving with debtor or person in possession or control of credits a copy of writ and notice that debts, credits, or such other personalty are attached pursuant to the writ. Code Civ.Proc., § 542, subd. 6.

3. Bills and notes 🔑28

A note is not a debt, but only primary written evidence of debt, which is an intangible obligation which debtor owes creditor and creditor has right to enforce in appropriate action.

4. Execution 🔑132

To constitute valid lien of attachment on sheriff's delivery to bank of copy of writ of execution and notice of attachment of trust deed and note belonging to judgment debtor and in bank's possession for collection, delivery of such instruments to sheriff by bank was unnecessary, as they were merely evidence of maker's obligation to debtor.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Raymond F. Puissecur against F. Gramer Yarbrough, Virginia Lee Yarbrough, and others to foreclose a trust deed as a mortgage. Judgment for plaintiff, and named defendants appeal.

Affirmed.

Fred W. Heath and Daniel A. Knapp, both of Los Angeles, for appellants.

J. M. Clements, Thomas Higgins, Robert E. Austin, and John N. Helmick, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to have a deed of trust foreclosed as a mortgage, defendants appeal.

The undisputed facts are these:

On November 12, 1938, defendant Yarbrough executed a promissory note in favor of Melanie D. Woodd in the sum of $800, also a trust deed, covering certain real property, to secure the payment of the note. The promissory note was to be paid in monthly installments of $10 each. The note was placed with the Security First National Bank of Los Angeles for collection. There was an action pending in the Superior Court of Los Angeles County No. 435,718 in which plaintiff herein was one of the plaintiffs and Melanie D. Woodd was defendant. On June 19th and 20th, 1940, a writ of execution predicated upon a judgment against defendant Woodd in action No. 435,718 was served upon the Security First National Bank and defendants herein attaching all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to Melanie D. Woodd in the possession or under control of the Security First National Bank. The sheriff's return on the execution read as follows:

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* Subsequent opinion 175 P.2d 830.

"On June 19, 1940, I duly attached all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to defendants therein named in possession or under control of Security First National Bank of Los Angeles, 561 South Spring Street, Los Angeles, California, to which I received the answer hereto attached."

On September 15, 1940, Melanie D. Woodd assigned the above mentioned promissory note to M. L. Hovey. Subsequent to this assignment the promissory note and deed of trust were delivered to the sheriff who at a later date at a sheriff's sale sold the note and trust deed to plaintiff herein.

[1, 2] According to an agreement of the parties at the time of the oral argument before this court the question presented for our determination was conceded to be:

Did the execution levied on the Security First National Bank on June 19, 1940, constitute a lien upon the promissory note and trust deed described above, since the promissory note and trust deed were retained in the possession of the bank and not delivered to the sheriff until subsequent to the assignment of the note by Melanie D. Woodd to H. L. Hovey?

This question must be answered in the affirmative and is governed by these pertinent rules of law:

(1) Debts, credits and other personal property not capable of manual delivery are attached by leaving with the person owing such debts, or having in his possession or under his control such credit a copy of the writ and a notice that the debt owing or the credit or other personal property not capable of manual delivery is attached pursuant to such writ. (Section 542, subdivision 6 of the Code of Civil Procedure.)

[3] (2) A note is not a debt. It is only primary evidence of a debt, the debt itself being the intangible obligation which the debtor owes to the creditor and which the creditor has the right to enforce in an appropriate action. The note is merely written evidence of the debt or obligation. (Johnston v. Wolf, 118 Cal.App. 388, 391, 5 P.2d 673; Bagley v. Eaton, 10 Cal. 126, 148 et seq.; 16 Cal.Jur. [1924] page 690, sec. 2.)

[4] Applying the foregoing rules to the facts in the instant case, it is clear that under rule 2, supra, the obligation which was attached was intangible personal property not capable of manual delivery, therefore under rule 1, supra, the lien of the execution became effective when the sheriff delivered to the bank a copy of the writ of execution and a notice that the trust deed and note in its possession and under its control belonging to Melanie D. Woodd were attached. It was not necessary in order to constitute a valid lien of attachment that the bank deliver the note and trust deed to the sheriff since they were merely *evidence* of the obligation and not the obligation itself.

In view of our conclusions it is unnecessary to discuss any other phase of the cause.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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72 Cal.App.2d 219

YEE KEE CHONG v. PACIFIC FREIGHT LINES et al.

3 Civ. 7236.

District Court of Appeal, Third District, California.

Dec. 13, 1945.

1. Appeal and error 🔑477

The granting or denial of a writ of supersedeas to stay proceedings pending an appeal from an order denying defendants' motion for a change of venue is a matter of discretion depending on special circumstances. Code Civ. Proc. § 949.

2. Venue 🔑52(1)

Denial of motion for change of venue based on convenience of witnesses is discretionary.

3. Appeal and error 🔑478

On petition for supersedeas to stay proceedings pending an appeal from an order denying defendants' motion for a change of venue, based on convenience of witnesses, evidence did not warrant finding of exceptional circumstances requiring issuance of writ or that trial court abused its discretion in denying motion. Code Civ. Proc. § 949.

4. Appeal and error 🔑478

Where exceptional circumstances, probability that substantial questions would be presented on appeal, or that otherwise apparent abuse of discretion existed justifying an appellate court in staying proceedings pending an appeal from an order denying defendants' motion for a change of venue were not shown, defendants were not entitled to a writ of supersedeas. Code Civ.Proc. § 949.

5. Appeal and error 🔑430(2)
Courts 🔑82

Relief may be granted for failure to comply with the Rules on Appeal, except failure to give timely notice of appeal. Rules on Appeal, rules 4, 5, 56(b)

6. Appeal and error 🔑607(1)

Where "shall" was used in requirements of service of notice to prepare transcript as contained in rules on appeal, rule did not permit of alternative or permissive procedure, but violation of rule was not jurisdictional to appeal so as to require its dismissal. Rules on Appeal, rules 4, 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

7. Courts 🔑82

Where District Court of Appeal obtained jurisdiction of appeal by the filing of a timely notice thereof, court was authorized to grant relief on a showing of excuse to a party violating a procedural requirement. Rules on Appeal, rules 4, 5, 56(b).

8. Appeal and error 🔑802

Where record on appeal was not yet before District Court of Appeal, a motion to dismiss appeal would be denied without prejudice.

◆

Appeal from Superior Court, Sonoma County.

Action by Yee Kee Chong against the Pacific Freight Lines, a corporation, and another for breach of contract for safe carriage of property, wherein defendants appealed from an order denying defendants' motion for a change of venue. On defendants' petition for a writ of supersedeas to stay proceedings pending the appeal, and on plaintiff's motion to dismiss appeal.

Petition for writ and motion to dismiss denied.

Hugh Gordon, of Los Angeles, and Wyman C. Knapp, of San Francisco, and Russell Milham and Geary & Tauzer, all of Santa Rosa, for appellants.

Hitchcock & Bell, of Santa Rosa, for respondent.

PEEK, Justice.

This opinion is in accordance with the order of this court made and entered at the conclusion of the hearing on defendants' petition for a writ of supersedeas to stay proceedings pending an appeal from an order of the trial court denying defendants' motion for a change of venue and plaintiff's motion to dismiss said appeal.

The record in regard to the petition for a writ of supersedeas discloses that defendants' motion for a change of venue was denied on August 10, 1945, and on the same day the case was set down for trial for October 10, 1945. Prior to said date of trial, defendants made application to the court for a continuance, and the cause was continued to October 29, 1945. Fifty-nine days after the order denying defendants' motion for a change of venue, notice of appeal was filed and the same is now pending. On October 29, 1945, the action, which is for damages for breach of contract for the safe carriage of property to its destination in Sonoma county, went on regularly for trial. At the conclusion of plaintiff's case defendants contended that they were not fully prepared to try said action and requested an extension of time within which to present evidence in support of their general denial. Thereupon counsel for plaintiff stipulated that defendants could have such time as the court would allow for the submission of any defense they might have to the action. The matter was then continued to December 3, 1945. The present petition was filed on October 29th and noticed for hearing on November 26th.

[1] It is the settled law of this state that the granting or denial of a petition for a writ of supersedeas in such a case is a matter of discretion (Code Civ.Proc. § 949; Bardwell v. Turner, 219 Cal. 228, 229, 25 P.2d 978; Kane v. Universal Film Exchanges, 32 Cal.App.2d 365, 367, 89 P.2d 693, 91 P.2d 577; McKenzie v. Los Angeles Life Ins. Co., 88 Cal.App. 259, 260, 263 P. 338), and that the exercise of such power "must in a great degree depend upon the special circumstances of each case." West Coast, etc., Co. v. Contractors, etc., Bd., 68 Cal.App.2d 1, 155 P.2d 863, 866.

There is no showing in the record of any exceptional circumstances which would require the issuance of the writ. See West Coast, etc., Co. v. Contractors, etc., Bd., 68 Cal.App.2d 1, 155 P.2d 863, 866; Private Investors v. Homestake Min. Co., 11 Cal.App.2d 488, 492, 54 P.2d 535. The application is predicated solely upon the affidavit of one of defendants' counsel. Said affidavit refers to the denial of the motion for change of venue and asserts mere conclusions to the effect that such denial was improper; that the trial court is proceeding to trial notwithstanding its action in such matter may be contrary to the final determination of this court on the appeal from the order made on said motion; that the appeal is not for the purpose of delay but because defendants believe their rights under the contract terminated in San Luis Obispo county where the property was destroyed by fire; and that defendants conduct no business of any kind in the county of Sonoma which would authorize a trial in said county.

[2, 3] Moreover, it is not apparent from the record herein, including said affidavit, that the appeal from the order denying the motion for change of place of trial will involve any substantial issue (see Laher, etc., Corporation v. Superior Court, 52 Cal.App.2d 467, 468, 126 P.2d 391), as the denial of the motion is based upon the convenience of witnesses, a matter solely within the discretion of the trial court. Without prejudging the questions which may be presented on the appeal, we conclude that prima facie there is no showing that the trial court acted in abuse of discretion in making said order. See West Coast, etc., Co. v. Contractors, etc., Bd., 68 Cal.App.2d 1, 155 P.2d 863; Private Investors v. Homestake Min. Co., 11 Cal.App.2d 488, 492, 54 P.2d 535.

[4] Since defendants have failed to sustain the burden of showing exceptional circumstances or the probability that substantial questions will be presented on appeal, or that otherwise there is any apparent abuse of discretion justifying an appellate court in staying proceedings, the petition is denied.

Plaintiff's motion to dismiss defendants' appeal is in effect predicated upon two charges of alleged error, (1) that the appeal was not taken within the period prescribed by rule 2(a) of Rules on Appeal, and (2) that defendants failed to serve upon plaintiff notice to prepare transcript in accordance with either rule 4 or 5 of Rules on Appeal.

[5-8] At the time of oral argument it was conceded that the first question was based upon information regarding the date of entry of the order denying defendants' motion for a change of venue, which information is now shown to have been erroneous. As to the second question raised it is now settled that relief may be granted from a default in failure to comply with the new rules, except failure to give timely notice of appeal. 56(b). It also may be said that although the mandatory "shall" is used in relation to the requirements of service of notice as contained in rules 4 and 5, the true meaning to be ascribed to such rule is that the "particular provision does not permit of alternative or permissive procedures." Averill v. Lincoln, 24 Cal.2d 761, 764, 151 P.2d 119, 127. "It does not follow", as the court stated in the case last cited, "that such violation is jurisdictional to the appeal." Therefore, this court having obtained jurisdiction of the appeal by the filing of a timely notice thereof, we may grant relief upon a proper showing of excuse to a party who is in default by reason of a violation of a procedural requirement. Averill v. Lincoln, supra; Rattray v. Scudder, 67 Cal.App.2d 123, 128, 153 P.2d 433. However, as the record on appeal in the present case is not yet before this court, plaintiff's motion to dismiss said appeal is denied without prejudice.

ADAMS, P. J., and THOMPSON, J., concur.

72 Cal.App.2d 53

HANDLON v. WOLFF et al.

Civ. 12920.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1945.

As Modified on Denial of Rehearing Jan. 4, 1946.

1. Mandamus ⚷168(4)

In proceeding for writ of mandate compelling municipal civil service commission to admit petitioner to office designated as claims agent municipal railway, evidence sustained finding that at time municipality acquired public utility the petitioner was in employ of the public utility as claim agent. St.1931, p. 2973.

2. Municipal corporations ⚷217(1)

Under charter providing that if one has been employed for one year in utility acquired by municipality such employee shall be deemed appointed to "such position", the quoted words mean a similar position in kind and degree. St.1931, p. 3049, § 125.

See Words and Phrases, Permanent Edition, for all other definitions of "Such Position".

3. Mandamus ⚷168(4)

In proceeding for writ of mandate to enforce petitioner's right under municipal charter provision that if one has been employed for one year in utility acquired by municipality employee shall be deemed appointed to such position, evidence sustained finding that position of general claims agent municipal railway was one most similar to position held by petitioner in private utility acquired by municipality and that petitioner had been improperly appointed to subordinate position of claims adjuster. St.1931, p. 3049, § 125.

4. Municipal corporations ⚷218(2)

Where employee of utility acquired by municipality had right to position of claims agent under municipal charter providing that if one has been employed for one year in acquired utility such employee shall be deemed appointed to such position, civil service commission could not take away employee's right to position of claims agent. St.1931, p. 3049, § 125.

5. Mandamus ⚷176, 187(10)

In proceeding for writ of mandate to enforce petitioner's right to position of claims agent under municipal charter, part of writ of mandate regarding rights of other employees who were not parties to proceeding and right of civil service commission to hold promotional examination for position of claims agent related to matters beyond issues and would be stricken out. St.1931, p. 3049, § 125.

6. Municipal corporations ⚷217(6)

Under municipal charter provision that if one has been employed for one year in utility acquired by municipality such employee shall be deemed appointed to such position, resignation of petitioner terminated duty of municipal railway to continue a position comparable to position held by petitioner previously with the acquired private utility but it was necessary to adjudicate petitioner's original right to determine compensation petitioner was entitled to during his tenure of office from date of municipality's acquisition of utility to date of petitioner's resignation. St.1931, p. 3049, § 125.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Proceeding by John H. Handlon against Harry K. Wolff and others, as and constituting the civil service commission of the City and County of San Francisco and others for a writ of mandate compelling the civil service commissioners to admit petitioner to a certain office. From an order granting the petition, the defendants appeal.

Order modified, and as modified, affirmed.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for appellant.

Milton Marks and Morris Lowenthal, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendants from an order of the superior court granting a petition for a writ of mandate compelling the civil service commissioners of the City and County of San Francisco to admit the petitioner, J. H. Handlon, to an office designated as "G 102 Claims Agent Municipal Railway."

Preliminarily it may be stated that the municipality, the operator of a street railway system under a city and county freeholder's charter provision, purchased a privately owned competitive company to be operated in conjunction with the municipally owned railway. Since the effective date of the freeholder's charter, adopted in 1932, Stats.1931, p. 2973, there has been a provision for positional rights of those theretofore in the employ of a municipal utility and also a provision to place employees of utilities which might be acquired. The portion of the charter relevant to the issues raised herein reads: "All employees engaged in public utility work at the time this charter shall go into effect, and who have been permanently appointed to their respective positions in conformity with the civil service provisions of this charter, shall become employees of the public utilities commission under the classification held by each such employee at such time. All persons employed in the operating service of any public utility hereafter acquired by the city and county at the time the same is taken over by the city and county, and who shall have been so employed for at least one year prior to the date of such acquisition, *shall be continued in their respective positions and shall be deemed appointed to such positions, under, and entitled to all the benefits of, the civil service provisions of this charter;* provided, however, that no person who is not a citizen of the United States shall be so continued in or appointed to his position. All persons residing outside the city and county claiming the benefit of this provision and who are not engaged on such utility work outside of the limits of the city and county shall be allowed a reasonable time, not exceeding one year, to become residents of the city and county." (Italics added.) Stats.1931, pp. 3049, 3050, sec. 125. No question of noncitizenship or nonresidence is raised in this proceeding. Those provisions are quoted only for the purpose of indicating that even under adverse circumstances it was intended that employees of an acquired private utility should be given the opportunity of continuation "in their respective positions."

[1] It is the contention of appellant city that section 125 operates to blanket into civil service only those employees in positions existing at the time of consolidation and not into any new positions created by reason of the consolidation. Appellants admit that the allegations of the complaint covering the duties of "claims agent" in the acquired company "were true" and that in that respect the "findings follow those allegations." The findings show that "For a period in excess of 36 years, namely ever since on or about the first day of January, 1908, the petitioner was an employee, namely, Claim Agent, in the operating service of Market Street Railway Company (and its immediate predecessor), a public utility acquired by respondent the City and County of San Francisco on September 29, 1944. For a period in excess of 18 years, namely, from or about the month of January, 1926, the petitioner was also an employee in the operating service of said public utility in the capacity of Chairman of the General Safety Committee of said Market Street Railway Company. The petitioner, ever since the respective dates of his employment in the operating service of said Market Street Railway Company (and its immediate predecessor) in the furtherance of his duties, acted and served continuously therein in said capacities and was so acting and serving in both of the said capacities for and in behalf of said public utility at the time of its acquisition by the City and County of San Francisco. * * *

"As Claim Agent, the petitioner * * * directed and assigned all work of the employees of said Claims Department and had full charge thereof. The services and duties of the petitioner as Claim Agent included the supervision and direction of the adjusting of all claims against said Market Street Railway Company arising out of injuries, deaths and property damage; the investigation of all accidents wherein the Market Street Railway Company was or might be involved and wherein claims against said company were or might be asserted; the preliminary preparation of all cases for the Law Department of the Market Street Railway upon which suits had been commenced; the compilation of periodic tabulations upon a comparative basis respecting the types and severity of accidents upon the various street railway lines operated by Market Street Railway Company; the compilation of data upon a comparative basis and at frequent intervals respecting the cost and expense to the said public utility arising out of accidents on the various street railway lines operated by Market Street Railway Company and arising out of accidents of various types and classes with respect to passengers and nonpassengers and with respect to vehicular and pedestrian accidents. In addition, the petitioner as Claim Agent of said public utility directed and participated in the preparation of statistical data concerning the operation of street railway systems in San Francisco and in other communities, inclusive of the frequency and severity of various types of accidents and the frequency and extent of claims resulting therefrom. * * *

"As chairman of the General Safety Committee of said Market Street Railway Company, the petitioner possessed and fulfilled the duty and function of determining the causes giving rise to accidents in the operation of the street railway lines owned and conducted by Market Street Railway Company for the purpose of ascertaining and finding means of reducing the frequency and severity of such accidents and establishing rules and method of safety to minimize the frequency and severity of such accidents and reducing the cost to said company arising out of claims by reason of accidents occurring in the operation of said railway lines. * * *

"All of said functions and duties of petitioner continued to be performed by petitioner to the date of the filing of his petition herein on September 28, 1944, and were being performed by him at the time said public utility was acquired by the City and County of San Francisco." All of the court's findings are supported by evidence or reasonable inferences that may be drawn from all the facts and circumstances.

The court further found that petitioner Handlon was designated by the Civil Service Commission as "a Claims Adjuster." Specifically the court found that such classification "therein and thereby fixed the compensation schedule for said position at $350.00 per month with a maximum of $435.00 per month, thereby knowingly demoting the petitioner in violation of Section 125 of the charter to a subordinate and inferior position as described therein and thereby reducing his compensation from $625.00 per month to $350.00 per month."

The court also found that at the time of the acquisition of the private utility there was a classification—"G 102 General Claims Agent, Municipal Railway"—which described a "claims agent" as one who directs investigations necessary for settlement of claims resulting from accidents, and included among his duties that he "assigns and reviews the work of claims adjusters, investigators, appraisers." In this connection the court found that the Board of Supervisors adopted an ordinance wherein and whereby the "City and County of San Francisco provided for the classification denominated by the Civil Service Commission as 'G 102 General Claims Agent' and for the classification denominated 'G 106 Claims Adjuster' and fixed the compensation of said General Claims Agent at between $500.00 and $600.00 per month, and for the Claims Adjuster at between $350.00 and $435.00 per month." From the findings it appears that at the time of the consolidation a person holding the position of "claims adjuster," ("an inferior and subordinate position to that of 'Claims Agent' "), was assigned to the position of "general claims adjuster," which in fact made such appointee the superior to all others in the claims department. Further, the court found that a claims agent is the head of a claims department, a position invariably superior to that of claims adjuster; and that Handlon's classification as a "claims adjuster" was "sham and pretended" and in effect reduced him to a subordinate position.

During the trial of the present case the Civil Service Commission announced a promotional examination for the position of "G 102 General Claims Agent, Municipal Railway." In this connection the court found that the terms and conditions of the promotional examination has been so devised and prescribed that Handlon would be deprived of his right to be continued in his position pursuant to section 125 of the charter inasmuch as "under the pretended or sham announcement that the examination is promotional in character, * * * in fact the petitioner if successful would be regaining only the position from which he had been improperly demoted," and that under the terms of the examination 100 points out of a total obtainable 1,000 would be lost to Handlon because he had not been previously an employee of the city and county.

On the basis of these findings the trial court in the peremptory writ commanded the city and county and certain official representatives thereof to admit Handlon to the occupancy, title, emoluments and right of position of "G 102 Claims Agent Municipal Railway," effective as of the date of acquisition of the private utility, the Market Street Railway, pursuant to the provisions of section 125 of the charter. By the peremptory writ the municipality was also ordered to discontinue any proceedings for the promotional examination and ordered to note in appropriate books that other employees holding the position of "G 106

Claims Adjuster" were inferior and subordinate to "G 102 Claims Agent Municipal Railway."

[2] Appellants admit that "The true standard must be this: a person is entitled, by reason of the Charter provision, to a position embodying the same authority and duties as possessed in the public utility, but nothing more and limited solely to those activities which are carried on by the public utility." In effect section 125 provides that if one has been employed for one year in an acquired utility such employee shall be deemed appointed to such position and entitled to "all benefits" of the service under the municipality. "Such position" if not the identical position should be interpreted as meaning a similar position in kind and degree—one that in salary, authority, duties, etc. is reasonably comparable to the employee's former position. If no comparable position exists then it appears that "such position" by the terms of the charter is "continued." The "position" in the private utility is adopted as a city position. The legislative or administrative means of continuing the employee in his position is a mechanical problem subordinate to the declaration in the freeholder's charter that he "shall be continued" in his position.

[3] The portion of the peremptory writ which provides that Handlon is entitled to a position as "Claims Agent Municipal Railway" from the date of the acquisition, and to enjoy the emoluments thereof, is based upon questions of fact: (1) Are there any positions in the civil service of the municipality which are comparable to that the petitioner held with the private utility? (2) Which position is most comparable to that held by petitioner with the private utility in which position insofar as possible, he is to be continued by the terms of the charter? There is substantial evidence to uphold the court's finding that the position of G 102 General Claims Agent, Municipal Railway was the one most similar to the position held by him in the private utility and the one to which he was entitled under section 125 of the charter.

[4] Under circumstances not identical but similar in determining the principle involved here, namely, the right of a governmental agency to reclassify, demote, suspend or expel, in Bruce v. Civil Service Board, 6 Cal.App.2d 633, 637, 45 P.2d 419, 421, the court said: "A civil service commission derives its powers from the charter creating it and may not exercise any not directly given or necessarily implied from those conferred." If Handlon had a right to the position of claims agent it was beyond the power of the commission to take that right away. Viner v. Civil Service Comm., 59 Cal.App.2d 458, 139 P.2d 88.

[5] The part of the writ providing that other *employees* in the "claims adjuster" type of position hold the same as inferiors and subordinates to the position of "G 102 Claims Agent Municipal Railway" is not an issue in this case. The only question to be determined here is the position Handlon occupied in the private utility and his rights to a comparable position. The other "employees" were not parties to this proceeding. The legal rights of others could only be pertinent insofar as the duties of the various positions might throw some light on the rights of Handlon. For the same reason the right of the Civil Service Commission to hold a promotional examination for a "G 102 General Claims Agent Municipal Railway" is not an issue in determining the right of Handlon to that classification under section 125 of the charter. Only the right of the commission to compel Handlon to take and pass the examination could be in issue. Therefore, the writ as issued should be modified by striking therefrom all matters not in issue as above enumerated.

[6] In passing it might be noted that there is a stipulation on file that prior to the filing of the notice of appeal, Handlon resigned from the city and county as an employee. The resignation became effective on January 10, 1945. The resignation terminated any duty on the part of the municipal railway to continue a position comparable to the position held by him previously with the acquired private utility. However, it has been necessary to adjudicate what his original rights in the premises were in order to determine to what compensation he was entitled during his tenure in office from the date of the acquisition of the private utility to the date of his resignation.

For the foregoing reasons the findings and order granting a peremptory writ of mandate are modified as indicated; as so modified the order is affirmed; respondent to recover his costs on this appeal.

PETERS, P. J., and OGDEN, Justice pro tem., concur.

72 Cal.App.2d 223

PEOPLE v. McCORD et al. (two cases).

Cr. 570, 571.

District Court of Appeal, Fourth District, California.

Dec. 14, 1945.

1. Criminal law 🔑1144(13)

Trial court sitting without jury was entitled to draw reasonable inferences from the evidence and all presumptions were in favor of trial judge's finding and judgment.

2. Larceny 🔑55

Evidence supported conviction of stealing and unlawfully acquiring gasoline stamps issued by federal government in furtherance of its ration program. Pen. Code, § 540 et seq., added by St.1944, 4th Ex.Sess., c. 42, § 1.

3. Jury 🔑29(6)

In prosecution of two defendants, where first defendant, joined in by his attorney, waived a jury trial, and thereafter attorney for second defendant asked second defendant whether he waived trial by jury and second defendant replied in the affirmative, and then trial court repeated question and also received an affirmative reply, second defendant's constitutional right to jury trial was not violated on ground that his attorney did not expressly join in the waiver.

4. Criminal law 🔑15

Fact that statutes under which defendants were convicted on charges of stealing and unlawfully acquiring gasoline stamps issued by federal government, in furtherance of its ration program, terminated upon federal government's ending of its gasoline rationing program, did not constitute a bar to punishment of acts already committed prior to termination of the statutes. Pen.Code, § 540 et seq., added by St. 1944, 4th Ex.Sess., c. 42, § 1; St.1943, p. 1008, § 9608.

◆

Appeals from Superior Court, Kern County; Warren L. Stockton, Judge.

Howard McCord and Cecil Thomas were convicted of two separate offenses against rationing and they appeal.

Affirmed.

Walter L. Gordon, Jr., and Crispus A. Wright, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were jointly charged in two separate actions with offenses against rationing. In one, they were charged with wilfully and unlawfully stealing about 357 gasoline coupons and stamps issued by the United States Government in furtherance of its ration program. In the other they were charged with wilfully and unlawfully acquiring approximately 1366 gallons' worth of gasoline ration stamps issued by the United States Government in furtherance of its ration program. They pleaded not guilty to each offense, the cases were consolidated for trial, and a jury was waived. The court found each defendant guilty of each offense and pronounced separate judgments, from which these appeals were taken. The appeals are presented upon separate clerk's transcripts, one reporter's transcript and one set of briefs.

It is first contended that the evidence is insufficient to support the judgments. It clearly appears from the evidence that on January 19, 1945, two truck drivers for oil companies delivered gasoline to certain oil stations and received the required gasoline ration stamps, and that about 1 o'clock on that day, while these trucks were parked and the drivers were eating lunch, these ration stamps were taken from the trucks. The appellants were seen by several witnesses around at least one of these trucks during the time the driver was in a restaurant eating his lunch. They remained there for some ten or fifteen minutes and then one of them was seen to enter a black Buick automobile which had been parked near by, and the Buick was driven rapidly away. The loss of the stamps was discovered shortly after 1 o'clock and the officers were notified. A radio message to watch for the Buick was broadcast. About 2 o'clock two motor patrol officers, who had received the message, saw the Buick passing Lebec. They set out in pursuit and by running 105 miles an hour caught up with the Buick about two miles south of Gorman. The appellants were the only occupants of the car. During the pursuit the Buick had been driven about 80 miles an hour. The officers searched the Buick but found nothing until they took off one of the hub caps. Concealed under this hub cap they found the missing ration stamps.

These ration stamps were thoroughly identified as those which had been taken from the trucks, through certain peculiarities in some of the sheets and by figures and names written on some of them. Not only were the appellants identified by several witnesses as having been at the place where the stamps were taken, at about the time they were taken, but they admitted that they had been there at that time. They denied having taken the stamps and offered the explanation that the stamps might have been placed under the hub cap by a third person, also a colored man, to whom they said they had given a ride. Not only were their stories with respect to this other man conflicting and somewhat incredible, but no attempt was made to show how he had any opportunity to put the stamps under the hub cap. He could not well have done so while the Buick was traveling at a high rate of speed. No authorities are needed to support the conclusion that the evidence, with the reasonable inferences therefrom, is amply sufficient to support the judgments.

[1, 2] Incidentally, it is argued that there is no evidence to prove that any of these ration stamps or coupons were issued by the United States Government in furtherance of its rationing program. There is evidence that these stamps were actually turned over to the truck drivers by the station operators for the usual purpose, and the stamps were introduced in evidence and were before the trial judge. He was entitled to draw the reasonable inferences from this evidence and all presumptions are in favor of his finding and judgment. Moreover, no objection as to the genuineness or validity of these coupons was raised in the trial court.

[3] It is next argued in behalf of appellant McCord, alone, that his constitutional rights were violated in that it does not appear that he properly waived a jury trial since his attorney did not expressly join in the waiver. It appears, without dispute, that the district attorney stated that he had been advised that the defendants wished to waive a jury. Mr. Gordon, attorney for Thomas, then said: "For the defendant Cecil Thomas, the defendant hereby waives trial by jury and Mr. Thomas, do you personally join in that waiver?" The appellant Thomas replied: "Yes, sir." Mr. Wright, the attorney for McCord, then said: "Do you waive your trial by jury?" and the appellant McCord replied: "Yes." The district attorney then said: "I join in the waiver." The court then asked: "Mr. McCord, are you waiving your trial by jury?" The appellant McCord replied: "Yes, sir." The court then replied: "All right then, there is nothing to do but excuse the jury." The appellants rely on certain cases where it has been held that in felony cases the waiver of a jury by counsel is not sufficient unless it is joined in by a defendant personally. These cases have no application here. People v. Noland, 30 Cal.App.2d 386, 86 P.2d 363. Counsel for Thomas expressly waived a jury and in response to his counsel's question Thomas joined in that waiver. Counsel for McCord then turned to him and asked him if he waived a trial by jury and he replied that he did. The court then repeated the question to McCord, receiving an affirmative reply. This counsel said nothing further and proceeded with the trial. Under these circumstances, this was a sufficient expression on the part of McCord's counsel that he was also joining in the waiver of a jury trial, and the court was obviously justified in so understanding. No prejudicial error or violation of rights appears in this regard.

[4] Finally, it is argued, without citation of authority, that the statutes under which these convictions were obtained expired when the gasoline rationing program ended on August 15, 1945, and that it follows that this terminated the sentences which were here imposed. Section 9608 of the Government Code, St.1943, p. 1008, continuing a law long in force and formerly set forth in section 329 of the Political Code, provides that the termination or suspension of any law creating a criminal offense does not constitute a bar to the punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such punishment is expressly declared. Chapter 9, entitled "Offenses Against Rationing", was added to Title 13 of Part 1 of the Penal Code by Stats., 4th Extra Session, 1944, Ch. 42, Sec. 1. Section 2 thereof provides that Chapter 9, thus added to the Penal Code, shall have no force and effect from and after the termination of rationing programs pursuant to the laws of the United

States. Nowhere is there any expressed intention to bar the punishment of one found guilty of such an offense prior to such termination. The offenses here in question were committed on January 19, 1945, and the judgments were pronounced on April 13, 1945. Under no theory could it be held that the offenses in question were in any way lessened or mitigated by the fact that, as happened by chance, the articles stolen would have been of no value to the appellants if they had been taken some eight months later than they were. We are cited to no provision of law, and we know of none, which would bar the appellants from punishment for what were very grave offenses at the time they were committed and at the time the punishments were imposed.

Each of the judgments is affirmed.

MARKS and GRIFFIN, JJ., concur.

72 Cal.App.2d 129

ROBERTSON v. ROBERTSON.

Civ. 7159; Sac. 5718.

District Court of Appeal, Third District, California.

Dec. 7, 1945.

1. Divorce 🔑296

Trial judge, in determining child's custody in a divorce case, has a large measure of discretion, but such discretionary power is limited by those provisions of the codes wherein express policy of Legislature regarding general questions of custody are set forth and by the judicial interpretations of those code provisions in relation to specific questions presented. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

2. Divorce 🔑298(1)

A court does not have jurisdiction in a divorce case to award custody of a minor child to a stranger as against a parent who is found to be a fit and proper person to have its custody and who is in a position to take care of the child, but such rule does not mean that the only cases where custody of a child may be lodged with a third person are those wherein it has been shown that parent is unfit to discharge the trust. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

3. Divorce 🔑298(1)

In a divorce proceeding, minor child of the parties cannot be awarded to a stranger as against a parent merely because court may feel that by so doing child may have greater material advantages or that stranger could give child better care and better protection. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

4. Divorce 🔑302

Parent to whom custody of child has been awarded in a divorce case has right to select a residence of his own choosing as a place for child to abide with him. Civ. Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

5. Divorce 🔑302

One charged with the care of minor under a divorce decree may delegate to others many of the incidental duties appertaining thereto, but, where he is unable to exercise the supervisory powers and perform the discretionary duties which are distinguishing features of a trustee, the permission of another to exercise such powers, or perform such duties, constitutes a substitution rather than a delegation. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

6. Divorce 🔑303(2)

Where father was awarded custody of child during three months of each year, modification of award after father's induction into navy to provide that, during the months when father would have right to custody, he should have right to place child under immediate care of child's paternal grandparents, was erroneous, since residence of grandparents was not a home where child would abide with father under the circumstances and improperly deprived mother of custody in favor of strangers. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

7. Divorce 🔑303(2)

The prolonged absence of a father who has been awarded custody and care of his child under a divorce decree, even though such absence be the result of military duties, constitutes such a change of condition as to warrant a modification of decree with respect to custody. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

8. Divorce ⚷303(2)

Where it was found in divorce proceeding that mother of three-year-old child was a competent and fit person to have custody and control of child for 9 months of the year, mother, after father's induction into the navy, was entitled to an order awarding custody to her until such time as father returned to his home, when, if circumstances demand, a new order might be made. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

9. Divorce ⚷303(2)

Desire to gratify wishes of loving grandparents and desire to further father's convenience while in the armed forces have no controlling place in an inquiry on motion to modify divorce decree as to custody of a minor child; paramount concern of court being child's welfare. Civ.Code, § 138.

10. Divorce ⚷184(10)

Ordinarily, finding or determination of a trial court in a divorce case predicated upon sufficient evidence will not be disturbed on appeal, but, where there is no evidence to sustain finding and determination is based upon an erroneous view of the law, rule has no application.

11. Divorce ⚷303(2)

Before a court may award custody of a child of tender years to a stranger to the marriage, where mother is capable and desirous of caring for child and is in a position to do so, it clearly must be made to appear that welfare of child would be impaired by permitting mother to do so. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

12. Divorce ⚷303(2)

Where evidence contained nothing to show that interest or welfare of three-year-old child would be prejudiced by leaving custody with mother, placing of child in custody of paternal grandparents during that period of the year during which custody had been given to father before his entry into military service was error, notwithstanding that mother for a limited period of time during the day placed the child in a day nursery operated as a part of the public school system. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

13. Divorce ⚷298(1)

The right of grandparents to custody of a child under a divorce decree is no different from that of any third person or stranger to the marriage.

14. Divorce ⚷303(2)

A mother cannot be deprived of custody of her child in a divorce proceeding, because she entertains an opposing philosophy or concept respecting educational requirements of child so long as such concept finds support in legal and social sanction. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

◆

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Robert Phillips Robertson against Grace Elmira Robertson for divorce. From an order modifying the decree with respect to custody of the minor child of the parties, defendant appeals.

Reversed with directions.

F. M. Brack, of Modesto, for appellant.

T. B. Scott, of Modesto, for respondent.

PEEK, Justice.

Under an interlocutory decree entered in June, 1943, appellant was awarded the custody and care of the three year old son of the parties, provided, however, that the father, respondent herein, should have the custody during the months of April, July and November of each year, until further order of the court. In September, 1943, respondent was inducted into the Navy, and, on the date of the modification order herein attacked, was still in the service. In June, 1944, the final decree of divorce was entered. Appellant has since remarried, retaining the care and custody of said child. From the date of the original decree until respondent's induction into the Navy he had been living continuously with his parents. After said induction appellant refused his request that she give the custody of the child to the paternal grandparents during the times the court had directed that he should have the child. However, she did leave the child with them on many occasions, usually for short, irregular periods of a day or two. On one occasion the boy was with them for more than two weeks. In August, 1944, respondent filed a motion for an order authorizing him to place the immediate care of the child with his parents during the months of April, July and November. At the conclusion of the hearing on said motion the court found that each of the parties was a competent and fit person to have the custody and control of the child; that the only home of respondent was with his parents, and that said grandparents were fit and proper persons to have the immediate care of the child. The court thereupon modified the decree to provide that during the months when respondent had the right to the care, custody, control and possession of said child, he should have the right to place the child under the immediate care of his parents at their home.

[1] In considering the propriety of this order, we are not unmindful of the principle strongly relied upon by respondent that in cases of this character a large measure of discretion resides in the trial court. We have consistently recognized this precept, deferring to it so far as to affirm an order of the trial court although, had we been arbiters of the facts, we probably would have arrived at a different conclusion. Juri v. Juri, 61 Cal.App.2d 815, 820, 143 P.2d 708.

However, the discretionary power of a trial court necessarily is limited by those provisions of the codes wherein the express policy of the legislature regarding general questions of custody are set forth, Civ. Code, §§ 138, 197; Probate Code, §§ 1407, 1408, and by the judicial interpretations of those code provisions in relation to the specific questions presented by the instant case. See Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229; Newby v. Newby, 55 Cal. App. 114, 202 P. 891.

The first of these questions is the right of a parent to the care and custody of a child as compared with what, under the circumstances of this case, would necessarily have to be termed the right of a stranger to the custody, if the order of the trial court goes to the extent of its stated purpose: that the respondent "shall have the right to place said child under the immediate care" of his grandparents during the period when respondent was given the sole custody.

[2] The law in this state is well established that "a court does not have jurisdiction to award the custody of a minor child to a stranger" as against a parent who is found to be a fit and proper person to have its custody and who is in a position to take care of the child. Heinz v. Heinz, 68 Cal.App.2d 713, 157 P.2d 660. See also Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229; Ex parte White, 54 Cal.App.2d 637, 640, 129 P.2d 706; Guardianship of DeRuff, 38 Cal.App.2d 529, 530, 101 P.2d 521; Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 344, 80 P.2d 1009; Newby v. Newby, 55 Cal.App. 114, 116, 202 P. 891.

We do not construe said rule to mean that the only cases where the custody of a child may be lodged with a third person are those wherein it has been shown that the parent is unfit to discharge the trust. But we do not believe that the facts in the instant case are such as would call for the action which apparently was warranted in Booth v. Booth, Cal.App., 159 P.2d 93 (hearing in the Supreme Court denied), as contended by respondent.

The case last cited, which the reviewing court characterized as "unusual," involved an attempt by a mother to secure the custody of her twelve year old daughter, approximately ten years after the divorce. The court observed that "almost from her birth when the plaintiff [mother] tossed the baby into the care of its paternal grandmother and refused to give her any further care or attention," the child had lived with her father in the grandparents' home, and that during the ten years since the divorce plaintiff had not contacted the child more than three or four times and had become "really a stranger to her." Moreover, at no time during the proceedings was there a finding that the plaintiff was a fit and proper person to have the care and custody of the child, but on the contrary she had been denied the custody by the terms of the interlocutory decree. At the time of the filing of the motion for a modification of the decree the father of the child was away on military duty and had no opportunity to be present at the hearing. For obvious reasons, therefore, the plaintiff's motion was denied.

[3] But this does not mean that custody can be awarded to a stranger merely because a court may feel that by so doing the child may have greater material advantages (see In re Estate of Mathews, 169 Cal. 26, 145 P. 503), or that "some third person can give the child better care and greater protection." Roche v. Roche, 25 Cal.2d 141, 144, 152 P.2d 999, 1000. See also Ex parte White, 54 Cal.App.2d 637, 640, 129 P.2d 706.

What then was the effect of the modification order herein? Did it, as appellant contends, actually lodge the custody with strangers (the paternal grandparents), or did it, as respondent argues, continue the custody with him as before, merely confirming a right which he claims he already had to place the child under the immediate care of the grandparents?

[4] In support of his contention respondent cites the cases of Luck v. Luck, 92 Cal. 653, 28 P. 787, and Heinz v. Heinz, 68 Cal.App.2d 713, 157 P.2d 660. We do not question the general rule therein stated concerning the right of the parent to whom custody of the child has been awarded to select a residence of his own choosing. But we do question the applicability of the rule to the facts presented in the instant case. As stated in the Luck case, 92 Cal., at page 655, 28 P. at page 787, if the father "is entitled to the custody of the children at all, he has the right to name any reasonable place in which they shall *abide with him.*" (Italics added.)

Nor does applicant question the right of respondent to have the child reside with him. In fact what appears to have been an attempt by appellant to obviate the questions now raised was made by her at the outset of the hearing when she offered to stipulate with respondent that the "interlocutory decree be amended so as to allow him to have the child while he was on his furloughs and leaves while he is in the Navy, no matter what the time is," but respondent refused the offer. However, she does strenuously attack that portion of the modification order which gives to the grandparents the custody of the child during the custodial periods allotted to respondent. In other words, it is appellant's contention that the residence of the grandparents is not a home where the child would "abide with him" as in the Luck case, inasmuch as respondent was far removed therefrom, which condition would undoubtedly prevail for an indefinite period of time. For example, when the cause was heard respondent was stationed in the State of Rhode Island.

[5, 6] While it is true, of course, that one charged with the care of a minor may delegate to others many of the incidental duties appertaining thereto, yet, where a legally appointed custodian is unable to exercise the supervisory powers and perform the discretionary duties which are the distinguishing functions of a trustee, then to permit another to exercise such powers or perform such duties would constitute not delegation but substitution.

In the previously cited case of Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, the court had before it almost the precise question here at issue and, in reversing an order of the trial court giving joint custody to the parents but lodging the actual physical custody in the paternal grandparents, stated:

> "It is of no significance that the court awarded the bare legal 'control' of the child to both parents. The essential thing in which a parent is interested is the physical control and care of the child, which here was awarded to the paternal grandparents."

Finally, the question arises whether by the modification order appellant has been improperly deprived of the custody and care of her child, or whether the order operates only as between respondent and his parents without affecting appellant's rights during the three months in question. In other words, is a right of appellant "taken away" by this order within the meaning of the rule of the Roche and White cases based on the code sections heretofore cited? We conclude that it is.

[7] It cannot be denied successfully that the prolonged absence of a father who has been awarded the custody and care of his child, even though such absence be the result of military duty, constitutes such a change of conditions as to warrant a modification of the decree which awarded such custody and care. Peterson v. Peterson, 64 Cal.App.2d 631, 149 P.2d 206. Indeed, it must be conceded that this was recognized by respondent when he petitioned for a modification of the decree herein. In respondent's absence, the child must be cared for by some one—either the mother or strangers to the marriage. The correct solution of this problem was foreshadowed in the Peterson case, 64 Cal.App.2d 631 at page 635, 149 P.2d at page 209, wherein this court stated:

> "However, if such contingency should arise [the induction of the father into the armed forces] it is obvious that the defendant [father] would be compelled to place the child with others. Under such circumstances the natural right of the moth-

er to the care of a minor child, if a fit and proper person, would prevail as against strangers." See also Juri v. Juri, Cal.App. 160 P.2d 73.

[8] We conclude that the mother of this three year old child, being found not only to be a competent and fit person to have the custody and control of the child, but also, during the greater part of the year, to be the person best fitted above all others, including the father, to have such custody and control, is entitled to an order awarding the care, custody and control of the child, Philip, to her until such time as the father returns permanently to his home in California, when, if circumstances demand, a new order may be made.

[9] It is quite evident from the record that the trial court, in granting respondent's petition, was strongly influenced by a desire to gratify the wishes of loving grandparents as well as a desire to further what the father felt to be his convenience while in the armed forces. But these considerations have no place, at least not a controlling place, in an inquiry of this nature. The chief concern of the courts is the welfare of the child, which is the paramount consideration by which they are to be guided in awarding the custody of the child. Civ.Code, sec. 138. In the case of a child of tender years, experience has taught that in the vast majority of cases there is no one who will give such complete and selfless devotion, and so unhesitatingly and unstintingly make the sacrifices which the welfare of the child demands, as the child's own mother. The record herein abounds in evidence showing the anxious desires of a mother to care for her child. Under such circumstances fairness alone requires that she and not a third person be allowed the opportunity to carry out the trust she as a mother owes her child. Juri v. Juri, Cal. App. 160 P.2d 73; In re Estate of Lindner, 13 Cal.App. 208, 212, 109 P. 101.

[10] However, respondent contends that inasmuch as the trial court found that it was for the best interest and welfare of the child that the custody be awarded as provided in the order modifying the decree, the condition imposed by section 138 has been fulfilled and the finding is binding on appeal. While it is ordinarily true that the finding or determination of a trial court predicated upon sufficient evidence will not be disturbed on appeal, yet where there is no evidence to sustain the finding and the determination is based on an erroneous view of the law (Coakley v. Ajuria, 209 Cal. 745, 749, 290 P. 33), the rule has no application. Such is the situation in this case.

[11] As has been seen, it is not merely a matter of balancing conveniences when the right of custody of a child as between a parent and a third person is questioned. Before a court may award the custody of a child of tender years to a stranger to the marriage, where the mother is capable and desirous of caring for the child and is in a position to do so (Heinz v. Heinz, 68 Cal.App.2d 713, 714, 157 P.2d 660), it clearly must be made to appear that the welfare of the child would be impaired by permitting her so to do. See Gavel v. Gavel, 123 Cal.App. 589, 591, 11 P.2d 654.

[12] There is nothing whatever in the evidence nor is anything disclosed by the record before this court to show that the interest or welfare of this child would be prejudiced by leaving the custody with the mother. Appellant was questioned minutely and at great length and frequently by the trial court as interrogator, with respect to her care of the child, although there was no question but that she was a fit and proper person to be entrusted with that care. The apparent reason for such interrogation was that for some six weeks during the summer months, while she was assisting her husband in the work and management of his drug store, appellant had her child attend a day nursery school which is a part of the public school system of the city of Modesto. About four days a week appellant would, after giving the child his breakfast, take him to the school at about ten-thirty or eleven o'clock in the morning, and bring him home in the afternoon. There were approximately thirty other children at the school in charge of trained teachers and attendants. Her thoughtful regard for the child's welfare is well illustrated by her statement that in her opinion the association of the child with other children of his own age was beneficial to him and met the need for social adjustment, and that even if she were not required to be away from home for a few hours during the day she still would be disposed to have the boy attend the school for a part of the time.

She further testified that she was constantly watchful as to his diet, conduct and treatment at the school, and that, whenever it was necessary, she would take care of him herself. It thus appears that appellant never in fact relinquished her power and duty of supervision over her son nor permitted another to exercise the discretion which a duly appointed custodian alone may exercise. See In re Guardianship of Reynolds, 60 Cal.App.2d 669, 678, 680, 141 P.2d 498. Yet it is apparently on this matter of the child's attending said school that the trial court based its finding, conclusion and decision. Thus, near the end of this phase of the examination, the court stated:

"I have a feeling right now that no child could fare better than in the arms of his own, so therefore I can't see that he is better off at the nursery than with his grandparents."

[13] It is not a question of the child's being better off at school than with his grandparents. Their right, if it can be called that, is no different from that of any third person or stranger. Heinz v. Heinz, 68 Cal.App.2d 713, 157 P.2d 660. Aside from involving a disregard of the fact that attendance at the nursery was for a limited number of hours each day while custody with the grandparents would be unlimited during the time allotted, the issue thus raised by the court injected into the case an entirely false quantity.

There is no showing that attendance at the nursery was in any way harmful to the child. See Gavel v. Gavel, 123 Cal.App. 589, 591, 11 P.2d 654. In fact the trial court stated: "There is no showing here that that place isn't a good place," at the same time expressing the opinion that, in view of the age of the child, "it was a matter for philosophy". Nevertheless it is apparent that those entrusted by the state with the administration of such matters, deemed the child of sufficient age to attend the nursery. In this regard it further should be noted that there is no direct or indirect contradiction of appellant's statement: "No child in town looks as well cared for as mine."

[14] We cannot subscribe to a principle which would justify a court in depriving a mother of the custody of her child because she entertained an opposing philosophy or concept respecting the educational requirements of the child so long as such concept finds support in legal and social sanction.

The order is reversed with directions to modify the decree in accordance with the principles set forth in this opinion.

ADAMS, P. J., and THOMPSON, J., concur.

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72 Cal.App.2d 8

EISENBERG'S WHITE HOUSE, Inc., v. STATE BOARD OF EQUALIZATION et al.

Civ. 14916.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1945.

Hearing Denied Jan. 31, 1946.

1. Licenses 🔑15(1)

Co-operative discount trading stamps issued by retail merchants to cash customers constitute "cash discounts" not subject to retail sales tax, though given only to customers requesting them and not used by all such customers. Gen.Laws Supp.1939, Act 8493 and § 2(f); Act 8495a.

See Words and Phrases, Permanent Edition, for all other definitions of "Cash Discount".

2. Constitutional law 🔑77

An administrative officer or body, such as State Board of Equalization, may not make a rule or regulation altering or enlarging terms of legislative enactment.

◆

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Eisenberg's White House, Inc., against the State Board of Equalization and others for the amount of a retail sales tax paid by plaintiff under protest. Judgment for defendants, and plaintiff appeals.

Reversed with direction.

T. H. Canfield and John A. Westwick, both of Santa Barbara, for appellant.

Robert W. Kenny, of San Francisco, and John L. Nourse, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover a retail sales tax paid under protest, plaintiff appeals.

The stipulated facts are these:

Plaintiff at all times herein mentioned was engaged in the retail business of men's and boys' clothing and supplies in the city of Santa Barbara. From April 1, 1940, to March 31, 1943, plaintiff used in connection with and as a part of its retail business the "Sperry & Hutchinson Co-operative Discount System." This trading stamp system was maintained and advertised by plaintiff under a written contract with Sperry & Hutchinson Company of New York. The Sperry & Hutchinson Co-operative discount system as used by plaintiff was the ordinary trading stamp plan. Plaintiff issued to its customers the stamps which it had purchased from the Sperry & Hutchinson Company. The stamps were labeled "S. & H. Co-operative Discount Stamps" and each stamp had printed on the face thereof:

"S & H Green Co-Operative Discount Stamps, when redeemed in accordance with conditions printed below, are your extra compensation for cash payments made."

The stamps were issued and offered by plaintiff to those of its customers who paid cash for their purchases, either at the time of the purchase or before the 15th of the month next following the purchase. Customers were issued stamps on the basis of one stamp for each ten cents of the purchase price paid, without regard to the kind or amount of merchandise purchased.

The stamps were redeemable by the customers at the Sperry & Hutchinson Company redemption office or store in Santa Barbara in goods, wares, and merchandise of the customer's own selection. The stamps were not redeemable in cash, but in a cash equivalent of merchandise. During the period of time in question from April 1, 1940, to March 31, 1943, plaintiff paid to the Sperry & Hutchinson Company for the privilege of using this trading stamp system and for stamps actually issued to plaintiff's customers as hereinbefore set forth the total sum of $9,783.87. The stamps were purchased by plaintiff in books of fifty pages, with one hundred stamps to the page and at $15 per book. The total sum paid by plaintiff to the Sperry & Hutchinson Company, to wit, $9,783.87 was not included by plaintiff in its gross receipts reported for sales tax purposes on the theory that this sum represented a cash discount within the meaning of the California Sales and Use Tax Law.* Gen.Laws Supp.1939, Act 8493, 8495a. On July 12, 1943, defendant State Board of Equalization taking a contrary view of the law determined that three per cent of the sum paid by plaintiff for the trading stamps or $297.20 was due as a sales tax. When the tax was not paid by plaintiff, interest and penalties were added. Thereafter the amount claimed to be due by defendants was paid by plaintiff under protest and the present suit was instituted to recover the sum so paid.

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* Section 2-(f) of the Retail Sales Tax Act read as follows at the time the stamps were purchased.

" 'Gross receipts' means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, except that in accordance with such rules and regulations as the board may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor must pay to the State, or has paid the use tax with respect to such property, and has resold the property prior to making any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, and without any deduction on account of the cost of the material used, labor or service cost, interest paid, losses or any other expense whatsoever; *provided, however, that cash discounts allowed and taken on sales shall not be included,* and 'gross receipts' shall not include the sale price of property returned by customers upon recision [rescission] of the contract of sale, when the full sale price thereof is refunded either in cash or by credit, nor shall 'gross receipts' include the price received for labor or services used in installing or applying the property sold.

"For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer." (Italics added)

[1] This is the sole question necessary for our determination:

Did the trading stamp which plaintiff issued to its customers constitute a "cash discount"?

This question must be answered in the affirmative. The courts of California have held that trading stamps issued to customers under conditions identical with the facts in the instant case constituted a "cash discount".

In Food and Grocery Bureau v. Garfield, 20 Cal.2d 288, 232, 125 P.2d 3, 6, our Supreme Court in commenting upon the character of trading stamps similar to those involved in the instant case says:

"It is well settled by the decisions of this court, as well as those in other jurisdictions, that the practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash. (Citing Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878, and numerous other authorities.) The respondent impliedly concedes that a cash discount is not a gift, which is a transfer of property without consideration, but it argues that the appellant's plan is not a true cash discount.

"In the first place, the respondent asserts, the record is devoid of any allegation by the appellant that he does any credit business, and it follows, therefore, that since all of his customers pay cash, he cannot by means of trading stamps be said to be inducing any of them to pay cash rather than to buy on credit. The argument is fallacious. The fact that the appellant conducts his business on an all-cash basis does not preclude him from giving a cash discount. On the contrary, the cash discount is even more vital to the all-cash store than to the cash and credit store because the proprietor of the former has staked his entire enterprise upon the ability to attract cash trade and has been willing to forego the patronage of those consumers who buy their goods upon credit.

"The respondent next contends that the appellant's trading stamps are given only to those customers who ask for them, and a bona fide cash discount in commercial practice is given to all purchasers meeting the cash payment condition. It is apparent, however, that the plan does not lose its character as a cash discount merely because certain purchasers do not take advantage of the offer and request stamps.

"The plan is also attacked by the respondent as not being a cash discount because the customer cannot redeem the stamps until he has accumulated 500 of them. If the appellant were in fact making cash discounts by means of trading stamps, says the association, he would redeem the stamps when the amount evidenced thereby equals the value of one cent, and on a fifty-cent cash sale would accept only forty-nine cents in payment. Substantially the same plan was upheld by this court in Ex parte Drexel, supra, as a method of allowing discounts on cash payments. * * *

"Finally, the respondent urges, the appellant advertises his stamp as 'free' and this circumstance, it is maintained, is inconsistent with a legitimate cash discount plan. But the advertisement upon which this claim is made shows that the stamps are given 'free' only upon the making of a ten-cent purchase from the appellant. The purchase is the prerequisite to obtaining the stamp and furnishes the consideration for the distribution of stamps to those customers asking for them.

"It must be concluded, therefore, that the trading stamp plan adopted by the appellant does not constitute the making of a gift of $1.00 in cash or $1.25 in merchandise but is a discount given to the customer in consideration of his paying cash."

Again in Ex parte Drexel, 147 Cal. 763, 773, 82 P. 429, 434, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878, our Supreme Court says:

"Indeed, an ordinary trading stamp or coupon is, in substance, a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract."

In Weco Products Company v. Mid-City Cut Rate Drug Stores, 55 Cal.App.2d 684, 688, 131 P.2d 856, 859, (hearing denied by the Supreme Court) this court says:

"To denominate appellant's trading stamp plan as a device for giving a discount for cash payment on merchandise, rather than as a cut in price upon the article sold, gains force when we consider that the stamps are given uniformly and without regard to the type of goods sold or the purchaser of the same. The only condition is that cash be paid for the purchases. Respondent's 'Fair Trade' minimum-priced articles are not singled out by appellant as objects to which alone the trading stamp privileges attach. No discrimination is made for or against them. The policy may be said to be of uniform application both as to goods sold and as to purchasers of the same, and logically falls into the classification of 'cash discount' rather than 'price cut'."

In view of the decisions of the appellate courts of this state it is clear that the plaintiff in issuing trading stamps was giving merely a "cash discount" and therefore under the terms of section 2-(f) of the Retail Sales Tax Act plaintiff should not have been required to pay a tax on "cash discounts allowed and taken on sales." (See italicized portion of section 2-(f) of the Retail Sales Tax Act in footnote.)

Rast v. Van Deman & Lewis, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917 A, 421, Ann.Cas.1917B, 455, and Tanner v. Little, 240 U.S. 369, 36 S.Ct. 379, 60 L.Ed. 691, relied upon by defendants as being in conflict with the decision in Ex parte Drexel, supra, 147 Cal. at page 773, 82 P. 429, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878, are not in fact in conflict with such decision since the Rast and Tanner cases merely held that a state legislature could constitutionally prohibit the issuance and use of trading stamps. Such cases did not pass upon the question of whether the giving of trading stamps constituted a cash discount or not. Defendants' contention that Ex parte Drexel is not authority because it was decided prior to the Rast and Tanner cases is likewise without merit for the reason that the Drexel case was cited with approval by our Supreme Court in Food and Grocery Bureau v. Garfield, supra, 20 Cal.2d at page 232, 125 P.2d 3, which case was decided subsequent to the decision of the Rast and Tanner cases and in fact cites them but makes no suggestion that they are in conflict with the Drexel case.

[2] Neither is there any merit in the position that the above decisions are contrary to the ruling of the Board of Equalization. The law is established in this state that an administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (Whitcomb Hotel, Inc., v. California Emp. Comm., 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405.)

There is not any force in defendants' contention that the cash discount, though allowed, was not in fact "taken." The cash discount was "taken" when the customers accepted the "stamps" and it is immaterial so far as the present litigation is concerned whether they subsequently used the stamps or not.

For the foregoing reasons the judgment is reversed and the trial court is directed to enter a judgment in favor of plaintiff in accordance with the prayer of the complaint.

MOORE, P. J., and FOX, Justice pro tem., concur.

Hearing denied; TRAYNOR, J., dissenting.

72 Cal.App.2d 145

T. E. CONNOLLY, Inc., v. STATE et al.

Civ. 7110; Sac. 5678.

District Court of Appeal, Third District, California.

Dec. 8, 1945.

1. Pleading 🔑218(3), 225(1)

Where trial court stated that leave to amend complaint would be granted if plaintiff so desired, and in response to statement plaintiff wrote judge that plaintiff's understanding was that court "will order the demurrer sustained without leave to amend, so that we may take such action in that connection as we may be advised", court did not abuse its discretion in sustaining demurrer without leave to amend

2. Automobiles 🔑37

Oversize and overweight "trac-truks" were not exempt from payment of registration fees when they were operated upon highways under permit as distinguished from merely crossing the highway from one property to another. Vehicle Code, §§ 694, 710, St.1941, pp. 1686, 1687; § 142, St. 1943, p. 2714.

3. Highways 🔑165

Legislature, in exercise of its police powers, for protection of traveling public and for payment of excise taxes for maintenance of highways, may reasonably regulate or limit length, width, weight or load of a vehicle which may be permitted to use the public highways.

4. Constitutional law 🔑208(1)

Reasonable classifications of vehicles or loads which they may be permitted to carry may be made on basis of their weight, for protection of streets or highways.

5. Constitutional law 🔑70(1)

Legislative discretion with respect to classification, uniform application or equal protection of the law will not be interfered with except upon clear showing of arbitrary or unreasonable exercise of discretion.

6. Automobiles 🔑28
Constitutional law 🔑230(1)

Section 710 omitting to exempt oversize vehicles from payment of registration fees is not unconstitutional as denying equal protection of the law because Section 142, subd. (b) specifically exempts similar motor vehicles from payment of registration fees when they are merely crossing highway from one property to another, since there is a reasonable distinction between oversize vehicles permitted to occasionally cross the highways from one property to another, and those which are permitted to travel upon highways for unlimited distances. Vehicle Code, § 710, St. 1941, p. 1687; § 142, St.1943, p. 2714.

7. Constitutional law 🔑208(1)

The question whether exemption created by statute is valid depends upon whether it is reasonable, uniform and applicable to all persons or vehicles coming within specified class.

8. Constitutional law 🔑48

In construing section 710 omitting to exempt oversize vehicles from payment of registration fees and section 142, subd. (b) exempting similar motor vehicles from payment of registration fees when vehicles are merely crossing highways from one property to another, all doubts must be resolved in favor of validity of such sections in view of broad discretion vested in Legislature in determining classifications of vehicles by weight or size for purpose of exemptions. Vehicle Code, §§ 694, 710, St.1941, pp. 1686, 1687; § 142, St.1943, p. 2714.

9. Licenses 🔑32(2)

One seeking to avoid payment of excise taxes or registration fees by exemption has burden of proving by clear evidence free from reasonable doubt that he is entitled thereto.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Suit by T. E. Connolly, Inc., against the State and others, for an injunction against alleged threatened enforcement of payment of registration fees and penalties for temporarily operating oversized "trac-truks" upon the public highways, wherein defendants filed a general and special demurrer. From a judgment sustaining the demurrer without leave to amend, plaintiff appeals.

Affirmed.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, for appellant.

Gardiner Johnson, of San Francisco, amicus curiæ.

Robert W. Kenny, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against it pursuant to an order sustaining a general and special demurrer to the complaint without leave to amend the pleading. The suit was for injunction against an alleged threatened enforcement of payment of registration fees and penalties for temporarily operating six oversized "trac-truks" upon the public highways. After determining that the complaint fails to state a cause of action, the court said, "If counsel desires to amend the complaint leave to do so will be granted." In response to that permission to amend the pleading, counsel for the appellant wrote to the judge, saying, "We understand that, in accordance with the direction of your memorandum, you will order the demurrer sustained *without leave to amend, so that we may take such action in that connection as we may be advised.*" In response to that suggestion the court sustained the demurrer "without leave to amend." Judgment was rendered accordingly dismissing the action. From that judgment this appeal was perfected.

The complaint contains three counts. The first cause alleges that plaintiff is a Delaware corporation authorized to do general contracting business in California, and that it owns equipment including "six

Euclid 'trac-truks'," which are in excess of the limited width of 96 inches prescribed by Section 694 of the Vehicle Code, St. 1941, p. 1686; that the vehicles are not "special mobile equipment" exempted from registration under Section 142, subdivision (d), of the Vehicle Code, St.1943, p. 2714; that upon petition to move said vehicles upon the public highways from Hillcrest, near Redding, to Rio Vista, a distance of 290 miles, the Department of Public Works, Division of Highways, on July 29, 1943, granted leave to do so during daylight on Saturday afternoons, Sundays or holidays, before August 10, 1943; that the machines were so moved on the public highways from Hillcrest to Rio Vista, but while doing so agents of the said department notified plaintiff that it was violating the statutes by operating the machines on the public highways without first paying the required registration fees therefor as provided by Section 140, St.1937, p. 164, 370, and section 372 of the Vehicle Code; that the department then gave notice that thenceforth it would refuse to grant permission to operate vehicles upon the public highways until the registration fees were first paid; and that, unless defendants were restrained from doing so they would proceed to enforce payment of registration fees and penalties for operating oversized and overweight vehicles for which special permits were granted under Section 710 of the Vehicle Code, St.1941, p. 1687.

The second and third causes of action allege, in effect, that defendants threaten to require payment of the registration fees of $3, provided by Section 370 of the Vehicle Code, St.1935, p. 147, together with the additional weight fees provided by Section 372, subdivision (c), of that Code, St. 1943, p. 3080, when permission to operate the vehicles is granted in the future under Section 710 of that code; that said registration fees apply only to commercial vehicles used primarily for continuous use in conveying passengers or freight, and not to the occasional operation of machines for which permission to use the highways has been granted. It is asserted that the enforced payment of such fees would be unlawful, and that such construction of the statutes would render them unreasonable, discriminatory and in conflict with the Fourteenth Amendment to the United States Constitution which guarantees equal protection of the laws.

It will be observed that the special permit which was granted plaintiff in this case to move the machines upon the public highways from Hillcrest to Rio Vista, a distance of 290 miles, had expired before this suit was commenced. The authorization provided that, "This permit shall be void unless the work herein contemplated shall have been completed before August 10, 1943." This suit was not commenced until November 13, 1943. The machines had been moved to Rio Vista before the expiration of the permit. It is not alleged the plaintiff desires or intends to apply for permits to use the highways for moving its machines in the future. Nor is it alleged how, or when or where the plaintiff expects or desires to move the machines.

[1] The demurrer was sustained, "without leave to amend", at the suggestion of the plaintiff. The court specifically stated, in its memorandum of decision, that leave to amend the complaint would be granted if plaintiff so desired. In response to that statement the plaintiff wrote a letter to the judge saying that "We understand that, * * * you will order the demurrer sustained without leave to amend, so that we may take such action in that connection as we may be advised." Clearly that letter infers that plaintiff was satisfied with its pleading and that it did not desire an order permitting it to amend the complaint. No request to amend was made. It is not suggested in the briefs on appeal that plaintiffs desired to amend its complaint. Under such circumstances the court did not abuse its discretion in sustaining the demurrer without leave to amend.

We are persuaded the demurrer was properly sustained. The complaint fails to state facts sufficient to constitute a cause of action entitling plaintiff to injunctive relief.

The plaintiff's machines which are involved in this case are motor vehicles, nine and a half feet in width, which are propelled on their own power. They are not used to convey passengers or freight. The maximum width of all machines which are ordinarily permitted to use the public highways is 96 inches. Sec. 694, Vehicle Code. That section contains some specified exceptions. It is conceded that plaintiff's vehicles do not come within any of the exceptions provided for therein. With certain specified exceptions all motor vehicles are required to be registered and to pay the registration fees provided for in Sections 370 to 372, inclusive, of the Vehicle Code. The plaintiff's vehicles do not come within any of the exceptions thereto. With respect to the necessity of registering all motor vehicles which may ordinarily use the public highways, Section 141, St. 1939, p. 2095, provides that: "Subject to the exemptions stated in section 142 hereof, registration of the following vehicles is required when driven or moved upon a highway: *Any motor vehicle,* trailer, semitrailer, pole or pipe dolly, and any dolly used to support part of the weight of a semitrailer."

Section 142 of that code provides in part:

"The registration provisions of this chapter shall not apply to any of the following vehicles:

"(a) * * *

"(b) Any vehicle of a type otherwise subject to registration hereunder which is driven or moved upon a highway *only for the purpose of crossing such highway from one property to another in accordance with a permit issued by the Department of Public Works.* * * *"

It is conceded that the foregoing omitted portions of that section do not apply to the type of machines involved in this case.

Section 710 of the Vehicle Code authorizes the department, *in its discretion,* to issue or withhold "a special permit" under "emergency conditions, to operate or move a type of vehicle otherwise prohibited hereunder, upon any highway", subject to specified conditions, for a limited number of trips or a limited time period, "to assure against undue damage to the road foundations", etc., to "protect the highways and bridges from injury", and to require a bond as security for "indemnity for any injury resulting from such operation."

That section does not waive payment of registration fees for such use of the public highways.

A twelve-day permit, subject to specified conditions, was granted plaintiff, under the provisions of Section 710 of the Vehicle Code, to move the oversized machines on the public highway from Hillcrest to Rio Vista. A bond in the sum of $5,000 was furnished to secure payment of any damages to the highways incurred on that account. No registration fees were paid.

The appellant contends that Sections 142 and 710 of the Vehicle Code should be construed together, and that since Section 142, subdivision (b), exempts oversized machines from registration when they are merely "crossing such highway from one property to another", such vehicles which are moved "*upon* a highway" by permission granted under Section 710, are therefore also exempt from registration.

[2] We cannot agree with that construction of the sections. We assume the foregoing sections were adopted by the legislature under its police power for the protection of the traveling public, as well as for providing revenue for maintenance of the highways. It is apparent that an oversized vehicle which is 9½ feet in width, traveling along the highway for a distance of 290 miles or more, would be much more hazardous to traffic, and more detrimental to the highways than that same machine would be in merely crossing the highway from one property to another on the opposite side of the roadway. That distinction furnishes reasonable grounds for requiring oversized or overweight vehicles traveling great distances along and upon highways to pay registration fees, while machines which merely cross the highway from one property to another may be exempted from payment of such fees. If the legislature had intended to exempt from payment of registration fees vehicles which are permitted under Section 710 to travel upon the highway for any distance authorized by the Department of Public Works, it would have been very easy for the legislature to have so stated. It did not do so. Section 710 of the Vehicle Code was adopted in 1935, Stats. 1935, p. 232, and amended in 1941, Stats. 1941, p. 1687. It is found in Division XI, Chapter 2, of that Code under the caption "Regulations Governing Size, Weight and Load." That chapter has no reference to the fixing or payment of registration fees. It is entirely separate and distinct from the division and chapter in which Section 142 is found, which is confined to the subject of "Registration" of vehicles. The last-mentioned section purports to contain all exemptions from registration which are provided for by the code. Section 141 provides that, "subject to the exemptions stated in section 142 hereof", all "motor vehicles" shall be registered. Section 142 has been amended several times. It was last amended in 1945. Stats. 1945, p. 108.

No reference was ever made in that section to indicate that the legislature intended to include therein exemptions of machines for which permits were granted under Section 710. We assume the history of the enactments and amendments of those two sections and their location in the code under separate headings indicate that exemptions from registration were not intended to include machines operated upon the highways under permits secured under Section 710. We conclude, therefore, that plaintiff's six Euclid trac-truks are not exempt from payment of registration fees when they are operated upon the highways under permit as distinguished from merely crossing the highway from one property to another.

[3-5] In the exercise of its police powers, for protection of the traveling public and for payment of excise taxes for maintenance of the highways, the legislature may reasonably regulate or limit the length, width, weight or load of a vehicle which may be permitted to use the public highways. State v. Wetzel, 208 Wis. 603, 243 N.W. 768, 86 A.L.R. 274, and note in 86 A.L.R. p. 282; 25 Am.Jur. 561, sec. 268. Reasonable classifications of vehicles or the loads which they may be permitted to carry may be made on the basis of their weight, for protection of streets or highways. Whyte v. City of Sacramento, 65 Cal.App. 534, 550, 224 P. 1008; Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923; Carley & Hamilton v. Snook, 281 U.S. 66, 50 S.Ct. 204, 74 L.Ed. 704, 68 A.L.R. 194. Legislative discretion with respect to classification, uniform application or equal protection of the law, will not be interfered with on appeal except upon clear showing of arbitrary or unreasonable exercise of discretion. Higbie v. County of Los Angeles, 47 Cal.App.2d 281, 289, 117 P.2d 933; 5 Cal. Jur. 823, sec. 188; 42 C.J. 666, § 81.

[6] The chief issue in this case is whether the omission of Section 710 of the Vehicle Code to exempt oversize vehicles from payment of registration fees renders that section unreasonable, discriminatory or contrary to the constitutional guarantee of equal protection of the law in view of the fact that Section 142, subdivision (b), of that code specifically exempts similar motor vehicles from payment of registration fees when they are merely crossing the highways from one property to another. For the reasons previously stated, we think the challenged section is not unconstitutional or discriminatory since there appears to be a reasonable classification or distinction between oversized vehicles which are permitted to occasionally cross the highways from one property to another, and those which are permitted to travel along and upon the highways for unlimited distances.

[7, 8] The question as to whether a valid exemption may be created by statute generally resolves itself into the problem of whether it is reasonable, uniform and applicable to all persons or vehicles coming within the specified class. The classifications of exempt vehicles under Section 142 (b) appear to be all-inclusive, reasonable and uniform. In view of the well-established rule, which confers upon the legislature broad discretion in determining classifications of vehicles by weight or size for the purpose of exemptions, all doubts must be resolved in favor of the validity of the statutes.

[9] Moreover, the burden is on one who seeks to avoid payment of excise taxes or registration fees by exemption, to prove by clear evidence, free from reasonable doubt, that he is entitled thereto. Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27; 33 Am.Jur. 363, sec. 38. In the text last cited it is said in that regard: "Those who seek shelter under an exemption law must present a clear case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public."

The same rule is declared in substantially that language in the Camas Stage Company case, supra, on page 35 of 25 A.L.R., supported by Northwest Auto Co. v. Hurlburt, 104 Or. 398, 207 P. 161; Wallace v. Board of Equalization, 47 Or. 584, 86 P. 365; 1 Cooley on Taxation, 3d Ed., p. 456; 17 R.C.L. p. 522, sec. 42; and 37 C.J. 237, § 91.

The judgment is affirmed.

PEEK, J., and ADAMS, P. J., concur.

72 Cal.App.2d 67

YOUNG v. HESSLER et al. (HESSLER, Intervener).

Civ. 14947.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1945.

1. **Homestead** ⚷193

Where wife did not file declaration of homestead for record until after an abstract of judgment against husband had been recorded, husband's interest in property owned by himself and wife as joint tenants was subject to execution sale, and the title of the purchaser thereof related back to time when the abstract of the judgment was recorded. Code Civ.Proc. § 674; Civ.Code, § 1241, subd. 1.

2. **Tenancy in common** ⚷3

After execution sale of husband's interest in realty, the purchaser and wife of execution defendant became tenants in common. Civ.Code, § 1241, subd. 1.

3. **Partition** ⚷12(3)

Where husband's interest in property held jointly with wife was sold at execution sale, wife's homestead interest therein, under a declaration filed by wife subsequent to time that judgment against husband became lien on his interest, was not a bar to maintenance of partition action by purchaser of husband's interest at execution sale. Code Civ.Proc. §§ 674, 693, 752; Civ.Code § 1241, subd. 1.

4. **Partition** ⚷19

Where husband's interest in property held jointly with wife was acquired by plaintiff at execution sale, fact that wife was in possession clothed with a homestead right and that plaintiff, as a tenant in common, was not in possession, did not deprive plaintiff of the remedy of partition. Code Civ.Proc. §§ 674, 693, 752; Civ.Code, § 1241, subd. 1.

5. **Judicial sales** ⚷11, 37

Failure to give proper notice of a judicial sale of real estate does not invalidate the sale or constitute a sufficient reason for setting the sale aside, and, if proper notice is not given, the injured party's exclusive remedy is under statute. Code Civ.Proc. § 693.

6. **Judgment** ⚷693

Where judgment recovered by plaintiff on an account purchased by plaintiff was regular on its face, judgment debtor's wife who was not party to the action could not question validity of the judgment, in subsequent action, on ground that plaintiff paid only a nominal amount for the account and that plaintiff did not have a city license authorizing her to purchase accounts.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by E. M. Young against Hazel Hessler and others for partition of real property, wherein the defendant named filed a cross-complaint and Fred Hessler intervened. From a judgment denying plaintiff any relief, and enjoining her from asserting any claim to the property, plaintiff appeals.

Reversed.

Roy C. Kaiser and Roy A. Linn, both of Los Angeles, for plaintiff and appellant.

Edward Feldman, of Los Angeles, for defendant, cross-complainant, and respondent Hazel Hessler and for intervenor and respondent Fred Hessler.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for defendants and respondents Corporation of America et al.

FOX, Justice pro tem.

This is an action for partition of real property. Plaintiff appeals from a judgment denying her any relief and enjoining her from asserting any claim to said property.

Plaintiff purchased an account against Fred Hessler and brought an action thereon against him in the municipal court of the City of Los Angeles. A default judgment was entered on July 12, 1941. On that same day plaintiff caused to be recorded in the office of the county recorder of Los Angeles County an abstract of said judgment certified by the clerk of said court, thereby creating a judgment lien on his interest in the premises here in question which were owned by him and his wife, Hazel, as joint tenants, and on which they resided. On March 20, 1942, Hazel filed a declaration of homestead on said property. On April 22, 1942, plaintiff had an execution issued out of the municipal court on said judgment and pursuant thereto the marshal of said court sold to plaintiff on May 28, 1942, all the right, title and interest of Fred Hessler in and to the real property involved in this action, which property, however, was subject to a trust deed encumbrance in the approximate amount of $2500. On said last date the marshal executed and delivered to plaintiff herein a certificate of sale to said real property. The interest sold to Young not having been redeemed, the marshal, on June 9, 1943, executed and delivered to plaintiff a marshal's deed to the said property.

[1,2] The municipal court judgment against Fred Hessler was regular on its face, and upon the recording of an abstract thereof with the county recorder it became a lien upon all the real property (not exempt from execution) in the county which Fred Hessler owned, including his interest in the lot here involved. Sec. 674, Code Civ.Proc. Such lien on the interest of Fred Hessler was therefore prior to the homestead declaration of his wife, Hazel, upon his interest since she did not file her declaration of homestead for record until March 20, 1942. Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A.,N.S., 522. Fred Hessler's interest was therefore subject to execution sale in satisfaction of the judgment by the express terms of section 1241, subdivision 1, Civil Code,[1] and the title of plaintiff related back to July 12, 1941, when the abstract of the municipal court judgment was recorded. Freelon v. Adrian, 161 Cal. 13, 18, 118 P. 220. After the sale plaintiff and Hazel Hessler became tenants in common. Tilden v. Tilden, 81 Cal.App. 535, 542, 254 P. 310; Pepin v. Stricklin, 114 Cal.App. 32, 35, 299 P. 557; Green v. Skinner, 185 Cal. 435, 438, 197 P. 60; Zeigler v. Bonnell, 52 Cal.App.2d 217, 219, 126 P.2d 118.

[3] The question, then, is: Does such a statutory homestead interest deprive the other cotenant of the right to have the common property partitioned? This question is answered in an annotation entitled Homestead Right of Cotenant as Affecting Partition, in 140 A.L.R. 1170, at page 171. It is there said that the cases uniformly hold or assume that the homestead rights of a cotenant in his interest in the common property are not a bar to partition. Many cases are cited in support of this proposition. This principle is recognized in Estate of Kachigian, 20 Cal.2d 787, 128 P.2d 865. In that case it is pointed out that since the amendment of section 1238,[2] Civil Code, in 1929, a tenant in common of real property may declare a homestead in his undivided interest. That such a homestead interest in one cotenant would not deprive the other cotenant of the remedy of partition is indicated by the following statement of the court (20 Cal.2d at page 792, 128 P.2d at page 868): "It cannot be said that the rights of the other cotenant are in any way prejudiced, as the homestead claimant, or his surviving family, acquires only such rights of occupancy as he had before the creation of the homestead, and the other cotenant's interest is in no way affected; for example, his right to use the property remains exactly as before and he may sell or assign his undivided share. If he objects to his cotenant, his remedy is by partition."

[4] Defendant Hazel Hessler, however, takes the position that since she was a tenant in common (after the execution sale of her husband's interest to the plaintiff), in possession and clothed with a homestead right, and the plaintiff a tenant in common not in possession, the latter therefore is deprived of the remedy of partition. This position is not well founded. In Skulich v. Skulich, 213 Cal. 653, at page 654, 3 P.2d 12, the court said: "It is definitely settled that, under section 752 of the Code of Civil Procedure, as amended in 1919 (St.1919, p. 319), neither actual possession nor the right to actual or immediate possession is necessary to enable a cotenant to maintain an action in partition, if he otherwise falls within the provisions of that section." It is clear that plaintiff comes within the provisions of section 752, Code Civil Procedure.

On this point defendant relies on Mills

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[1] "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises."

[2] Under this section the property from which a homestead may be selected "includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive."

v. Stump, 20 Cal.App. 84, 128 P. 349, and Walton v. Walton, 59 Cal.App.2d 26, 138 P.2d 54. These cases are not applicable. In the former case a probate homestead was involved. The probate court had set apart to the surviving widow a certain 25 acres which included the dwelling house and other improvements which had been used and occupied by the family. By a decree of distribution the entire tract of 320 acres was distributed in undivided shares of one third each, to plaintiff and defendants, as tenants in common subject to said homestead. Plaintiff sought partition of the 295 acres, leaving the 25 acre homestead undisposed of. The defendants, however, wanted the entire tract partitioned. The court refused to include the homestead in the partition. To have held otherwise would have deprived the surviving widow of property rights which she was entitled to under the law and which the court had set aside for her use and enjoyment during her lifetime. No problem of the effect of a prior judgment lien under section 1241 (1), Civil Code, was involved. In the Walton case the husband, was trying to destroy, through the medium of an action to partition, the homestead rights which the wife had declared in joint tenancy property. The husband, of course, was not a judgment creditor as the plaintiff is in this case and consequently did not come within the provisions of section 1241(1), Civil Code, while the plaintiff here does come within said provisions. Complete title to the property was held by the husband and wife when the latter filed her declaration of homestead. Here, however, a judgment lien had already attached to the husband's interest before the declaration of homestead was filed.

[5] Defendant Hazel Hessler argues that the execution sale of Fred's interest in the property should be vacated. Her first contention in support of this proposition is the alleged failure to properly post the notice of sale. This contention is not tenable for the reason that "the law is established in this state that a failure to give proper notice of a judicial sale of real estate does not invalidate the sale or constitute sufficient reason for setting such sale aside." If proper notice is not given, the injured party's exclusive remedy is that provided in section 693, Code of Civil Procedure. Hamilton v. Carpenter, 52 Cal.App.2d 447, 126 P.2d 395. On this point defendant strongly relies on Hindle v. Warden, 50 Cal.App. 356, 195 P. 428, and Penn v. Dyba, 115 Cal.App. 67, 1 P.2d 461. These cases are not applicable since they deal with the posting of redemption notices pursuant to the specific requirements of the public improvement statutes there under consideration.

There is no foundation either in the pleadings or in the evidence to support defendant's contention that the municipal court judgment against Fred Hessler was fully satisfied. Nor do we find any support for the other alleged irregularities in the execution sale of his interest in the property.

[6] Defendant emphasizes the nominal amount plaintiff is supposed to have paid for the account on which the municipal court judgment is based and the alleged failure of the plaintiff to have a city license authorizing her to purchase accounts. As the defendant in this action she is in no position to raise these questions since the municipal court judgment was regular on its face and she was not a party to that action.

Finally it should be noted that there are no findings on the issues made by the amended complaint in intervention of Fred Hessler and the answer of the plaintiff thereto and consequently no judgment as between these parties. Upon a retrial findings should be made on said issues and an appropriate judgment entered thereon. This is particularly important in this case since plaintiff's municipal court judgment is against Fred Hessler and it is his interest in the property here in question upon which plaintiff claimed a lien by reason of said judgment and upon which she levied execution and the purchase of which at the marshal's sale made her a cotenant with Hazel and gave her the asserted right to have the property partitioned.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

72 Cal.App.2d 72

PEOPLE v. ODOM.

Cr. 3919.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1945.

1. Criminal law ⚷1144(13)

On defendant's appeal from a conviction evidence was viewed in light most favorable to the people.

2. Criminal law ⚷1159(6)

Where circumstantial evidence reasonably justifies finding of trier of fact of guilty that circumstances might also be reasonably reconciled with defendant's innocence will not warrant reviewing court's interference with determination of trier of fact.

3. Homicide ⚷254

Evidence sustained conviction of murder in second degree.

4. Criminal law ⚷1036(1)

Where evidence is admitted without objection, any objection which might have been made is waived, and an objection may not be made for first time on appeal.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

James C. Odom was convicted of murder in second degree, and he appeals.

Affirmed.

Robert W. Kenny, of San Francisco, and Carl S. Kegley, of Los Angeles, for plaintiff.

Maurice A. Gleason, of Los Angeles, for defendant.

McCOMB, Justice.

From a judgment of guilty of murder in the second degree after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in People v. Newland, 15 Cal.2d 678, 680, 104 P.2d 778, and People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

On December 24, 1944, defendant struck and beat Matilda Williams so severely that she received injuries from which she died.

Defendant relies for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *There was not any substantial evidence to sustain the verdict of the jury.*

[2] This proposition is untenable and is governed by the evidence hereinafter related and the rule of law that if circumstantial evidence reasonably justifies the finding of the trier of fact an opinion of the reviewing court that those circumstances might also be reasonably reconciled with the innocence of the defendant will not warrant interference with the determination of the trier of fact. (People v. Newland, supra.)

In the present case the evidence discloses that defendant had resided at 1573 East 41st Place, Los Angeles for two years with Matilda Williams, the deceased. About 2 or 3 a.m., December 24, 1944, Mr. Warr, who lived in the house next to defendant's residence, heard a noise which he recognized as that of defendant arguing and fighting with certain other persons. About twenty or thirty minutes after hearing the first noise he heard a woman "scream and holler" and the following morning he noticed "a pretty good spot of" blood on the sidewalk near defendant's residence. The same afternoon defendant came to Mr. Warr's house and asked him and his wife to come to his home. When the Warrs entered defendant's house, Matilda Williams was lying in bed with her hands lying across one another. Mrs. Warr endeavored to take the deceased's pulse and finding none told defendant Matilda Williams was dead. The deceased had a scar under her left eye and dried blood around her nose. At defendant's request the police were called. Mrs. Warr further testified that she was also awakened on the morning of December 24, 1944, at about the same time that her husband had been and that she heard a scuffling in the driveway between her home and defendant's, and heard the defendant say, "I am going to get rid of the rest of you four-eyed bitches". She in other respects corroborated the testimony given by her husband.

Police officer, Todd testified that about 5:15 p.m. December 24, 1944, he went to defendant's home and saw the deceased lying on a bed; that there was a red seam, appearing to be blood, on the south wall about in line with the foot of the bed and 12 inches from the floor, which ran in a westerly direction and appeared as if it had been "smeared on the wall"; that he noticed bruises on both eyes and on the forehead just above the left eye of the deceased.

[3] From the foregoing testimony, pursuant to the rule of law set forth above, the jury was justified in finding that death came to the deceased as a result of a beating administrated by defendant. It would serve no useful purpose to discuss the testimony of defendant in which he denied having struck the deceased.

Second: *The trial court erred in permitting Dr. Homer R. Keyes to testify as follows:*

*"Q. Doctor, this extent of the injury that you found in the liver couldn't be made by the end of this bed that counsel showed you? A. My opinion is based on —well, I have an opinion. It was more severe, probably more severe than you would expect from a fall on an outstanding object. * * **

"Q. Do you think that, in your opinion, Doctor, if this woman were standing next to this bed and she fell, she could have received the injuries to her liver as you have described here in the record? A. It seems unlikely that the body could develop such amount of momentum in the distance from a person of her height to the top of that bed, to fall with such force as to cause all the damage that I found. Of course it is speculation, but I don't think so."

[4] We will not consider this proposition for the reason that the law is established in California that an objection to the introduction of evidence may not be made for the first time on appeal. (10 Cal. Jur. [1943] page 824, sec. 111; Hurd v. Walker, 9 Cal.App.2d 525, 527, 50 P.2d 1074.) In the present case the testimony which it is urged the trial judge should not have received was admitted in the trial court without objection, and under the rule just stated any objection which might have been made to such testimony was waived.

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are affirmed.

MOORE, P. J., and FOX, J. pro tem., concur.

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72 Cal.App.2d 125

PEOPLE v. SCHOONDERWOOD.

Cr. 3950.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1945.

1. Judges ⚷51(2)

The objection that trial judge is disqualified from hearing fact issues must be made before commencement of hearing of any such issue and comes too late on appeal and is waived by failure to make it before trial court. Code Civ. Proc. § 170.

2. Infants ⚷20

Evidence sustained conviction of contributing to minors' delinquency by committing acts of perversion with two boys. St.1937, p. 1033, § 702.

3. Criminal law ⚷678(1)

In prosecution for contributing to minors' delinquency, district attorney need not elect as to particular date of alleged act or acts causing or tending to cause minor to lead dissolute or immoral life. St.1937, p. 1033, § 702; St.1915, p. 1246, § 21, as amended by St.1921, p. 773.

◆

Appeal from Superior Court, San Louis Obispo County; Ernest D. Wagner, Judge.

Guy Schoonderwood was convicted of contributing to minors' delinquency, and he appeals.

Affirmed.

George F. Finucane, Jr., of Santa Maria, for appellant.

Robert W. Kenny, of San Francisco, and Everett W. Mattoon, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of guilty on two counts of violating Section 702 of the Welfare and Institutions Code, St.1937, p. 1033 (contributing to the delinquency of a minor), after trial before the court without a jury, defendant appeals.

The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

On or about January 12th and 20th, 1945, defendant committed acts of perversion with the body of a boy fourteen years of age. (Count two of the indictment.) On or about April 18, 1945, defendant committed another act of perversion on the body of a boy fifteen years of age. (Count three of the indictment.)

[1] Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *The trial judge was disqualified from hearing and determining the cause.*

This proposition is untenable. The objection that a trial judge is disqualified from hearing issues of fact in a case must be made before the commencement of a hearing of *any issue of fact* in the action. (Sec. 170, Code of Civil Procedure, subsection 5; People v. Sweet, 19 Cal.App.2d 392, 396, 65 P.2d 899.)

In the present case no objection of any nature was made in the trial court relative to the qualifications of the trial judge. The objection is raised for the first time on appeal. Therefore, under the rule above stated, it comes too late and any objection that defendant might have had to the qualifications of the trial judge he has waived by failing to make the objection before the trial court.

[2] Second: *The evidence was insufficient to support the trial court's findings that defendant was guilty as charged in counts two and three.*

This proposition is also without merit. Earl Smith, a boy fourteen years of age, testified that defendant committed acts of perversion with him on two separate occasions, viz. on Friday, January 12, 1945 and Saturday, January 20, 1945. Such testimony constituted substantial evidence to sustain the verdict of guilty as to count two.

Daniel Smith, a boy age fifteen, testified that on April 18, 1945, defendant committed an act of perversion with him. This testimony sustains the verdict of guilty under count three of the indictment.

Further discussion of the sordid details as disclosed by the evidence would serve no useful purpose.

[3] Third: *The trial court erred in refusing to require the district attorney to elect as to the particular date of the offenses upon which he was relying for conviction.*

This proposition is likewise untenable. In prosecutions under section 702 of the Welfare and Institution Code (contributing to the delinquency of a minor) it is unnecessary for the People to make an election as to the particular date of the act or acts causing or tending to cause a person under the age of 21 years to lead a dissolute or immoral life. This section is based upon and is almost identical with the provisions of Statutes of 1915, chapter 631, p. 1246, section 21 as amended by Statutes of 1921, chapter 504, p. 773, known as the Juvenile Court Law. Under the provisions of the statute just mentioned it was held that the gist of the violation of the statute consisted in the doing of *one or a series of acts* prohibited by the statute. Hence it was not necessary for the district attorney to elect and rely on any specific date or dates in proving an offense charged under such law. (People v. Koosistra, 58 Cal.App. 277, 279, 208 P. 316; People v. Oliver, 29 Cal.App. 576, 580 et seq, 156 P. 1005.)

In People v. Koosistra, supra, 57 Cal. App. at page 279, 208 P. at page 317, the court said: "Under the Juvenile Court Law it is permissible to show any conduct on the part of a person toward a minor which either causes or tends to cause such minor to become a delinquent, even though such conduct may consist in the doing of one act only or of a series of acts. People v. Oliver, 29 Cal.App. 576, 156 P. 1005."

State v. Ewing, Or., 149 P.2d 765, is an Oregon case and therefore it is not authority in view of the decisions of the appellate courts of our state announcing a contrary rule. (Rast v. Van Deman & Lewis Co., 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A.1917A, 421, Ann.Cas. 1917B, 455; Tanner v. Little, 240 U.S. 369, 36 S.Ct. 379, 60 L.Ed. 691.)

People v. Stangler, 18 Cal.2d 688, 117 P.2d 321, is not here in point, for in such case the violation was of the provisions of section 288 of the Penal Code and not of section 702 of the Welfare and Institution Code.

People v. Wilhite, 49 Cal.App. 246, 193 P. 151, is not in conflict with the law as above stated. The language appearing on page 249 of 49 Cal.App., on page 152 of

193 P.* is merely dicta in so far as the inference may be drawn therefrom that it is necessary to rely upon a particular date when charging an offense under the juvenile court law. The law on the subject is clearly stated as being to the contrary in the subsequent decision of People v. Koosistra, supra, in which case the Supreme Court denied an application for a hearing.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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* The language referred to in People v. Wilhite, supra, is this: "The appellant claims that the court erred in giving the following instruction to the jury: 'The prosecution in this case has selected the alleged acts of the defendant set forth in the information and testified to by witness Bessie Robertson, as having occurred on or about the 21st day of June, 1918, and has elected to rely on proof of such acts for a conviction in this case. Testimony has been introduced by the prosecution tending to prove other acts and conduct of the defendant toward said Bessie Robertson of a similar character to those alleged in the information. This evidence is introduced for the purpose of proving the disposition and tendency of the defendant to commit acts such as those alleged in the information and relied upon by the prosecution, and such evidence is not introduced to prove distinct offenses, but as corroborative evidence tending to support the one specific offense for which the defendant is being tried.' The giving of this instruction was not erroneous."

72 Cal.App.2d 153

NOBLE v. KERTZ & SONS FEED & FUEL CO. et al.

Civ. 12896.

District Court of Appeal, First District,
Division 1, California.

Dec. 11, 1945.

1. Automobiles ⚷11

An area, to be a residential district wherein statute limits vehicle speed to 25 miles per hour, must both be signposted as such district and have number of buildings required by statute. Vehicle Code, § 90, St.1935, p. 99; §§ 511, 758, St.1941, pp. 2716, 2718.

2. Evidence ⚷5(2)

A disputed question as to whether area is residential district, wherein vehicle speed is limited to 25 miles per hour by statute, is one of fact and not one for judicial notice. Vehicle Code, § 90, St.1935, p. 99; § 511, St.1941, p. 2716.

3. Trial ⚷375

In case not properly subject of judicial notice, trial judge may not lawfully base his fact findings on what he observes during inspection of locus in quo without presence or consent of parties or their counsel, where uncontradicted evidence is contrary to such findings.

4. Trial ⚷375

The trial judge may view locus in quo for purpose of understanding evidence introduced.

5. Trial ⚷375

What trial judge, viewing locus in quo with parties' consent sees on such view is itself evidence and may be used alone or with other evidence to support his fact findings.

6. Trial ⚷375

A trial judge's view of locus in quo without parties' consent cannot be considered independent evidence supporting his fact finding otherwise unsupported by, or contrary to, evidence introduced.

7. Trial ⚷375

The trial judge's statements that he intended to visit scene of automobile and truck collision, and failure of plaintiff's counsel to object to such visit, did not constitute stipulation that trial judge could visit premises for purpose of taking evidence, as required to render his observations independent evidence sufficient to support his fact findings based thereon.

8. Trial ⚷375

In action for injuries sustained in collision between automobile and defendant's truck, trial judge's finding of plaintiff's contributory negligence in driving automobile at speed exceeding that limited by statute in residential district, based on judge's observation, from personal view of collision scene without parties' presence or consent, that district was residential, did not support judgment denying either party any relief. Vehicle Code, §§ 90, 510, St.1935, pp. 99, 176; § 90.1, St.1939, p. 2106; §§ 511, 758 St.1941, pp. 2716, 2718.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Allen W. Noble against Kertz & Sons Feed & Fuel Company and others for damage to an automobile and personal injuries sustained in a collision with named defendant's truck, in which defendants filed a cross-complaint for damage to the truck and injuries to defendant driver thereof. From a judgment denying either plaintiff or cross-complainants any relief, plaintiff appeals.

Reversed.

Campbell, Hayes & Custer, of San Jose, for appellant.

Emmett R. Burns, of San Francisco, for respondent.

PETERS, Presiding Justice.

On June 18, 1943, at about 5 p.m., plaintiff was driving his automobile on Garden Avenue, East Palo Alto, outside the city limits. Garden Avenue has an oil and gravel surface and is eighteen to twenty feet wide. There are no sidewalks. Within two and one-half or three feet of one of the edges of the highway at the place of the accident there is a solid hedge six to nine feet high, about one hundred and thirty-five feet long. The truck of defendant Kertz, then being operated by his employee and defendant Moberty, came from a private driveway leading through the hedge into Garden Avenue, and the two vehicles collided. Plaintiff brought this action against Moberty and Kertz for the damage to the car he was driving and for certain personal injuries alleged to have been received by him in the accident. Moberty and Kertz cross-complained, Kertz for the damage to his truck, and Moberty for his claimed injuries. The case was tried before the court without a jury and resulted in a judgment that plaintiff and cross-complainants take nothing by their respective actions, it being the conclusion of the court that both plaintiff and Moberty were guilty of negligence. From this judgment plaintiff appeals.

The evidence is conflicting as to the speed of the truck and as to whether Moberty stopped before proceeding into Garden Avenue. The evidence is also conflicting as to the conduct of the plaintiff. He testified that he was proceeding along Garden Avenue at a speed of twenty-five miles per hour; that he saw the truck emerging from behind the hedge when he was twenty-five to thirty feet from the driveway; that he applied the brakes and swerved to the left in an attempt to avoid the truck; that his brakes locked and the car skidded on the loose gravel. The plaintiff's car left visible skid marks on the highway for forty-two to forty-five feet. The speed of plaintiff's car was only slightly reduced when the two vehicles collided. The force of the impact turned the truck around, and both vehicles were damaged.

The evidence is in such a state that, independently of the speed limits fixed by § 511 of the Vehicle Code, St.1941, p. 2716, the trial court could have found that the accident was proximately caused by the negligence of the plaintiff, or by the negligence of the defendant, or that each was negligent. It was the theory of the trial court that both plaintiff and Moberty were negligent, and it is on this theory that judgment was entered denying plaintiff any recovery. Had the trial court made proper findings on this theory there can be no doubt but that such findings would find support in the record. The difficulty is that the actual findings are not based on the evidence introduced at the trial but upon what the trial court observed in a personal inspection of the area involved, which inspection was made without the presence or consent of the parties. Moreover, the findings based on such observations are directly contrary to the evidence introduced at the trial.

At the trial one of the issues involved was the nature of the district where the accident occurred. The trial judge, quite properly, asked counsel what the speed limit was at the scene of the accident. Counsel for defendants stated that the "basic speed law would control there." He at no time contended that the district was a residential district but did contend that plaintiff was contributively negligent in driving even twenty-five miles per hour in that area under § 510 of the Vehicle Code, St.1935, p. 176, which provides that: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." During this discussion the counsel for defendant suggested that the trial judge might like to see for himself the conditions existing at the place of the accident, and the trial judge replied that he intended to go out and look at the scene. Thereafter, the plaintiff introduced evidence, which is not contradicted, that the area at the scene of the accident is not a residential district as defined in § 90 of the Vehicle Code, St.1935, p. 99. That section defines such a district as one where, within a quarter of a mile, there are at least thirteen buildings on one side of the highway or sixteen on both sides. Section 90.1, St. 1939, p. 2106, provides that in making such computations no building shall be counted unless its front is within seventy-five feet of the highway. The evidence introduced by plaintiff shows that in the area in question there are not sufficient buildings to make the district a residential one, and that some of the buildings are back from the roadway more than seventy-five feet. No evidence at all was introduced by the defendant on this issue. In denying defendant's motion for a non-suit the trial judge again stated that he would like to go up and see the road.

At the conclusion of the evidence the trial court took the case under submission, and thereafter filed an opinion. This opinion has been properly made part of the clerk's transcript on this appeal. Rule 5, Rules on Appeal. In the opinion it is stated:

"An inspection of the scene of the accident clearly shows that the place is a residential district as defined by Section 90 of the Vehicle Code. If it were not for shrubs, hedges and trees in front of the houses it would be a typical city residential block with the exception that there are no sidewalks. It is a very dangerous street because of the close proximity of the houses to the street and because of high hedges, trees and shrubs. Under the circumstances it was the duty of plaintiff to obey the speed limit as set forth in Section 511 of the Vehicle Code and even a speed of twenty-five miles per hour is too fast, in my opinion, for a street such as described.

"From all of the facts as borne out by the evidence introduced at the trial and the skid-marks on the street I am of the opinion that plaintiff was traveling faster than 25 miles per hour."

Findings were thereafter filed. Finding number 3 is as follows: "The court finds that the place where the accident occurred is a residential district, as defined by section 90 of the Vehicle Code * * *. The court further finds that because of the circumstances heretofore mentioned the plaintiff was under duty to obey the speed limit as set forth in section 511 of the Vehicle Code of California, which he failed to do, and from the evidence before the court said speed was too fast to operate an automobile in this particular vicinity * * *."

Thereafter plaintiff moved for a new trial and in support thereof filed his own affidavit and that of his attorney in which it is averred that the trial judge visited the scene of the accident after the case was submitted and there made certain observations, which he at no time communicated to the parties or to their counsel, and based his findings thereon. It is further averred that, since the trial, plaintiff and his counsel by personal observation have determined that the area in question is not within a residential district. It is charged that the action of the trial judge constituted an irregularity that deprived plaintiff of a fair trial and amounted to taking evidence out of court in the absence of the parties or their counsel.

A reading of the findings discloses that the trial court found, as a fact, that the district involved was a residential district, and that the speed limit was there not more than twenty-five miles per hour.

The permissible speeds at which vehicles lawfully may travel in various areas are fixed by §§ 510 and 511 of the Vehicle Code. Section 510, already quoted, contains the basic speed limit, namely, no speed greater than is reasonable and prudent. Section 511 provides that "The speed of any vehicle * * * not in excess of the limits specified in this section * * * is lawful unless clearly proved to be in violation of the basic rule declared in Section 510," but that a speed in excess of the limits fixed by § 511 is prima facie unlawful. The section then fixes twenty-five miles per hour as the permissible speed in a residence zone, and, with certain exceptions not here involved, fifty-five miles per hour in all other areas. It will be noted that the trial judge both in his opinion and in his findings based his finding of negligence on a claimed violation of § 511, and not on a violation of § 510.

[1, 2] It is also apparent that the conclusion that plaintiff was contributively negligent was largely, if not entirely, based on this finding. It is also quite apparent that, so far as the evidence introduced at the trial is concerned, such evidence not only fails to support that finding, but is contrary to the evidence. The only evidence introduced on the issue was that there were not a sufficient number of buildings in the area to make the district residential in character within the meaning of § 90 of the Vehicle Code. Moreover, there was no evidence at all that the district was signposted as required by § 758 of the Vehicle Code, St.1941, p. 2718. That section provides in part that "Every highway shall be conclusively presumed to be outside of a business or residence district unless such district is duly signposted when and as required by this code." The area must both be posted and have the required number of buildings to be a residential district. McGough v. Hendrickson, 58 Cal.App.2d 60, 136 P.2d 110. Moreover, when the nature of the district is in dispute the question becomes one of fact and is not one for judicial notice. McGough v. Hendrickson, supra; Hill v. County of Fresno, 140 Cal.App. 272, 35 P.2d 593; see cases collected 2 Cal. Jur.Supp. p. 274, § 182.

[3] If we look only at the findings it necessarily follows that it must be held that the basic finding under discussion is contrary to the evidence. If we are entitled to consider the opinion of the trial court, and we are inclined to the view that it may be considered for the purpose of understanding the findings (Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273), then it is clear that the challenged finding is based not on the evidence introduced at the time of trial but on what the trial judge saw when he visited the scene without the parties or their counsel, and without an agreement that such an inspection could be made. The affidavits without contradiction aver that this inspection was made after submission of the case. Thus we are directly pre-

sented with the question as to whether, in a case not properly the subject of judicial notice, a trial judge may lawfully base his findings on what he observes during an inspection of the locus in quo, where such inspection is made without the presence of the parties or their counsel, or without their consent to such inspection, and where the uncontradicted evidence in the record is contrary to the finding based on such observation. To this question there can be but one answer. To sanction such a rule would be to permit a trial judge to take evidence outside of court, without the parties or their counsel being present, and would effectively deprive a litigant of his constitutional right of an appeal. Such a rule would amount to a denial of due process, and certainly would deny to a litigant the fair and impartial trial to which he is entitled.

Strangely enough there does not appear to be a California case directly in point. In other jurisdictions there is a wealth of authority that while a trial judge trying a case without a jury may inspect the locus in quo for the purpose of understanding the evidence introduced, such view is not independent evidence, and findings may not be based on the result of such personal investigation, at least where the parties have not consented to or participated in such view. See many cases collected and commented upon in an annotation entitled: "Right of judge trying case without jury to base findings on result of personal observations" in 97 A.L.R. 335; in addition, see, Provo River Water Users' Ass'n v. Carlson, 103 Utah 93, 133 P.2d 777; Union Nat. Bank of Pittsburgh v. Crump, 349 Pa. 339, 37 A.2d 733; Owings v. Talbott, 262 Ky. 550, 90 S.W.2d 723; Carter v. Parsons, 136 Neb. 515, 286 N.W. 696; Rietzel v. Cary, 66 R.I. 418, 19 A.2d 760; Kovacs v. Szentes, 130 Conn. 229, 33 A.2d 124; Conner v. Parker, Tex.Civ.App., 181 S.W.2d 873.

[4, 5] Some of the cases from other jurisdictions commented on in the above annotation go so far as to hold that even where the parties consent to the view, such view is not independent evidence and findings cannot be supported by the results of such view. This was the position taken in some of the early California cases. Stanford v. Felt, 71 Cal. 249, 16 P. 900; Wright v. Carpenter, 50 Cal. 556. The more recent California cases, however, clearly establish two principles: First, that, with or without consent, the trial judge may view the locus in quo for the purpose of understanding the evidence introduced; and, second, that where the view is with consent, what is then seen is itself evidence and may be used alone or with other evidence to support the findings. Hatton v. Gregg, 4 Cal.App. 537, 88 P. 592; Vaughan v. County of Tulare, 56 Cal.App. 261, 205 P. 21; Preston v. Culbertson, 58 Cal. 198; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 271 P. 509; Wade v. Thorsen, 5 Cal.App.2d 706, 43 P.2d 592; Brugger v. Lee Yim, 12 Cal.App.2d 38, 55 P.2d 564; Peckwith v. Lavezzola, 50 Cal.App.2d 211, 122 P.2d 678; Otey v. Carmel Sanitary Dist., 219 Cal. 310, 26 P.2d 308; Ethel D. Co. v. Industrial Acc. Com. 219 Cal. 699, 28 P.2d 919; Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 83 P.2d 942; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Gastine v. Ewing, 65 Cal.App.2d 131, 150 P.2d 266; Gularte v. Martins, 65 Cal.App.2d 817, 151 P.2d 570; Wood v. Davidson, 62 Cal.App.2d 885, 145 P.2d 659. There are a few cases where consent or lack of consent does not appear on the face of the opinion and where the view was held to be independent evidence, but most of those cases involved situations where other evidence on the issue appeared in the record. In none of them, so far as our research has disclosed, was it held that a view without consent constitutes independent evidence. See, for example, Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Wright v. Locomobile Co. of America, 33 Cal.App. 694, 167 P. 407; Gray v. Magee, 133 Cal.App. 653, 24 P.2d 948; Pohl v. Anderson, 13 Cal.App.2d 241, 56 P.2d 992; Mitchell v. City of Santa Barbara, 48 Cal.App.2d 568, 120 P.2d 131; Cornell v. Hearst Sunical etc. Corporation, 55 Cal.App.2d 708, 131 P.2d 404.

[6, 7] On principle, there can be little doubt that a view without consent cannot be considered independent evidence on a controverted issue so as to support alone a finding otherwise not supported by other evidence, and, in fact, contrary to the evidence introduced. To hold otherwise would permit the trial judge to base his findings on what he observed without giving the parties the opportunity to explain or to supplement such observations, or to cross-examine the witness. The two statements of the trial judge in the present case that he intended to visit the premises, and the failure of the plaintiff's counsel to object, cannot, under the circumstances disclosed by the record, be construed as constituting an

express or implied stipulation that the trial judge could visit the premises for the purpose of taking evidence. Obviously, no express stipulation to that effect was entered into, and counsel for defendants do not so contend. Under the circumstances shown by the record it cannot be held that there was an implied stipulation to that effect. Counsel may well have assumed that either they would be notified of the time of the visit, or that the visit was to be for the purpose of understanding the evidence introduced.

Nothing here said is intended to limit the trial court's power of inspection where he is empowered to take judicial notice of the facts. That is not this case, and the finding does not pretend to be based on such notice, but on the inspection.

[8] From what has been stated it is quite clear that the finding that plaintiff was contributively negligent, being based on what the trial court observed, and being in part contrary to the evidence, does not support the judgment.

The judgment appealed from is reversed.

WARD, J., and OGDEN, Justice pro tem., concur.

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72 Cal.App.2d 191

PEOPLE v. CARR.

Cr. 3912.

District Court of Appeal, Second District, Division 3, California.

Dec. 12, 1945.

1. Homicide 🔑253(3)

Evidence sustained finding that killing was willful, deliberate, and premeditated, so as to sustain conviction for first-degree murder.

2. Homicide 🔑236(1)

Evidence showed that decedent's death was caused by shot fired by defendant.

3. Assault and battery 🔑92

Evidence sustained conviction of an assault with a deadly weapon.

4. Assault and battery 🔑56

That defendant, while engaged in killing another person, did not intend to shoot a bystander who was wounded at the time, was no defense to charge of assault with a deadly weapon.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Johnny Carr was convicted of murder, and of assault with a deadly weapon, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

SHINN, Justice.

At about 2 o'clock in the morning of June 19, 1944, Johnny Carr entered the Swing Shift Cafe in Los Angeles, armed with a revolver, and shot and killed one Frank Williams. Also struck by a bullet at the same time was one Richard Swanson. Accused of the murder of Williams and of assault with a deadly weapon upon Swanson, defendant was convicted of both offenses in a trial by the court. The court determined that the murder was of the first degree and defendant was sentenced to State Prison for life upon the murder charge and for the term prescribed by law upon the other. He appeals from the judgment.

The grounds of the appeal are as follows: (1) Insufficiency of the evidence to sustain the conviction of first degree murder; (2) insufficiency of the evidence to establish the fact that deceased died as a result of a criminal agency, and (3) insufficiency of the evidence to support the conviction of assault with a deadly weapon.

Defendant, a Negro, and Velma Carr, a Creole, although not united by ceremonial marriage, lived together in Texas as husband and wife for two years or more before coming to Los Angeles in 1939. They continued to live together and operated a cafe but they separated about two months before the shooting and defendant thereafter ran the business alone for another six weeks, when he sold it. After the separation Velma was frequently in the company of Williams, when they made use of a car which defendant was purchasing for Velma. During this time Williams, who had been a customer of defendant, carried messages between the two. On the night of the shooting Williams and Velma alighted from the car and entered the Swing Shift Cafe with one Cathcart. They seated themselves to have coffee, Velma sitting between the two men at a counter. Defendant was standing outside the door when the occupants alighted from the car and he saw the three enter the cafe. He said to a friend called Buddy: "You know one thing I wish I had me some tonight. You know where I can buy me a gun? I got to protect myself. Somebody trying to run over me." Buddy then produced a .45 caliber Smith & Wesson revolver and defendant bought it for $20 and put it in his pocket. He testified that this occurrence took place before Williams and Velma arrived. Shortly after they entered the cafe defendant followed them with the revolver in his pocket and sat down at the counter near the door. According to defendant, Williams began cursing him, calling him names, jumped up and reached toward his belt for a knife, as defendant thought, whereupon he was shot. According to other eyewitnesses defendant came into the cafe and, without any exchange of words which they heard, walked up to Williams where he was seated facing across the counter and shot him. One bullet entered the left side of the body below the left shoulder and passed across slightly forward and slightly upward; the second entered the right cheek just below the cheek bone, crossing downward and lodging beneath the seventh rib, and a third one grazed the cheek close to the second wound but did not penetrate. Either of the penetrating wounds was sufficient to have caused death. The witness Cathcart testified that Williams fell to the floor between the stools at the first shot and that defendant put the revolver close to his head and continued to shoot and that there must have been five shots fired. Defendant immediately left the cafe, threw away the gun and went home, but later surrendered to the Sheriff's office. He testified that he recalled firing only two shots but there was evidence that the gun was found by the officers and was then empty. When the body of Williams was removed from the floor an unopened pocket knife was found in a vest pocket.

[1] Defendant testified that Williams had a house on Avalon Boulevard where he sold whiskey and ran a crap game; that he had women around the place and that after the separation Velma was often there, leaving her car standing in front of the house; that he saw her make dates with men in bars and later meet them at Williams' place, which she would enter first and the men later through the rear door; that after the separation he talked to her about her conduct and accused her of being a prostitute. In testifying to his feelings in the matter, he said: "No, I wasn't mad at anybody taking her away from me, but I didn't like the way he was using her out in the street, making a prostitute out of her." He testified that he had lived with her "on or off for eight or ten years" and that he still loved her; that on many occasions Williams had taunted him and had addressed to him many obscene and jeering remarks, and that upon one occasion Williams and Velma, driving the latter's car, had almost run over him and his brother as they were crossing the street and that upon other occasions they drove past his place and turned a spotlight upon him. He testified that Williams had said that he would kill him, defendant, but did not testify that he had heard the statement made and the remarks which he attributed to Williams as having been addressed to him, directly, contained no threats. He did not testify to any threat by Williams on the evening of the shooting. According to his account, as he sat in the cafe Williams and Velma were looking toward him and Williams said: "What the damn people sitting around this time of night eye balling people going on for? * * * Sitting around watching. They ought to be at home asleep. They got to work. Sit around all night eye balling people and going on." To which defendant testified he replied: "I asked him why did he keep on cursing me and going on. I am not bothering him. Why didn't he go on and let me alone." Counsel for appellant, after reciting the evidence substantially as we have stated it, say: "The prosecution has failed to raise the degree of the crime from second to first degree murder as defined in the Penal Code. There is no evidence in the record where it can be reasonably inferred that the murder was willful, deliberate and premeditated," citing, without discussing, People v. Holt, 1944, 25 Cal.2d 59, 153 P.2d 21, and People v. Thomas,

1945, 25 Cal.2d 880, 156 P.2d 7. The elements of deliberation and premeditation which were found to be wanting in the Holt case, by reason of which the offense was reduced from first to second degree murder, are not absent in the present case. There is nothing in the exposition of the law relating to murder in the Thomas case which furnishes support for the argument of defendant. It appeared by his own testimony that he had a grievance against Williams which was aggravated by the continuous course of conduct of Williams and Velma and by the frequent taunts and abuse of the former. His testimony established a motive for the killing. He expected trouble when he entered the cafe and prepared himself for it. There was evidence that he shot Williams in cold blood as he was seated at the counter and he continued shooting as Williams lay on the floor, until he had emptied his gun. We are asked to hold, contrary to the findings of the trial judge, that when defendant purchased the revolver and entered the cafe it was not his deliberately formed purpose to kill Williams but only to act in self-defense; in other words, that the shooting was wholly unpremeditated. Such a conclusion of fact would be contrary to the evidence and the reasonable inferences deducible therefrom. We do not see how the trial judge, upon a consideration of the evidence, could have found that defendant's acts were not deliberate and premeditated. His resentment toward Williams was not the result of sudden impulse and he had had much time to reflect upon the conduct of Williams, which he believed to be responsible for the loss of the woman with whom he had lived, and for her debauchery. The encounter with Williams on the night of the shooting was sought by defendant and the results of it are proof of the purpose which he had in mind. The conclusion that the killing was willful, deliberate and premeditated is fully sustained by the evidence.

[2] The contention that there was no evidence that Williams' death was caused by the shots which defendant fired is not sustainable. The information charged the murder of Frank Williams. It was stipulated that Doctor Webb, Chief Autopsy Surgeon of Los Angeles County, if called as a witness, would testify that on June 19, 1944, he performed an autopsy upon the body of Frank E. Williams and that the cause of death was gunshot wounds. Under the stipulation the autopsy report was received in evidence. Defendant's point is that there was no evidence that Frank Williams named in the information was the Frank E. Williams whose body was the subject of the autopsy. Autra Williams, widow of Frank Williams, was called as a witness and testified that she had seen the body of her husband in the morgue. It was stipulated that the body was that of her husband and also that her husband was the Frank Williams named in the information. This evidence was clearly sufficient to prove the killing of Frank Williams as charged in the information.

[3, 4] The final contention to be considered is that the evidence was insufficient to prove an assault with a deadly weapon upon Richard Swanson. This victim of the shooting was not called as a witness, but others testified that he had been seated next to Williams, conversing with him, at the time of the shooting. One witness testified that "there was another fellow hit too" and that he "heard his name was Richard Swanson." When questioned as to whether he appeared to have been injured, he answered, "Yes, he was injured." He testified further: "Q. By Mr. Lynch: What happened to the other man that was shot? A. Oh, he was shot—I think he was hit in the arm, or some place near the shoulder, and some lady taken him to the hospital." Another witness was questioned whether he saw Mr. Swanson there, "a gentleman who had been shot in the arm," and answered, "Yes, he was there." A police officer, testifying to statements of defendant, was asked: "Was anything said about any one else getting injured in the shooting?" and he replied, "He [defendant] mentioned that there was a man on either side of Velma and that one of the men was shot in the arm." While this evidence of the shooting of Swanson was somewhat vague, it was sufficient. It came in without objection. Defendant did all of the shooting that was done upon the occasion and he did not deny having shot Swanson. The court correctly found from this evidence that Richard Swanson was present and that he was injured by one of the bullets. The fact that defendant did not intend to shoot him would not have been a good defense. People v. Ramirez, 1923, 64 Cal.App. 358, 221 P. 960.

The judgment of conviction is affirmed as to both counts.

DESMOND, P. J., and WOOD, J., concur.

72 Cal.App.2d 187

GLOVER v. LOS ANGELES RY. CORPORATION.

Civ. 14957.

District Court of Appeal, Second District, Division 3, California.

Dec. 12, 1945.

1. **Automobiles** ⚷245(72)

Whether pedestrian was contributorily negligent in failing to look to his left again before leaving curb, in order to see whether bus which had been standing about ten feet from curb was coming around corner was for jury.

2. **Automobiles** ⚷217(5)

A pedestrian at an intersection must make some effort to see whether vehicles traveling in the same direction are about to turn across his path, but whether the precautions taken measure up to ordinary care must be determined from the facts of the particular case.

3. **Automobiles** ⚷217(5)

A pedestrian before stepping from a place of safety into one of danger must look for oncoming traffic, but, if pedestrian is aware of his surroundings, the fact that he acts under a mistake of judgment does not necessarily mean that he is negligent.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Gene Glover against Los Angeles Railway Corporation for injuries sustained in collision with motorbus. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher and E. H. Chapman, all of Los Angeles, for appellant.

Francis J. Gabel, of Los Angeles, for respondent.

SHINN, Justice.

Defendant prosecutes this appeal from a judgment pursuant to the verdict of a jury in an action for damages sustained by plaintiff, a pedestrian, in a collision with a motor bus of defendant.

The accident occurred about 6:15 p. m., December 12, 1943, as plaintiff was crossing San Julian Street in Los Angeles. It was almost dark and the headlights and inside lights of the bus were on. Plaintiff was walking easterly on the southerly sidewalk of Seventh Street and as he approached the intersection of San Julian Street the bus was standing at the south curb of Seventh, the front end of it being about 10 feet west of the westerly curb line of San Julian. Plaintiff was intending to continue across San Julian; the bus was to turn the corner to go south on San Julian, but plaintiff did not know this. There were no traffic signals at the corner. The driver of the bus did not see any pedestrians in the vicinity of the west curb of San Julian; he did not at any time observe plaintiff approaching and did not know an accident had occurred until a passenger called out. The bus was about 35 feet long; San Julian Street was 40 feet in width. Plaintiff stepped into San Julian Street and started to cross within an unmarked crosswalk. The bus swung around the corner and plaintiff came into contact with the right front wheel of it, which was about 6 feet 4 inches to the rear of the front of the bus. As the bus was making a sharp turn to the right, the front wheel was extended outward and plaintiff's leg was caught and jammed behind the wheel and severely injured. Counsel for defendant properly concede that there was sufficient evidence to support the implied finding that its driver was negligent. They earnestly insist, however, that the pleaded defense of contributory negligence was established by the proven circumstances of the accident and by plaintiff's own testimony which, it is contended, clearly showed that he failed to exercise ordinary care as he started across the street.

[1-3] In the course of plaintiff's cross-examination he testified as follows:

"Q. As you stepped from the curb into the street, did you look to your left? A. No; no more than maybe putting my eye over; I don't remember turning my head.

"Q. You don't remember looking to the left as you stepped from the curb to the street? A. No.

"Q. You would say you did not, then? A. I don't get it.

"Q. You say you did not look to the left? A. I would say I did not turn my head.

"Q. Do you recall whether you looked to the left as you stepped off the curb into the street? A. No. I don't recall.

"Q. The next thing you knew you were in contact with some part of the bus? A. Yes."

The quoted testimony, considered by itself, would make it appear that plaintiff took no precautions for his safety as he attempted to cross the street, but this conclusion does not necessarily result when the testimony is considered with the entire circumstances of the accident. Plaintiff also testified that he saw the bus as it was standing at the curb before he entered San Julian and that he was not certain, but that he must have taken four or five steps before coming into collision with it. He was 28 years of age and wore a patch over his left eye. A fact which the jury and the trial judge no doubt deemed to be of importance is that there is a jog in San Julian Street at Seventh Street, the south intersection being some distance west of the north intersection. Obviously it would not have been difficult for a pedestrian, situated as plaintiff was, to have a view of vehicles being driven across Seventh Street from the northerly to the southerly intersections of San Julian. The only vehicles which would be encountered under the circumstances would be those which came from the east on Seventh Street and turned south into San Julian, those which came from the south on San Julian, and those which might be rounding the intersection, as the bus was. Plaintiff testified that as he entered San Julian he was ahead of the bus; that after he passed it as it stood at the curb he did not see it before coming into contact with it, and that at that time he was looking to his right. He also testified that when he last saw the bus standing at the curb on Seventh Street he was only a couple of steps away from the curb on San Julian. Witnesses who were on the bus also testified, but their testimony added nothing to the circumstances of the accident as above related. The essential question is: Was plaintiff guilty of negligence as a matter of law in failing to look to his left again before leaving the curb, in order to see whether the bus was coming around the corner. It is our opinion that the question whether he failed to exercise ordinary care was one of fact, as the learned trial judge concluded after he had reviewed the transcript of the evidence upon the motion for a new trial. It is inherent in the jury system that divergent views as to what constitutes ordinary care will be held by individual jurors and will be reflected in the verdicts which they return. Some verdicts will appear to a reviewing court to be somewhat extreme one way or the other, but these determinations must be respected unless they are seen to be so unreasonable as to justify the belief that the jury arrived at its conclusions without a fair consideration of the evidence. The implied finding that plaintiff was not guilty of contributory negligence does not appear to be unduly favorable to him. As already noted, he was not crossing an ordinary street intersection but one in which no vehicles would approach him from the north other than those which were turning to leave Seventh Street. He was in a crosswalk, with right-of-way which drivers of vehicles were bound to respect. Uncounted numbers of pedestrians cross our busy intersections hourly under similar conditions. Motorists making turns at such intersections go slowly, yielding to pedestrians until they are allowed to pass through. Such traffic conditions are of common knowledge to motorists and pedestrians alike. We recently said, in the case of a pedestrian who had been struck by a car making a left-hand turn: "The jurors no doubt knew from experience that a pedestrian, in crossing the street at an intersection, must of necessity, in order to proceed safely, give more attention to traffic which is in his path or approaching him from the right or the left than to that which may be approaching diagonally from the rear. It is the duty of motorists who are making turns at intersections to have this fact in mind and when they approach pedestrians diagonally from the rear, to assume a large measure of responsibility to avoid striking them." Spillers v. Silver, 1945, Cal.App., 158 P.2d 617, 619. Unquestionably it is necessary for a pedestrian at an intersection to make some effort to see whether vehicles traveling in the same direction are about to turn across his path, but whether the precautions taken measure up to ordinary care must be determined from the facts of the particular case. Accepting as true the testimony of plaintiff, it would not have been an unreasonable assumption upon his part that if defendant's bus did start up and turn south into San Julian Street, he could safely cross ahead of it. He could reasonably have assumed that the bus would get under way slowly and that the driver would see him and respect his right-of-way. As plaintiff was walking toward the center of the street he looked to the right. The front of the bus, which had swung far into San Julian, was swinging back toward him. Plaintiff, and no doubt the driver, at the time of the collision, were looking for vehicles approaching from the south. The conclusions of the jury that the driver was at fault, and that plaintiff was not, were not unreasonable in view of the fact that plaintiff was entitled to the immediate use of the crosswalk, while the bus driver was not. Counsel for defendant have cited many cases in which the conduct of pedestrians has been held to show as a matter of law failure to exercise ordinary care. It is unnecessary to discuss them. That a pedestrian, before stepping from a place of safety into one of danger, must look for oncoming traffic is an elementary rule. But it is also true that if a pedestrian is aware of his surroundings, the fact that he acts under a mistake of judgment does not necessarily mean that he was negligent. The conclusion of the jury that plaintiff did not fail to exercise ordinary care was not unwarranted.

The judgment and the order denying motion for judgment notwithstanding the verdict are affirmed.

DESMOND, P. J., and WOOD, J., concur.

72 Cal.App.2d 197

DORNELL v. RETIREMENT BOARD OF SAN FRANCISCO CITY AND COUNTY EMPLOYEES' RETIREMENT SYSTEM et al.

Civ. 12873.

District Court of Appeal, First District, Division 1, California.

Dec. 13, 1945.

Rehearing Denied Jan. 12, 1946.

1. Municipal corporations 🔑220(9)

The retirement board of San Francisco employees' retirement system is a local quasi judicial body, the findings of which may not be disturbed by a court if there is any substantial evidence before the board to support such findings.

2. Municipal corporations 🔑220(9)

Under the provisions of the San Francisco City Charter conferring judicial powers upon the retirement board of San Francisco employees' retirement system, findings of board based on conflicting evidence are binding on the courts.

3. Evidence 🔑574

Where medical expert for retirement board based opinion that fireman's death was not industrial on a reading of all testimony in the record, including testimony of attending physician and of widow's expert to the contrary, such opinion did not fall within rule that, as against positive, uncontradicted factual evidence applicable to a particular case, particularly when given by attending physicians, opinions of experts as to probabilities or possibilities, particularly when based on erroneous assumption, creates no conflict.

4. Municipal corporations 🔑200

Opinion of medical expert for retirement board that fireman's death was not industrial, which opinion was based upon entire record before retirement board, created a conflict in the evidence and was substantial evidence to support the determination of retirement board that, since death was not industrial, fireman's widow was not entitled to a pension.

5. Evidence 🔑574

The testimony of a medical witness in answer to a hypothetical question based on the facts in the record is sufficient to support a finding contrary to the testimony of other medical witnesses who have seen and examined the patient.

6. Municipal corporations 🔑220(9)

Municipal pension laws are to be liberally construed and applied to the end that the beneficent policies thereby established may be accorded proper recognition.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Mandamus by Elizabeth M. Dornell against the Retirement Board of San Francisco City and County Employees' Retirement System, John F. Brady and others, to compel the board to grant petitioner a pension as the widow of a fireman whose death was alleged to have resulted from illness caused by the performance of his duties as a fireman. Writ of mandate issued, and defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for appellants.

Melvin M. Belli, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Lloyd Dornell was a member of the San Francisco Fire Department for 17 years prior to his death on March 5, 1941. His widow, Elizabeth M. Dornell, applied to the Retirement Board of the San Francisco City and County Employees' Retirement System for a pension, claiming that her husband's death was industrial in character and resulted from illness caused by the performance of his duties as fireman. Section 169 of the city charter provides that in the event any member of the fire department "shall die as a result of any injury received during the performance of his duty, or from sickness clearly, unmistakably and directly caused by and resulting from the discharge of such duty" his family shall be entitled to a pension. The Retirement Board, after hearing, concluded that Lloyd Dornell's death was not industrial in character and that he did not die as a result of any injury sustained while in the performance of his duties as an employee of the Fire Department of the City and County of San Francisco. A petition for rehearing was denied. Thereafter, respondent filed a petition for a writ of mandate in the Superior Court to compel the board to grant her the pension she sought. The case was submitted to the court upon the record of the evidence and testimony as submitted before the Retirement Board. The court ruled that petitioner was entitled to a writ of mandate compelling the granting of the pension. From this judgment the board appeals.

[1, 2] It is conceded by both respondent and appellants that appellant Retirement Board is a local quasi judicial body and that its findings may not be disturbed by a court if there is any substantial evidence before the board to support them. The City Charter of San Francisco confers judicial powers upon the board, and its findings, based on conflicting evidence, are binding on the courts. Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396; Naughton v. Retirement Board of San Francisco, 43 Cal.App.2d 254, 110 P.2d 714; Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1385. The principal question presented upon this appeal, therefore, is whether there was any substantial evidence to support the determination of the board.

It is the contention of appellants that the trial court erred in finding that the evidence introduced before the board was susceptible of but one construction, namely, that respondent was entitled to a pension, and also in finding that there was no substantial evidence to constitute grounds for denial of respondent's application for a pension. Respondent, on the other hand, contends that "Not only is there no 'substantial' evidence to support the Board's ruling, there *is absolutely no evidence*" to support it. We shall briefly summarize the evidence introduced before the board.

Lloyd Dornell had been receiving treatment for high blood pressure since November, 1939, from Dr. Lloyd E. Wilson, his family physician. The treatment consisted of medication, including nitroglycerine, and the doctor had suggested also that he try to get assigned to easier work. Twice the doctor himself asked the fire department doctor for lighter work for Dornell, but it could not be arranged. On December 3, 1940, Dornell contracted influenza. Dr. Wilson called upon him at his home on December 3d, 4th and 6th, and on the latter date found Dornell improved, and told him to stay in bed three or four more days and then get up, and to see the fire department doctor before he went back to work. On December 17th Dornell went back to work and was ordered to assist on a "pressure test" (also called an "Underwriters' drill"), which consisted of putting a hose into the bay on the water front and pumping the water through the apparatus and hose. The hose had to be lifted up and down out of the bay several times, and it was very heavy. The job normally required four men, but only three were available on this particular day—Dornell and two other firemen, named McGovern and Locke. McGovern testified that Dornell did not look well, that he "was only as good as half a man, for he was in bad shape. He was sick"; and that he and Locke had to do practically all the work themselves. According to the testimony of another witness, Elmer J. Rice, who was employed in the "auto school" of the fire department, and who was present at the test on December

17th, Dornell made the remark that "This is a hell of a thing to do to a guy just coming back to work." The job lasted an hour and a half, and due to some leaking in the hose connections the firemen got their clothes wet. On returning to the fire house, Dornell was unable to change his clothes because he did not have a change of clothing there (having been assigned to that particular fire house for only one day), and he sat huddled near the furnace in the basement for about an hour, until he was relieved to go home. From December 17, 1940, up to and including January 5, 1941, Dornell reported for work every day, but he evidenced a lethargy, fatigue and loss of appetite.

On January 5, 1941, Dornell apparently did not feel well and spent all day in bed at the fire house. He returned home that night by himself and went right to bed and, according to his wife, "coughed and sweated all night," and the next day he suffered from dizziness. That day, January 6th, he had his first stroke, which affected the left side of his face. He remained home in bed until February 11, 1941, when he had a second stroke, which this time affected the right side of his body and his throat so that he could not swallow; and on February 12, 1941, he was taken to St. Mary's Hospital, where he died on March 5, 1941. The death certificate stated the cause of death as follows: "Immediate cause of death—bronchial pneumonia—three days; contributory causes: apoplexy—two months; arteriosclerosis, general and cerebral, and hypertension."

Three doctors testified before the board as to whether Dornell's death was caused by sickness resulting from the discharge of his duties: Dr. Wilson, the attending physician; Dr. H. M. F. Behneman, an expert, called by the petitioner; and another expert, Dr. Ernest du Bray, called by the Retirement Board. Dr. Wilson testified from his personal knowledge of the case as the attending physician, and it was his opinion that the heavy work which Dornell did on December 17, 1940, affected his condition so that it contributed to the stroke he had on January 6th; that "it could have" caused the stroke on the latter date; that the inner structure of a diseased blood vessel in his brain was weakened by the work done that day; and that "this arteriosclerotic process which was going on was hastened by any over activity or any over exertion." Dr. Wilson also testified, as stated, that in 1940, before Dornell had influenza and while he was treating Dornell for high blood pressure, he twice asked the fire department doctor, Dr. J. J. McGuire, for lighter work for Dornell, and mentioned the theater detail, but that Dr. McGuire "didn't seem to think that there was any way he could get lighter work; that as long as he was a fireman, he had to do the same work as the other men."

Dr. Behneman, petitioner's expert, testified, after reading the transcript and the testimony given by Dr. Wilson, and considering all the facts of the history brought out in the evidence in connection with the deceased, that there was a definite relationship between the work done by the deceased on December 17th and the stroke he suffered January 6th which contributed to his death; "that his going back to work when he did, and being called upon to do what he did, hastened his death from hypertension." He also testified that it was possible that some hemorrhage started on December 17th; that Dornell's general attitude of lassitude and lethargy and his fatigue and loss of appetite between December 17th and January 5th were symptoms of increased cranial pressure present at that time.

Dr. du Bray, as stated, called as an expert by the board, also read the transcript and the records in the case, and testified that it was his conclusion that the death was due to a non-occupational disease; that on December 17th there was no increase in the degenerative process of the blood vessels which would be responsible for the hemorrhages on January 6th or February 11th. He further testified that the symptoms of lethargy, fatigue and loss of appetite which Dornell had between December 17th and January 5th were probably not symptoms of intracranial disturbance, but were convalescing symptoms from the respiratory illness; furthermore, that in his opinion there could have been no damage to the blood vessels on December 17th where it did not manifest itself for three weeks—that such a delayed showing of hemorrhage only occurred in rare cases of head or skull injuries.

The appellant board contends that there was a substantial conflict in the medical testimony and that therefore its findings cannot be disturbed either by this court on appeal or by the trial court on mandamus. Appellants argue that Dr. du Bray's expert testimony created a substantial conflict in the evidence and is sufficient to support the board's findings; that all of the facts as they existed were testified to and made part of the record before the board, and that Dr. du Bray first read and became familiar with the record before giving his expert testimony and upon which facts he predicated his testimony; that Dr. Behneman, respondent's expert, had not known or examined Dornell during his lifetime and based his conclusions on the same record as Dr. du Bray; that Dr. Wilson had engaged in certain conjectures of his own, and although he was the attending physician when Dornell had the flu, and also when he had both strokes, he did not see Dornell on December 17th when he went back to work, nor did he see him between December 6th and January 6th, when he had the first stroke; and that his testimony, therefore, as to what caused the stroke was based not on his personal observations of Dornell but on the testimony given by other witnesses as to Dornell's condition and symptoms on December 17th and up to January 5th.

Respondent argues that Dr. Wilson, Dornell's attending physician, stated positively that death was due to the work done by Dornell on December 17th; that Dr. Behneman, respondent's expert, expressed the same opinion; and that "the only testimony adduced in favor of appellants was that of their 'expert Dr. du Bray' *who never saw the patient* and whose testimony was that there was 'A Possible' *correlation between the work on December 17th and the death.*"

Respondent further argues that Dr. du Bray's testimony did not create a conflict; that he qualified some of his statements and conclusions by such expressions as "It is possible," "this is another guess," "can't say with definiteness," and "questionable"—which made his testimony too uncertain to be "substantial evidence" to support the board's finding; and that, in any event, having testified as an expert, who did not see or treat the patient before his death, Dr. du Bray's testimony could not create any conflict with the testimony of Dr. Wilson, the attending physician, under the rule laid down in Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396. Respondent quotes extensively from this decision and bases her case mainly upon it. In that case the evidence showed that Brant, a fireman, on January 11, 1937, was called upon to fight a fire which lasted over five hours. The day was cold and very rainy and all the firemen received a thorough drenching. Within a short time after the fire, nearly all of them, including Brant, contracted severe colds; and on January 15th Brant's cold had developed into pneumonia. He was very ill from the pneumonia for some 20 days and it left him with a hacking cough, and up to the time of his death he had frequent and extended coughing spells. On December 20, 1937, he collapsed on the floor of the bathroom with a cerebral hemorrhage, and died that same day. The respondent's evidence was that Brant had had a violent coughing spell that morning before he got out of bed, and another after he went into the bathroom. Two doctors testified for Brant's widow, who was seeking a pension under section 169 of the charter, as is the widow in the present case. They had both attended Brant before his death. One had treated him when he had pneumonia and had prescribed for the resulting cough; the other was called in when Brant was taken to the hospital after he had collapsed, on December 20th. Both doctors gave it as their opinion that the exposure at the fire on January 11th had caused the pneumonia, and that the severe cough was a direct result of the pneumonia attack, and was a major contributory cause of the cerebral hemorrhage which caused Brant's death. The board produced an expert, who had not seen Brant during his lifetime, but who based his opinion on the record produced before the board, which he had read. "He was asked if he had formed an opinion as to whether the exposure at the fire caused the death. He replied that 'I think there is a very remote possibility that that was so'; that he based his opinion on the fact that this man attended a fire on January 11th and became cold and wet and that 'four days later he contracted pneumonia'; that it was the theory of respondent that the drenching at the fire caused the pneumonia, that the pneumonia caused the protracted severe cough, and that the cough caused the cerebral hemorrhage; that 'I think all these suppositions are possible, but I think, in varying degrees, improbable.'" 57 Cal.App.2d at page 730, 135 P.2d at page 401. He stated that the facts adduced caused him to "doubt very much that the coughing caused the cerebral hemorrhage" and stated that it was "very highly probable that the drenching had nothing to do" with Brant's death. The board denied the widow a pension and she took the matter into the Superior Court on mandamus. The court found in her favor, on the grounds that under the testimony produced before the board " 'the only conclusion that could reasonably be drawn' therefrom was that Brant died from a cerebral hemorrhage caused by a cough condition contracted at the January 11th fire"; that the testimony of the expert "did not constitute substantial or any evidence in support of a denial" of the pension by the board and did not create a substantial conflict in the evidence because (1) it was the opinion of an expert who had not treated Brant; (2) it was based on a state of facts not shown by the record to exist; (3) it was purely speculative and conjectural; and (4) at the very most it constituted a mere conflict in words, was not a substantial conflict and was wholly insufficient to support a decision denying the application for a pension. This court held that these findings were supported by the record. The opinion points out that the expert assumed that the pneumonia did not develop until four days after the fire, and that this assumption was "contrary to the uncontradicted facts, and at variance with matters of common knowledge." Furthermore, the opinion states that in giving his opinion the expert did not testify that any one of the steps in the chain of causation (whether the drenching at the fire caused the pneumonia, the pneumonia caused the cough, and the cough caused the cerebral hemorrhage) was impossible or did not occur, but merely that these steps were "improbable." The court there holds: "Under such circumstances, what might have occurred, what may occur in many or most cases, what the 'probabilities' might be, creates no conflict with positive testimony as to what did occur in this particular case. * * * The rule is well settled in this state that, as against positive, uncontradicted factual evidence applicable to the particular case, particularly when given by attending physicians, opinions of experts as to probabilities or possibilities (*particularly when partially based on erroneous assumptions)* creates no conflict. Thoreau v. Industrial Acc. Comm., 120 Cal. App. 67, 7 P.2d 767; Singer v. Industrial Acc. Comm., 105 Cal.App. 374, 287 P. 567; Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.2d 142; Gamberg v. Industrial Acc. Comm., 138 Cal.App. 424, 32 P.2d 413; Nielsen v. Industrial Acc. Comm., 125 Cal.App. 210, 13 P.2d 517; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 84 P. 2d 1071; Blankenfeld v. Industrial Acc. Comm., 36 Cal.App.2d 690, 98 P.2d 584. While it is true that an appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting evidence, it is equally well settled that for that rule to apply the conflict must be substantial and real and not fanciful or fictitious. Thoreau v. Industrial Acc. Comm., supra; Gamberg v. Industrial Acc. Comm., supra; Burns v. Faget Engineering Co., 53 Cal.App. 762, 200 P. 818; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377." 57 Cal.App.2d at pages 731-734, 135 P.2d at page 403. Italics added.

[3] Respondent contends that the Brant case is controlling here, but we are unable to agree with this contention. The basis of this court's decision in the Brant case was that the expert witness there assumed a different state of facts than those observed by the attending physician, and because his opinion was partially based upon erroneous assumptions it created no conflict as against the positive, uncontradicted factual evidence given by the attending physician. However, in the instant case it was stipulated that Dr. du Bray had read all of the testimony at the hearing, including that of Dr. Wilson and Dr. Behneman, and it is clear from a reading of his testimony that his opinion that Dornell's death was not due to any injury received while in the performance of his duties as fireman was based upon the entire record of that testimony. The following appears in his testimony:

"Mr. Bianchi. Q. As a result of reading all of them, which you just testified to have read, and which it has been stipulated you did read, did you come to any conclusion as to whether the death of Lloyd Dornell was due to an injury received in the performance of his duty as an employee of the Fire Department of the City and County of San Francisco? A. I have come to a conclusion.

"Q. Is it your conclusion that his death was or was not due to an injury received in the performance of his duty as a fireman in the service of the City and County of San Francisco? A. I think his death was due to non-occupational causes.

"Q. Your answer is, you think that his death was not due to an injury sustained while in the performance of his duties as a fireman of the City and County of San Francisco? A. That's right. * * * To sum the whole thing up, I think that we have here a man who is a little hypertensive for a year or two at least before he has this influenza. He has a respiratory infection which was an incidental thing, and not occupational. He returned to work. He is possibly never quite right in general energy and strength but has nothing to suggest anything wrong with him in his brain. He ruptured a blood vessel spontaneously, without any immediate history of effort previous to it—that is, just immediately previous to January 5th; that he is in bed then continuously until February 11th when, on the opposite side of the brain, he develops a larger hemorrhage which throws out the motor functions of the whole opposite side of the body, which was the right side, and then dies of a terminal bronchial pneumonia. * * *

"Mr. Bianchi. Q. Do you believe that the work of December 17th, 1940—doctor, is it your opinion that the work on December 17th, 1940, was the proximate cause of the cerebral hemorrhage on January 5th, 1941? A. No I don't.

"Q. Do you feel that it was the proximate cause of the cerebral hemorrhage on February 12th, 1941? A. No."

[4, 5] In our opinion, the instant case is clearly distinguishable from the Brant case. We are convinced that the testimony of Dr. du Bray created a conflict in the evidence and was substantial evidence to support the determination of the appellant board. As was stated in Sales v. Bacigalupi, 47 Cal. App.2d 82, at page 86, 117 P.2d 399, at page 402: "Dr. Ruedy's testimony created a conflict in the evidence and is sufficient to support the verdict. The testimony of a medical witness in answer to a hypothetical question based on the facts in the record is sufficient to support a finding contrary to the testimony of other medical witnesses who have seen and examined the patient. Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 29 P.2d 852; Alaska Packers' Ass'n v. Industrial Acc. Comm., 1 Cal.2d 250, 34 P. 2d 716. Nor can the fact that Dr. Ruedy's testimony conflicted with all the other medical testimony affect this rule since the testimony of one credible witness if believed by the jury is sufficient to support a verdict."

The following language of the court in the case of Bennett v. Brady, 17 Cal.App.2d 114, at page 118, 61 P.2d 530, at page 532, might well be applied to the instant case: "Petitioner, upon a detailed analysis of each expert's reasons for his opinion, in which she stresses agreements and minimizes differences, argues that, while the literal wording of the second expert's conclusion as to the cause of death differs from that expressed by the first, yet in reality his opinion accords with that of the first. Such argument, in that it involves the weight and effect of testimony and its interpretation, might properly be addressed to respondents as the triers of fact, but cannot be considered by a court as proof that the two opinions did not conflict. Respondents, however, were not concluded by the opinion of either expert, but could draw their own conclusions from the facts shown by the testimony. Bach v. C. Swanston & Son, 105 Cal.App. 72, 286 P. 1097. The death certificate was prima facie evidence of the cause of death. Longuy v. La Societe Francaise, 52 Cal.App. 370, 198 P. 1011. Deceased's recovery from the heart injury received in the drill could be reasonably inferred from the length of time elapsing between his return to duty and his death. The case of Buckley v. Roche, supra [214 Cal. 241, 4 P.2d 929], is readily distinguishable from the instant case because there the evidence did not present a conflict as to the cause of death, since the parties had stipulated that the police officer's death was caused by a heart spasm resulting from his ascension of a stairway in the performance of his duty. Since the evidence as to the cause of death was conflicting, respondents were authorized to decide such conflict and their decision cannot be controlled by mandate. Klevesahl v. Byington, 1 Cal.App.2d 671, 37 P.2d 179."

[6] It is true that pension laws are to be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition. Brant v. Retirement Board of San Francisco, supra; Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537; Casserly v. City of Oakland, 215 Cal. 600, 12 P.2d 425. But it also is true that the city charter confers judicial powers upon the appellant board, and that its findings, based upon conflicting but sufficient evidence, are binding upon the court. It was the function of the appellant board, under the charter, to determine from the evidence before it whether the death of Lloyd Dornell resulted "from sickness clearly, unmistakably and directly caused by and resulting from the discharge" of his duties as a member of the San Francisco Fire Department. The board decided in accordance with the opinion of Dr. du Bray, even though his opinion was opposed to those of Dr. Wilson and Dr. Behneman. While we believe that, upon the record before us, the board might

well have decided in favor of petitioner, and while we believe further that the weight of the evidence is with respondent, we cannot hold that its determination against petitioner does not find substantial support in the record.

In view of the foregoing, our conclusion is that the trial court erred in holding that respondent was entitled to a writ of mandate compelling the granting of a pension to respondent, and that the judgment should be and is hereby reversed.

PETERS, P. J., and WARD, J., concur.

72 Cal.App.2d 275

LYONS et al. v. EMERY et al.

Civ. 3294.

District Court of Appeal, Fourth District, California.

Dec. 20, 1945.

1. Quieting title 🔑50

In equitable action to quiet title to improvements placed on land by plaintiff's predecessors in interest as tenants, court had jurisdiction in granting relief to plaintiff to require him to remove the improvements from defendant's land within a reasonable time, and requirement that improvements be removed within 60 days after judgment became final was reasonable.

2. Quieting title 🔑10(1)

Plaintiff in quiet title action must rely on the strength of his own title and cannot maintain such an action which is brought after he has disposed of all of his interest in the property involved.

3. Quieting title 🔑10(2)

Plaintiff could not recover in action to quiet title to improvements placed on defendant's land by plaintiff's predecessors in interest as tenants, regardless of whether such improvements constituted trade fixtures, where plaintiff before action was filed had sold his business and the alleged fixtures to another thereby parting with all interest in the property involved.

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by Charles J. Lyons and others against Charles G. Emery and others to quiet title to hog feeding pens, fences, house, and garage situated on land belonging to defendant. From a judgment quieting title in named plaintiff, and requiring him to remove the property within 60 days after judgment became final, both plaintiffs and defendants appeal.

Judgment reversed.

Chandler & Wright, of Los Angeles, for appellant and respondent Emery.

Hugh G. Maddox, of Long Beach, for appellant and respondent Lyons.

BARNARD, Presiding Justice.

This is a quiet title action involving certain hog feeding pens, fences and a small house and garage situated on land in Orange County belonging to the defendant. The plaintiff claimed ownership of this personal property as being trade fixtures while the defendant claims that these improvements had become a part of the realty.

It appears that sometime prior to 1931, the defendant leased this and other real property to one Bastanchury under a written lease which provided that all improvements should go to the lessor at the expiration of the lease. This lease terminated in November, 1931. Prior thereto, Bastanchury had subleased this property to one Dugan and a part of the pens and equipment here in question had been built thereon. The premises had been used for the purpose of feeding hogs and sometime before 1932 Dugan sold out to one Nishamura, giving him a bill of sale covering the improvements then on the place. At a meeting in February, 1932, between the defendant and Nishamura and others similarly situated, it was agreed that the tenants should continue on a month to month basis and nothing was said about removing any improvements. Nishamura added more feeding pens and other equipment, including an addition to the small house. Nishamura operated the place for some ten years and, early in 1942, sold his hogs to the plaintiff and also gave the plaintiff a bill of sale covering the improvements on the place. The plaintiff took possession on April 1, 1942, and, as he testified, operated the place until the spring of 1943. At that time he sold his interest to the Wallace Finance Company.

The complaint in this action was filed on July 23, 1943. After a trial, the court found most of the facts above stated and also found that the addition to the house, a garage, tool house and bunk house, added by Nishamura, were built on mud sills; that the hog pens and feeding pens constructed by him, as well as those which had been previously built, are of very substantial construction with concrete floors and heavy posts imbedded in the ground and firmly affixed to the real property; that these various pens could not be removed except by dismantling them and using the material as second-hand material; that it would cost as much or more than the pens are worth to move, dismantle and reconstruct them; and that the improvements here in question were used in conducting a commercial enterprise and are trade fixtures. The court then further found that on or about May, 1943, the plaintiff sold his hog business and all of his rights to the Wallace Finance Company. The court then entered its judgment quieting title to the personal property in question in the plaintiff, and further providing that he must remove such property from the real property on which it is situated within sixty days after the judgment becomes final and that, otherwise, his interest in this personal property shall cease and terminate. From this judgment both the plaintiff and the defendant have appealed.

[1] While the plaintiff gave notice of appeal from the entire judgment he states in his brief that he objects only to that part of the judgment which requires him to remove the structures claimed by him within sixty days after the judgment becomes final. It is argued that this portion of the judgment goes beyond the issues raised by the pleadings, that the action was purely one to quiet title to personal property, and that this part of the judgment is entirely foreign to any issue in the case. There is no merit in this contention. The real issues in this quiet title action were whether these improvements constituted trade fixtures and if so whether, at the time this suit was filed, the plaintiff still had a right to remove them. In this equitable action the court had the power, in granting any relief to the plaintiff, to require him to act in an equitable manner. If the plaintiff was entitled to these improvements, and had a right to remove them as being trade fixtures, it was entirely consistent with the relief asked for that a limit be placed on the time within which he could exercise that right. The time fixed by the court for this purpose was at least reasonable, if it was not liberal. If it be assumed that the plaintiff is the owner of these fixtures and that he is entitled to remove them there is nothing in the case, whether of fact or of law, which indicates that he has any right to have them remain indefinitely on the defendant's real property.

It would appear that most of the improvements here in question were affixed to the land in a manner which would ordinarily make them a part of the realty. A question is raised as to whether the operations in question were sufficiently agricultural in nature to make the trade fixture rule inapplicable. Assuming the trade fixture rule to be otherwise applicable there is a further question whether, under that rule, the improvements would not have to have been removed while the plaintiff was still a tenant. See Earle v. Kelly, 21 Cal. App. 480, 132 P. 262. Even if a reasonable time should be allowed to remove the fixtures after the tenancy ended, contrary to the usual rule where there is no express agreement, another question would still remain here since, apparently, two or three months expired after the plaintiff's tenancy terminated and before suit was filed, during which no attempt was made to remove the property.

[2, 3] It is unnecessary to decide the questions thus suggested as it appears that the judgment must be reversed for another reason. The court found that in May, 1943, some two months before this action was filed, the plaintiff sold this hog business and all of his rights therein to the Wallace Finance Company. The plaintiff argues that there is evidence that the sale to the Wallace Finance Company was made through an escrow and that there is no evidence that the escrow was ever closed. However, the plaintiff testified that he took possession of the property on April 1, 1942, and that he operated the ranch until the spring of 1943; that he then sold it to the Wallace Finance Company; that they had a little trouble in the escrow; and that the Wallace Finance Company took possession in June or July, or maybe August, that he did not know just when they did take possession. Assuming, without holding, that the escrow would postpone the time when the plaintiff ceased to have any interest in

the property, the evidence as a whole indicates that he had parted with any possible interest therein at the time this action was filed and the court's finding that he sold out on or about May, 1943, is sufficiently supported, insofar as it is a finding that he parted with all interest in the property at about that date. It is well settled that a plaintiff in a quiet title action must rely on the strength of his own title, and it seems clear that he cannot maintain such an action which is brought after he has disposed of all of his interest in the property. To say the least, the findings are conflicting and under the findings here made the plaintiff was not entitled to recover, regardless of what the decision might be on the other points raised.

The judgment is reversed. Defendant to recover costs of appeal.

MARKS and GRIFFIN, JJ., concur.

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72 Cal.App.2d 279

STEWART v. CITY OF RIO VISTA.

Civ. 7214.

District Court of Appeal, Third District, California.

Dec. 21, 1945.

Hearing Denied Feb. 18, 1946.

1. Municipal corporations 🔑741(2)

Statement in verification of claim against city for personal injuries that person making verification was the attorney for claimant and had his office in named city and county constituted substantial compliance with statutory requirement that claim specify the address of claimant. St.1923, p. 675; St.1931, p. 2475.

2. Municipal corporations 🔑741(2)

The statutory requirement that claim against city for personal injuries specify claimant's "address" does not use quoted word as synonymous with "residence", the purpose of statute being accomplished if an address is given at which or through which claimant may be found in order that city officials may investigate merits of claim. St.1923, p. 675; St.1931, p. 2475.

See Words and Phrases, Permanent Edition, for all other definitions of "Address" and "Residence".

3. Municipal corporations 🔑812(8), 857

Verification is a necessary part of claim against city for personal injuries resulting from maintenance of dangerous and defective streets and grounds. St.1923, p. 675; St.1931, p. 2475.

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Action by Elizabeth Stewart against City of Rio Vista to recover damages for personal injuries sustained by plaintiff as a result of falling into an open ditch maintained by defendant city. From a judgment rendered against plaintiff pursuant to an order sustaining a demurrer to her complaint without leave to amend, plaintiff appeals.

Judgment reversed with directions.

Sinclair M. Dobbins, of Vacaville, for appellant.

Leo C. Dunnell, of Fairfield, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against her pursuant to an order sustaining a demurrer to her complaint without leave to amend the pleading. The suit was for damages for personal injuries received as a result of falling into an open ditch maintained by the city within its limits. The demurrer was sustained on the ground that the complaint fails to state a valid cause of action for the reason that it affirmatively appears from an exhibit attached to the complaint that plaintiff failed to file a claim for damages in the form and manner required by the statute relating to demands for damages for personal injuries against municipalities. Stats. 1931, p. 2475, 2 Deering's Gen.Laws, p. 1678, Act 5149. The defect in the claim which was filed in due time is that it fails to "specify the * * * address of the claimant," as required by the statute.

A complaint for damages for personal injuries sustained by plaintiff was filed March 29, 1944, against the City of Rio Vista, under the act providing for liability of municipalities for the maintenance of dangerous and defective streets and grounds. Stats. 1923, p. 675, 2 Deering's Gen.Laws, p. 2062, Act 5619. The injuries were alleged to have been received April 9, 1943, by falling into an open ditch which was dug and maintained by the city within its limits. July 8, 1943, a claim for damages was filed in behalf of the plaintiff, by her attorney. It is attached to the complaint as Exhibit A, and made a part thereof. The claim conforms to the requirements of the statute, with the exception that it fails to "specify the * * * address of the claimant," in the body thereof. The claim was signed by "Elizabeth Stewart, Ray E. Stewart, by Sinclair M. Dobbins, Their Attorney." It was verified by the attorney. His verification contains this language, "That he is an attorney at law * * * and has his office in Vacaville, Solano County, California, and is the Attorney for the Claimant * * *; that claimant is unable to make the verification because she is absent from said County."

The only question on appeal is whether the omission *in the claim* to "specify the * * * address of the claimant," is fatal to the maintenance of the action for damages against the city, in spite of the fact that the attorney stated in his verification of the claim of his client that he "has *his office* in Vacaville."

[1, 2] We are of the opinion the claim which was filed in this case is not fatally defective for the mere reason that the address of the claimant is not given in the body of the claim. The name of the claimant is mentioned therein. It was verified by her attorney, who states in the verification that he is her attorney and that his office address is Vacaville, California. Vacaville is not a large city. It is not contended that the mere address of Vacaville would not enable one to readily locate the office of the attorney. The statute does not require the *residence* of the claimant to be designated. It merely requires the "address" of the claimant to be stated therein. That requirement is for the purpose of enabling the officers of the municipality against which the claim is made to locate or communicate with the claimant. It is not synonymous with the word "residence". Ridge v. Boulder Creek, etc., School Dist., 60 Cal.App.2d 453, 457, 140 P.2d 990. Quoting with approval from the case of Uttley v. City of Santa Ana, 136 Cal.App. 23, at page 25, 28 P.2d 377, at page 379, the court said in the Ridge case [60 Cal.App. 2d 453, 457, 140 P.2d 992]: " 'The purpose of the statute would seem to be accomplished if an address is given *at which or through which the claimant may be found, in order that the city officials may make such investigation of the merits of the claim as may be desired.* * * *' " (Emphasis ours.)

[3] The verification is a necessary part of the claim required by the statute. Since the verification of the claim in this case contains the name and business address of the attorney of the claimant, where the claimant may readily be located it would appear to be a substantial compliance with the statute in that regard. Uttley v. City of Santa Ana, supra; Ridge v. Boulder Creek, etc., School Dist., supra. In the Uttley case, in which a judgment for plaintiff was affirmed, and a hearing denied by the Supreme Court, it was held that the claim which merely "set forth the name of the plaintiff and the name and office address of his attorney" [136 Cal.App. 23, 25, 28 P.2d 378] was an adequate compliance with the statute. In the Ridge case, in which a judgment for plaintiff was also affirmed and a hearing denied by the Supreme Court, it was held that the claim was in substantial compliance with the statute. It merely recited that the claimants, being the father and his minor son, were "citizens and residents of the County of Santa Cruz, State of California, and the said R. C. Ridge is the father of said Walter Ridge, a minor, *who is a student at said Boulder Creek Union High School.*" In holding that the foregoing language was a sufficient designation of the addresses of both the father and his son, the court said: "It should be noted that here we are dealing with a statutory requirement designed to give a public agency the knowledge whereby its liability can be investigated."

If the addresses of the claimants in the Uttley and Ridge cases were sufficiently accurate to comply with the statute, on principle, the statement in the present case that Sinclair M. Dobbins is the attorney for the claimant Elizabeth Stewart, and that he "has his office in Vacaville, Solano County, California," is also an adequate and substantial compliance with the statute in that regard. On authority of the two cases last cited, we conclude that the claim which was filed in this case, which is conceded to be adequate in every other respect, contains a sufficient designation of the address of the claimant to comply with the statute.

In Kelso v. Board of Education, 42 Cal. App.2d 415, 109 P.2d 29, 31, a judgment for nonsuit was reversed on appeal. One of the issues was with respect to the sufficiency of the claim for damages which was signed, verified and filed by the father in behalf of his minor son, Earl C. Kelso, who was injured while attending school as a result of the dangerous condition of the school grounds. The claim contained the following designation of address: "My son resides with me at 130 North Cedar Street, Glendale, California." That designation of address was properly held to be sufficient to comply with the statute.

It is true that in the case of Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13, 15, in which a judgment of dismissal of the action was affirmed on appeal, the Supreme Court held that: "'Compliance with the statute referred to is mandatory and there must be at least a substantial compliance with its provisions before a suit for damages for personal injuries resulting from a defective sidewalk or street may be maintained against the City.'"

The Hall case did not involve an alleged defect of the claim in failing to state therein the address of the claimant. The case was dismissed for failure to state the "place of the accident" as the statute requires. The court said:

"Defendant contends that the failure of plaintiff to specify the place of the accident in the claim is fatal to her right to maintain the present action.

* * * * * *

"* * * The courts held that a defect in the form of compliance is not fatal so long as there is substantial compliance with the essentials of the requirement. *In the present case, however, there is an entire failure on the part of the plaintiff to comply with one of the mandates of the statute. Substantial compliance cannot be predicated upon no compliance.*" (Italics added.)

The Hall case is not in conflict with what we have previously said regarding the sufficiency of the designation of the claimant's address in the present case.

In the case of Eppstein v. City of Berkeley, 52 Cal.App.2d 395, 126 P.2d 365, 366, relied upon by respondent, an order sustaining a demurrer to the complaint for failure to allege that the claim was filed as required by the statute was affirmed on appeal. But in that case the claim contained absolutely no designation of the address. The court said in that regard: "The claim contained no specification of address." That fact distinguishes the Eppstein case from the present action.

The other cases relied upon by the respondent may likewise be distinguished.

The judgment is reversed and the court is directed to overrule the demurrer and permit the defendant to answer.

ADAMS, P. J., and PEEK, J., concur.

TAYLOR v. SELIG et al.*

Civ. 12879.

District Court of Appeal, First District, Division 1, California.

Dec. 20, 1945.

Rehearing Denied Jan. 19, 1946.

Hearing Granted Feb. 14, 1946.

1. Patents 🔑202(1)

Under contract whereby inventor assigned half-interest in invention in exchange for assignee's promise to finance protection of invention by patenting and "to continue to use his best efforts and to advance funds" for further development of the invention, words "to continue" did not modify entire succeeding phrase, and hence assignee was not in default at any time he failed to continue to advance funds in any amount, but assignee merely represented that he would according to his financial ability assist in development of invention and endeavor to raise funds to best of assignee's ability from other sources.

2. Specific performance 🔑131

Where inventor agreed to assign "said invention and improvements thereof; and in and to any and all Letters Patent that may be granted on said invention and/or improvements", and assignment pursuant to agreement was "in and to any and all improvements on said invention * * * including each and every Letter Patent granted on any application which is a division, substitution for or continuation of said parent application", judgment that assignee had a half interest in patent "and in and to any and all additions, substitutions, improvements and alterations relating thereto" was not too broad.

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* Subsequent opinion 170 P.2d 913.

3. Specific performance ⚷73

Generally, a contract for personal services will not be specifically enforced. Civ. Code, § 3390(1).

4. Specific performance ⚷131

A judgment that inventor's assignee was entitled to a half interest in all "additions, substitutions, improvements or alterations" relating to assigned invention was not void on theory that judgment compelled involuntary servitude on part of inventor where judgment merely provided that if inventor worked on particular invention or subsidiary thereof, product of his efforts would belong one-half to assignee pursuant to agreement made by inventor to that effect. Civ.Code, § 3390(1).

5. Action ⚷6

Declaratory relief is not strictly legal or equitable, but is sui generis in nature. Code Civ.Proc. § 1061.

6. Action ⚷6

Where patent assignor's action for declaratory relief was in reality merely a suit to rescind agreement of assignment and all that had been done thereunder, denying declaratory relief to assignor was not an abuse of discretion. Code Civ.Proc. § 1061.

7. Action ⚷6
Appeal and error ⚷949

The court's discretion under statute providing for declaratory relief is very broad and court's action should not be reversed unless it is clearly shown to be arbitrary. Code Civ.Proc. § 1061.

Appeal from Superior Court, San Francisco County; John J. Van Nostrand, Judge.

Action by Lloyd M. Taylor against George A. Selig and others for declaratory relief. From an adverse judgment, plaintiff appeals.

Affirmed.

Vincent Surr and Morgan V. Spicer, both of San Francisco, for appellant.

Fred A. Watkins, of San Francisco, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment declaring that he take nothing from defendants; that defendant George A. Selig is the owner of a valid and subsisting one-half interest in certain patents and "in and to any and all alterations, modifications, improvements or substitutions thereof"; and that defendant, All Steel Engines, Inc., a Nevada corporation, is the owner of "a valid and subsisting exclusive license to manufacture, make, have made, use, sell, deal in and with engines and/or constructions under those certain Letters Patent * * * and in and to any and all alterations, modifications, improvements, or substitutions thereof." The plaintiff brought a suit for declaratory relief against the above-named defendants Harry G. Selig and All Steel Engine Company, Inc., a California corporation, who are the respondents here, a single brief having been filed in their behalf. Certain other defendants, stockholders in the Nevada corporation and Kinner Motors, Inc., were named in the complaint but the action was dismissed as to them. In view of the contentions by the appellant that the judgment is too broad in some respects, does not fully adjudicate the rights of the parties in other respects, and is not supported by the evidence, it is necessary to detail not only the pleadings to determine what was in issue but also the evidence in the transcript.

The complaint was entitled "Amended Complaint for Declaratory Relief" and was divided into three alleged causes of action. Under the first cause of action the plaintiff alleged that he was an inventor of an internal combustion engine and that a controversy existed between him and the defendants with respect to the rights and duties under certain contracts in relation to the invention; that defendant George A. Selig in December, 1936, represented falsely to plaintiff that he would advance between $5,000 and $6,000 to develop and patent said engine, upon which representation plaintiff relied and thereupon entered into a contract with said George A. Selig whereby he agreed to give a one-half interest "in and to said invention and improvements thereof; and in and to any and all Letters Patent that may be granted on said invention and/or improvements thereof" in exchange for the promise of George A. Selig to finance the protection of said invention by patenting and "to continue to use his best efforts and to advance funds and to provide facilities for the further development of said invention and/or improvements thereof"; that in fact George A.

Selig advanced only $1,500, of which fact and the need for more financing plaintiff did not learn until September, 1938, and that on January 24, 1941 plaintiff sent a letter to George A. Selig which constituted a notice of rescission and a rescission on plaintiff's part. This letter is attached to the complaint and marked "Exhibit C." The letter stated that plaintiff would no longer go along with All Steel Engines, Inc., a Nevada corporation, because of its failure adequately to advance his invention; that he planned to organize a new company to finance an entirely new idea; that his decision was influenced by failure to comply with California corporation laws which subjected him to punishments; that the new company would be glad to reimburse the stockholders of the old corporation; and that if the stockholders did not so elect to be reimbursed, the plaintiff asked George A. Selig to reassign his one-half interest in the patent in exchange for the money he had advanced or come in with plaintiff on a new stock deal which had adequate financing.

As a second cause of action the plaintiff incorporated all the foregoing allegations save those concerning the alleged rescission, and further alleged that defendant Harry G. Selig was represented by George A. Selig to be versed and expert in business; that Harry G. Selig advised the formation of a corporation to finance the invention, which corporation, All Steel Engine Company, Inc., was formed March 13, 1940 in California, but that the original plan of issuing 60% of the stock to plaintiff and George A. Selig in exchange for an exclusive license to manufacture said invention was disapproved by the corporation commissioner who issued a permit whereby only 50% of the stock would be issued to George A. Selig and plaintiff and said stock and the payments for the other 50% were to be held in escrow; that although stock was sold in said corporation, it was not placed in escrow; that after this first incorporation, Harry G. Selig told plaintiff it was necessary to form the Nevada corporation—All Steel Engines, Inc.; that under the plan of incorporation of the Nevada corporation, 51% of the stock was to be issued to plaintiff and George A. Selig, which stock was not to be sold without the consent of the majority of stockholders during the duration of the agreement (which was not specified) in exchange for an exclusive license to manufacture the engine; that although 5,225 shares of stock have been issued in the Nevada corporation, plaintiff has never received any shares or a certificate; that the Nevada corporation sold shares of stock in California without obtaining a permit therefor in California.

The third cause of action incorporates all the allegations of the first cause of action, save those concerning the alleged rescission and those allegations of the second cause of action relating to the representations concerning the financial desirability of incorporation, and the facts of the formation of the two corporations. In addition the plaintiff alleged the assignment by the Nevada corporation of the exclusive right to manufacture the invention to Kinner Motors, but that plaintiff had never given the right to reassign to the Nevada corporation.

Wherefore the plaintiff prayed for declaratory relief in the premises and particularly that the court declare what rights the defendant corporations, George A. Selig and plaintiff had to the invention inter se, and what rights the defendants and plaintiff had in the corporations as stockholders, directors or otherwise. Specifically he asked for damages or that his right to rescind and a rescission be adjudged and that the Kinner Motors' contract be declared invalid. Defendants Harry G. Selig, George A. Selig, the Nevada corporation and the California corporation filed separate answers denying the material allegations of the complaint.

The trial court made the following pertinent findings of fact: That both corporations are valid and existing corporations under the laws of their respective states of incorporation; that a controversy exists between defendants and plaintiff with respect to certain contracts concerning the plaintiff's invention but that it is not true "that plaintiff desires a declaration of his rights and duties with respect to defendants * * * [or] in the premises"; that plaintiff brought the action "for the purpose of rescinding an assignment to George A. Selig of an interest in the patent * * and to repudiate and have declared rescinded * * * all proceedings that plaintiff participated in as a stockholder, officer or agent" of defendant corporation; that George A. Selig had never represented that he had $5,000 to $6,000 or any other sum available for development of said invention but that he had represented "that he would, according to his financial ability, assist in the development of said invention, and endeavor to raise funds to the best of his ability from other sources" and that he "did advance substantial sums of money from his own funds" in the development of the invention and "interested other persons who advanced money" and "that it was in reliance upon these payments and the activities of the said defendant" that the agreement of March 20, 1937 was entered into giving defendant George A. Selig, one-half interest in the invention and improvements thereof; that plaintiff "knew at all times the extent of the funds said defendant * * * had available for the development of said invention, and did not at any time" prior to the filing of the complaint charge that defendant had misrepresented his financial condition; that plaintiff did not offer, on January 24, 1941 or at any other time, to restore any money received by him from George A. Selig; that plaintiff did not rescind and that the letter of January 24, 1941, was never received by defendant George A. Selig, and was not a notice of rescission or a rescission; that Harry G. Selig never made any representations to plaintiff concerning his excellence in business but that plaintiff actively participated in the formation of the California corporation but that no stock was ever issued in same; that all proceedings were abandoned under the California corporation and that plaintiff actively participated in the formation of the Nevada corporation whereby he and George A. Selig granted the exclusive right to "make, have made, use, sell * * * and otherwise deal in and with said engines covered by said invention" in exchange for 51% of the stock, which stock was not to be sold during the term of the agreement; that it is not true that either corporation sought to abdicate its exclusive right to the invention to Kinner Motors; that plaintiff had not been damaged and that "it is not true that the plaintiff in this cause of action has established any right to relief, declaratory or otherwise, as to his status as a stockholder or otherwise or as a member of the board of directors of defendant corporations or either of said corporations"; that defendant George A. Selig has a valid and subsisting one-half interest in the invention and patents "and in and to any and all additions, substitutions, improvements or alterations relating thereto" and that the Nevada corporation has the "exclusive right and license to manufacture, make, have made, use, sell, deal in and with said engine, the subject of said invention, and any and all modifications, improvements, alterations and substitutions relating thereto."

[1] The appellant contends that the evidence is insufficient to support the findings of the trial judge as to George A. Selig's representations concerning his financial status, as to plaintiff's protests in this regard including the findings that the letter of January 24, 1941 was not a notice of rescission or a rescission and did not constitute an offer to restore, and as to George A. Selig's subsisting interest in the invention and plaintiff's lack of right to rescind. Further he contends that the court erred in failing to make a finding in respect to the illegal conduct of the corporations according to the California corporation laws. Finally, he asserts that the conclusions of law were erroneous in the denial of plaintiff's right to rescind, in determining the broad scope of George A. Selig's and the Nevada corporation's interests and in their failure fully to adjudicate the issues raised by his complaint. Upon analysis the appellant's position that the trial court's findings are not supported by the evidence appears to rest upon the contention that the trial court has erroneously construed the original agreements in 1937 between George A. Selig and plaintiff, the assignment to the Nevada corporation, and the plaintiff's letter of January 24, 1941. With reference to the factual issues tendered by this position, there is evidence in the transcript to support the following recital of facts. Both George A. Selig and plaintiff at the time they first became interested in this invention were co-workers, mechanics, at an airport. Neither one had much money. They worked only intermittently prior to the war boom. George A. Selig paid the whole of the costs of patenting and exhausted his funds somewhere toward the end of 1938 or beginning of 1939, at which time the other means of financing, by corporate form, were started culminating in the abortive California corporation, and eventually, in the Nevada corporation. The plaintiff took an active part in these ventures until around December of 1940 when a disagreement arose over the signing of a particular contract by the corporation with one Tyson which was advocated by plaintiff and opposed by George A. Selig. In this connection another letter of December 11, 1940 by plaintiff to

defendant George A. Selig should be noted in which the plaintiff wrote the following: "To begin with you will recall we have a contract stating you agreed to *promote and finance* the motor for a 50% interest. I have had to sacrifice 50% of my interest to help you try to finance it as well as donating close to $500.00 myself and you still have failed miserably. On those grounds I can sue you for breach of contract and have a cut and dried case against you." On the basis of these facts, and the wording of the original agreement the trial court's finding that George A. Selig "represented merely that he would, according to his financial ability, assist in the development of said invention, and endeavor to raise funds to the best of his ability from other sources" is a reasonable construction of the promise contained in the agreement of March 20, 1937. It is also clear from the evidence that he carried out this promise to the best of his ability and is still seeking to do so. There is no merit in the plaintiff's contention that the words "to continue" in that agreement modify the whole of the succeeding phrase so that George A. Selig was in default at any time he failed "to continue * * * to advance funds" in any amount.

[2] Plaintiff's second contention—that the terms of the judgment are too broad and are not supported by the evidence—is refuted by the terms of the various documents and what was done thereunder. The transcript furnishes ample evidence to justify the scope of judgment in respect to what rights were intended to be granted by the original assignment to George A. Selig and the license to the Nevada corporation. In the original agreement of March 20, 1937, the language is "to said invention and improvements thereof; and in and to any and all Letters Patent that may be granted on said invention and/or improvements." In the assignment executed by plaintiff to George A. Selig, pursuant to that agreement, dated April 17, 1937, the language used is "in and to any and all improvements on said invention, heretofore or hereafter made by said Lloyd M. Taylor; and in and to any and all Letters Patent * * * including each and every Letter Patent granted on any application which is a division, substitution for or continuation of said parent application." Plaintiff's counsel stipulated that plaintiff "sought to get a release from George Selig of any right he may have in the improvements or substitutions of this particular patent." During the period when the California corporation was operating under a license agreement from plaintiff and defendant George A. Selig, plaintiff executed, as vice-president of the California corporation, a sub-licensing agreement with a Vancouver corporation which granted the Canadian corporation "the sole and exclusive right and irrevocable license to make, have made, use, and sell in the Dominion of Canada the constructions disclosed in the patent and patent applications set forth hereinabove together with any improvements in such type of construction as may be made by First Party (the California corporation) during the time Second Party (the Canadian corporation) is using such type of constructions; either experimentally or in production." This evidence indicates that the parties thought the agreements were as broad as the judgment and findings made them. The words "and/or improvements" with respect to a particular invention clearly embrace the terms "alterations, modifications, improvements or substitutions" when taken in connection with the reference to patents immediately preceding it. The words "alterations, modifications, improvements or substitutions" refer only to the particular patents enumerated in the judgment. In the original assignment, the words "substitution for or continuation of" the particular patent rights are used and it is clear that this is the sense in which the words in the judgment were used.

[3, 4] There is no merit in plaintiff's further argument that the judgment mortgages the inventor's brain for life and compels involuntary servitude. Only one subject matter is here involved. It is of course the law that generally a contract for personal services will not be specifically enforced. 23 Cal.Jur. 479; Civil Code, sec. 3390(1). But what the trial court has done here does not compel plaintiff to work against his will, but merely says that if he does work on a particular invention or subsidiary thereof, the product of his efforts will belong one-half to defendant George A. Selig pursuant to agreements made by plaintiff to that effect. This result is in accordance with the rule that "equity, in certain cases, accomplishes indirectly what it may not accomplish directly." 23 Cal.Jur. 480. The judgment does no more than reiterate the terms of the plaintiff's promises.

There being ample evidence to sustain the trial court in these respects, it is unnecessary to determine what effect the letter of January 24, 1941, would have in the event the trial court had found that there had been a breach of George A. Selig's obligations under the 1937 agreement. The letter's effectiveness as a notice of rescission or a rescission becomes an issue only in the event the contract has been breached.

[5-7] The only other contention of appellant which requires discussion concerns the alleged refusal of the trial court fully to adjudicate all the issues raised by the complaint. The transcript sustains the trial court's finding that this suit for declaratory relief was in reality merely a suit to rescind and get out from the agreement of March 20, 1937, and all that had been done thereunder. The delay in bringing the suit, the active participation of plaintiff in the two corporations, the testimony concerning the new business contracts of plaintiff in and around December, 1940, the lack of any evidence in the transcript concerning the precise stockholdings in the Nevada corporation, the dismissal of the suit against the alleged stockholders in the Nevada corporation, and the dismissal of the suit as to Kinner Motors, with whom no contract was ever completed by the Nevada corporation, all support this finding. Section 1061 of the Code of Civil Procedure provides that the court may refuse to grant declaratory relief in any case "where its declaration or determination is not necessary or proper at the time under all the circumstances." In Moss v. Moss, 20 Cal.2d 640, 643, 644, 128 P.2d 526, 528, 141 A.L.R. 1422, the Supreme Court stated: "Since we have held that this complaint was sufficient to authorize a declaration of plaintiff's obligations under the contract, we must now consider whether the trial court abused its discretion in denying declaratory relief under the circumstances here presented. Plaintiff urges that the trial court abused its discretion and that there is no basis upon which its determination can be sustained. It is not necessary for us to consider each of the various grounds advanced by defendant in support of the trial court's conclusion. * * * It is contended by plaintiff that such an action is not strictly an action in equity and, therefore, that the doctrine of in pari delicto should not be applied. * * * It is true that declaratory relief is not strictly legal or equitable, but is suis generis in nature (Gore v. Bingaman, 20 Cal.2d 118, 120, 124 P.2d 17; see Borchard, Declaratory Judgments (2d Ed. 1941), pp. 238, 248, 399, 439) and that in pari delicto is not ordinarily applied to the executory portions of an illegal agreement. Cases supra, and see 3 Pomeroy, Equity Jurisprudence, 5th Ed. 1941, § 940, pp. 728–733. Assuming, however, as contended by plaintiff, that the doctrine of in pari delicto should not be treated as an absolute bar to this action, it is nevertheless an element which the trial court in its discretion could consider in deciding whether or not to grant declaratory relief under the circumstances presented here. Cf. Borchard, supra, pp. 239–240, 304–305. It cannot be said, therefore, that the trial court abused its discretion, and we find no error in its conclusion that declaratory relief was not proper under the facts of this case." This reasoning is applicable here once the trial court has determined that plaintiff is acting in what amounts to bad faith in bringing an action for declaratory relief. The court's discretion under sec. 1061 has consistently been held to be very broad. The trial court's action should not be reversed unless it is clearly shown to be arbitrary and capricious. See City of Alturas v. Gloster, 16 Cal.2d 46, 104 P.2d 810; Cutting v. Bryan, 206 Cal. 254, 274 P. 326; Gunn v. Giraudo, 48 Cal.App.2d 622, 120 P.2d 177; Caldwell v. Gem Packing Co., 52 Cal.App.2d 80, 125 P.2d 901. In this connection it should be noted that no evidence was introduced as to any controversy as to plaintiff's rights as a stockholder or director of either of the corporations and that as to any illegality in the conduct of the corporations, plaintiff was a participant therein, and a finding thereon was immaterial insofar as any relief which plaintiff asked was concerned.

For the foregoing reasons the judgment is affirmed.

PETERS, P. J., and OGDEN, J. pro tem, concur.

72 Cal.App.2d 171

ROSICRUCIAN FELLOWSHIP v. ROSICRUCIAN FELLOWSHIP NONSECTARIAN CHURCH et al.

Civ. 14911.

District Court of Appeal, Second District, Division 3, California.

Dec. 12, 1945.

Rehearing Denied Jan. 8, 1946.

Hearing Denied Feb. 7, 1946.

Venue ⚷42

Where church organization located in San Diego county, brought action in Los Angeles county against another church organization with offices in San Diego county, answer and cross-complaint referred to beneficial rights of individuals in realty held by plaintiff as trustee in San Diego county, and affidavit that convenience of witnesses required trial in Los Angeles county was contradicted, ordering venue of action changed to San Diego county was not an abuse of discretion. Code Civ.Proc. §§ 392, 397(3).

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Rosicrucian Fellowship, a corporation, against the Rosicrucian Fellowship Nonsectarian Church, a corporation, and others, for equitable relief including an accounting and payment by defendants to plaintiff of all contributions and free will offerings received by defendants, wherein defendant filed a cross-complaint. From an order changing the venue of the cause to the superior court for the county of San Diego, the plaintiff appeals.

Affirmed.

Elmer J. Walther, of Los Angeles, for appellant.

Stewart, Shaw & Murphey, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

On September 26, 1944, The Rosicrucian Fellowship, a corporation, filed an action in the Superior Court of Los Angeles County, joining as defendants The Rosicrucian Fellowship Non-Sectarian Church, a corporation, five individuals named as directors and incorporators thereof, and The Rosicrucian Probationers Association.

On October 13, 1944, Judge Clarence M. Hanson, a member of the bench in Los Angeles County, acting upon a motion made by the defendants, ordered the venue of the cause changed to the Superior court in and for the county of San Diego.

Upon this appeal it is contended that the granting of that order constituted an abuse of discretion for the reasons that the motion for change of venue stated no legal grounds, and "that there was no evidence before the trial court by affidavit, or otherwise, by which the trial court could justifiably determine that the convenience of witnesses and the interests of justice would be promoted by the change."

Section 392 of the Code of Civil Procedure, entitled "Venue of actions involving real property," provides that the county in which the real property which is the subject of the legal action is situated is the proper county for a trial of an action "For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property." If, therefore, the trial judge found that the instant case presented a cause within the terms of section 392 just quoted, that in itself, of course, would furnish a sufficient ground for the transfer which he ordered, for section 397, Code of Civil Procedure, provides that the court on motion may change the place of trial "when the court designated in the complaint is not the proper court."

The order of October 13 does not state the grounds upon which the decision of the court rested, but it may be said that even though the case did not concern any interest in real property the court would still be authorized to order the change of venue if he found that the convenience of witnesses and the ends of justice would be promoted by the change. Code Civ. Proc. § 397(3).

The pleadings and affidavits which were before the court are lengthy and detailed, but a consideration of their substance seems necessary in determining whether the court exercised a sound discretion in ordering the cause transferred.

According to the complaint, the plaintiff, The Rosicrucian Fellowship, was incorporated in January, 1913, by Max Heindel and his associates, and was empowered under its articles "To establish and maintain a nonsectarian church or religious organization, with power to appoint, ordain and consecrate its ministers, to advocate, teach and disseminate the principles and teachings of the Christian Religion as interpreted by the Rosicrucian Philosophy sponsored by the Rosicrucian Fellowship established at Oceanside, California, by Max Heindel in 1912, and as set forth by and through his books and writings and those of Mrs. Max Heindel, and writings additional and supplemental thereto * * *."

It is also alleged that Max Heindel founded the Rosicrucian Philosophy about the year 1908, and shortly thereafter organized The Rosicrucian Fellowship, an unincorporated association "for the purpose of advocating, teaching and disseminating the principles of the Rosicrucian Philosophy as set forth and recorded in books and other literature prepared and published by said Max Heindel. * * * That when said The Rosicrucian Fellowship was incorporated all of the property of said unincorporated association and all of the work of advocating, sponsoring, teaching and disseminating the principles of the Rosicrucian Philosophy, and the complete charge and responsibility thereof was transferred and turned over to said The Rosicrucian Fellowship, plaintiff herein, and has been carried on by said The Rosicrucian Fellowship, exclusively, ever since. * * * That the property and assets of plaintiff consist of land, a sanitarium, a printing plant, lodge building for the housing of guests, and miscellaneous buildings, furniture and fixtures, machinery and equipment, cash and securities, copyrights and other personal property, situated at Oceanside, California, of the value of in excess of $350,000.00."

Paragraph VI of the complaint reads as follows: "That by reason of the establishment of said business and enterprise by said Max Heindel and plaintiff as aforesaid, and by reason of the manner in which said Max Heindel and plaintiff have conducted, carried on and advertised the same, the name 'The Rosicrucian Fellowship' adopted and acquired by plaintiff as aforesaid has been so exclusively identified with plaintiff's said business and enterprise that it has acquired a secondary meaning, that is to say, that said name is solely indicative of plaintiff's business and enterprise, and its business and enterprise alone, and not of the business or enterprise of any other person, association or corporation, and that said name has come to mean the business and enterprise of plaintiff alone."

The paragraph immediately following alleges that the defendants, "on or about July 6, 1944, filed or caused to be filed in the office of the Secretary of State of California, articles of incorporation under the name 'The Rosicrucian Fellowship Non-Sectarian Church' which said articles set forth the names of Mrs. Max Heindel, Mrs. Irene Murray, Mr. George Schwenk, Mr. Arnold Mulli and Mr. Karl Mueller, defendants herein, as incorporators and directors of said The Rosicrucian Fellowship Non-Sectarian Church; that the principal place of business of said corporation is situated at the same place as that of said The Rosicrucian Fellowship, to-wit, Oceanside, San Diego County, California.

"That the powers and purposes of said The Rosicrucian Fellowship Non-Sectarian Church, among others as set forth in its articles of incorporation are substantially the same as the powers and purposes of said The Rosicrucian Fellowship, plaintiff herein, to-wit:

" 'To organize, establish and conduct an international association of Christian Mystics and spiritual, ecclesiastical, non-sectarian church to carry on, disseminate and perpetuate the teachings of the principles of Rosicrucian Philosophy and spiritual concepts as given to its members and offered to the world by Max Heindel in his book entitled "The Rosicrucian Cosmo-Conception or Mystic Christianity," and other supplemental writings of said Max Heindel and his wife Augusta Foss Heindel * * *.' "

Paragraph VIII states: "That notwithstanding the long and quiet use and enjoyment by plaintiff and its affiliates of the name and designation 'The Rosicrucian Fellowship', defendants, well knowing that plaintiff and its affiliates were entitled to the sole and exclusive use and benefit of said name, did wilfully, wrongfully, unlawfully and with utter disregard of the rights of plaintiff and its affiliates, and against their wishes and without their permission, assume and appropriate to their own use and benefit on or about July 6, 1944, the name 'The Rosicrucian Fellowship Non-Sectarian Church', with intent to mislead, deceive, confuse and defraud said 'The Rosicrucian Fellowship' and its students, probationers and disciples and the public, and to discredit plaintiff, and have used and now use said name, to-wit, 'The Rosicrucian Fellowship Non-Sectarian Church' to the great and irreparable damage and detriment of plaintiff and its affiliates."

In paragraph IX appears the following: "That defendants have wrongfully, wilfully, unlawfully and with utter disregard of the rights of plaintiff and its affiliates represented and are continuing to represent to the students, probationers and disciples of plaintiff and the public that said new corporation is necessary in order to protect the property now held by plaintiff, and to protect the Rosicrucian Philosophy and teachings, all to the great and irreparable damage and detriment of plaintiff and its affiliates."

Paragraph XI alleges that a demand in writing was made by the plaintiff on the defendants to discontinue the use of their corporate name, "The Rosicrucian Fellowship Non-Sectarian Church," but the discontinuance has been refused.

The second cause of action alleges:

"That the principal purpose of defendants in incorporating said The Rosicrucian Fellowship Non-Sectarian Church is to disseminate the teachings and principles of the Rosicrucian Philosophy as taught, sponsored and disseminated by said Max Heindel and said The Rosicrucian Fellowship, as set forth and contained in a book written and published by said Max Heindel entitled 'The Rosicrucian Cosmo-Conception or Mystic Christianity' and other writings of said Max Heindel and Mrs. Max Heindel, in substantially the same manner as said The Rosicrucian Fellowship has done and carried on and is doing and carrying on, for a period of in excess of thirty years, without the consent and against the will and wishes of plaintiff.

"That said book and other writings of said Max Heindel and Mrs. Max Heindel are copyrighted, and the exclusive right to the use thereof is vested in plaintiff; that the use thereof by defendants is and will be in violation of the rights of plaintiff, all to the great and irreparable injury, damage and detriment of said The Rosicrutian Fellowship and its affiliates."

A third cause of action alleges that the "defendants have wilfully, wrongfully and unlawfully interfered with, hampered and harassed said The Rosicrucian Fellowship, its officers and trustees in teaching, sponsoring and disseminating the Rosicrucian Philosophy."

Further allegations are to the effect that defendants have interfered with the meetings of study clubs organized by the plaintiff, that they unlawfully took from the plaintiff's office confidential records and files and have appropriated for their own use a mailing list of the students, probationers and disciples of the plaintiff; that the defendants have by circular letters misrepresented the work carried on by the plaintiff and its officers and trustees; by insinuation and innuendo have represented that the trustees of the plaintiff are derelict in their duties and that the philosophy and teachings of The Rosicrucian Fellowship are in jeopardy; "that said defendants have wilfully and wrongfully represented to said students, probationers and disciples and other persons by circular letters, word of mouth and otherwise that said new corporation is a necessary instrumentality for carrying on the work and activities of said The Rosicrucian Fellowship, and by reason of said wrongful representations have induced a number of said students, probationers and disciples and other persons to send their free will offerings and financial support to defendants instead of to said The Rosicrucian Fellowship."

On the general allegations above summarized the plaintiff asked for equitable relief, including an accounting and payment by defendants to plaintiff corporation of all contributions and freewill offerings received by the defendants. The court, by Judge Emmet H. Wilson, issued an order on the day that the action was filed, restraining the defendants temporarily from carrying on business under the name, The Rosicrucian Fellowship Non-Sectarian Church, from soliciting freewill offerings or financial or other support, from using any of the copyrighted books and literature used by the plaintiff in disseminating the principles and teachings of The Rosicrucian Philosophy, from interfering in any way with the business and operations of the plaintiff, its officers, trustees, employees and agents and from interfering with the conduct or meetings, services, or lectures given by the plaintiff or under its directorship or sponsorship, or of its study groups or centers.

On October 6, 1944, the defendant corporation and the individual defendants filed, concurrently with their demand for change of venue and the notice thereof, a general and special demurrer and their joint answer to the complaint. As a special ground of demurrer they asserted that another action was pending between the parties for the same cause in the superior court of San Diego County, entitled George Schwenk, Plaintiff, v. The Rosicrucian Fellowship, a Corporation, in which the right of said corporation to expel or excommunicate probationers and to deny probationers the right to attend meetings and to participate in the ecclesiastical functions of The Rosicrucian Fellowship are in issue.

The answer admitted various allegations made in the complaint, denied others, and alleged particularly "that at all times until Max Heindel's death on January 19, 1919, Mr. and Mrs. Max Heindel, as members of the unincorporated church association, conducted all ecclesiastical and esoteric functions of The Rosicrucian Philosophy under the name, The Rosicrucian Fellowship. That at all times after the death of Max Heindel and until July 6, 1944 (the date upon which The Rosicrucian Fellowship Non-Sectarian Church was incorporated), Mrs. Max Heindel and other probationers and disciples of said unincorporated church association conducted all ecclesiastical and esoteric functions of The Rosicrucian Philosophy under the name 'The Rosicrucian Fellowship' as distinguished from the temporal purposes, powers and functions conducted by plaintiff corporation."

The answer set forth that on or about May 1, 1911, Mr. and Mrs. Heindel purchased the real property described in the plaintiff's complaint at Oceanside, California, and caused it to be improved with buildings, temples, dormitories, furniture, fixtures and other personal property and improvements, from funds contributed by Mrs. Heindel and the members of the unincorporated church association known as "The Rosicrucian Fellowship" and held the same in trust for the use, benefit and enjoyment of all the members of the unincorporated church association as beneficiaries. The answer admits and alleges that the plaintiff corporation was organized on January 10, 1913, by Mr. and Mrs. Heindel, and that on or about the year 1918 they conveyed all of the real property and improvements thereon to the plaintiff corporation in trust, as previously held by them, namely, for the use, benefit and enjoyment of the unincorporated church association, as beneficiaries, in the conduct of the ecclesiastical and esoteric functions of The Rosicrucian Philosophy.

The answer denied that any of the real or personal property of the unincorporated church association, or any of the ecclesiastical or esoteric work of teaching and disseminating The Rosicrucian Philosophy was transferred or conveyed to the plaintiff or was owned by the plaintiff corporation; also denied that the ecclesiastical and esoteric work of teaching has been carried on by the plaintiff corporation at any time prior to January 19, 1943. On this latter date a decision was rendered by Honorable Charles C. Haines, Judge of the Superior Court of the County of San Diego, in a case entitled Weaver v. Meynke. A copy of the judgment in that case is attached to the answer. By its decision the court held that "the persons who constitute the believers in and the followers of The Rosicrucian Philosophy constitute a Church known as The Rosicrucian Fellowship, as distinguished from The Rosicrucian Fellowship, a corporation, without any ecclesiastical organization or system of Church government." The court further held that the unincorporated Church, as such, owns no real or personal property, that all of the real and personal property conveyed to or controlled by the corporation, The Rosicrucian Fellowship, is owned by that organization and "that said corporation holds all of said real and personal property as trustee for the members of said Church." The court also decreed that there is no spiritual head of the unincorporated Church and that Mrs. Heindel is not the spiritual head thereof, but that she is a trustee of the corporation.

In that action and by the decision of the court, the relief sought by the plaintiffs "against the present corporate setup and for amendment to the Articles of Incorporation and By-Laws is denied" but the removal of Mrs. Heindel as president of the corporation by the trustees thereof in February, 1942, was held to be legal; further, that the use of certain funds for the purpose of meeting expenses in operating a sanitarium was not in accordance with the terms upon which a bequest was made to the corporation by a resident of New York. The court also declared that the members of the unincorporated church are beneficiaries for whom the corporation is trustee, and by its decree retained jurisdiction to make such orders as may be fit and proper with respect to the management of the sanitarium and restoration of funds, calling for a quarterly report to the court meantime by the board of trustees.

The answer alleges that the plaintiff corporation continued to exist and operate as a college or seminary of learning until January 19, 1940, when it amended its articles of incorporation to include purposes and powers of conducting a business of a church, but that during that time the plaintiff corporation confined its activities to the conduct of temporal and secular functions and the management of said properties as trustee, for the use, benefit and enjoyment of the members of the unincorporated church association. It is further alleged that after January 19, 1943, the date of Judge Haines' decree, the plaintiff corporation, without the knowledge, consent or approval of the beneficiaries, by amendment to its articles and by-laws and the adoption of rules and regulations "attempted to usurp the ecclesiastical and esoteric functions of The Rosicrucian Philosophy, and to use the real property for the said purpose, and expelled and excluded members of the said church association from the use and enjoyment of the said real property."

The answer, as summarized in respondents' brief, "admits the incorporation on July 6, 1944, of defendant corporation by the individual defendants, as members, and more than 400 other members of the unincorporated church association, for a twofold purpose: (1) of organizing the unincorporated church association into a permanent church corporation under Title XII, Part 4, Division First of the Civil Code of the State of California to conduct the ecclesiastical and esoteric functions of the Rosicrucian Philosophy at Oceanside, San Diego County, California, and (2) to protect the rights of its members, as beneficial owners of the right to use and enjoy said real property in the conduct of the said ecclesiastical and esoteric functions. That Mrs. Max Heindel was the sponsor thereof."

A cross-complaint was filed concurrently with the answer alleging that on or about August 8, 1909, Max Heindel and a group of people formed an unincorporated church institution under the name of "The Rosicrucian Fellowship." That on August 10, 1910, Max Heindel and the cross-complainant, Mrs. Max Heindel, then Augusta Foss, were married. That at all times thereafter, until the death of Max Heindel on January 6, 1919, he and Mrs. Heindel conducted, and at all times from January 6, 1919 to July 6, 1944 (the date upon which The Rosicrucian Fellowship Non-Sectarian Church was incorporated), Mrs. Heindel conducted a church composed of students, probationers and disciples of The Rosicrucian Philosophy in the state of California under the name of The Rosicrucian Fellowship. That the unincorporated church was at all times until October 3, 1943, without ecclesiastical organization or system of church government.

It is also alleged in the cross-complaint that Max Heindel's will, bequeathing all of his estate to his widow, was admitted to probate in the county of San Diego and that thereafter, on August 23, 1920, Mrs. Heindel executed a deed to the cross-defendant, The Rosicrucian Fellowship, a corporation, in and to the real property now held by that corporation, "as Trustee, to be held in trust for the use, benefit and enjoyment of the said students, probationers and disciples, as members of the said church established by Max Heindel in 1909, and at all times known as The Rosicrucian Fellowship."

A further allegation asserts: "That on October 3, 1942, the individual cross-complainants, and more than twenty other students, probationers and disciples filed written Articles of Association of The Rosicrucian Probationers Association. That from October 3, 1942, until July 7, 1943, more than four hundred students, probationers and disciples of the said church joined and became members of The Rosicrucian Probationers Association. That in and by the Articles of Association of the Rosicrucian Probationers Association, the following purposes were stated: (1) To organize the said church institution; (2) To establish the church government; (3) To adopt rules, regulations and orders regarding the ecclesiastical functions of the said church; (4) To designate Mrs. Max Heindel as the spiritual leader of the said church with complete jurisdiction over all esoteric correspondence and ecclesiastical instruction." That the Rosicrucian Probationers Association continued to operate and exist until July 6, 1944, when all of its members, together with the cross-complainants, organized The Rosicrucian Fellowship Non-Sectarian Church as a corporation.

It is further alleged that at all times from and after January 19, 1943 (the date of Judge Haines' decision), the cross-defendants have taken active steps and performed acts to discourage students, probationers and disciples as believers and followers of The Rosicrucian Philosophy from organizing a church institution. That the cross-defendants caused letters to be written to students, probationers and disciples containing false representations as to the purpose of the cross-complainants in organizing The Rosicrucian Probationers Association and in organizing The Rosicrucian Fellowship Non-Sectarian Church. That the cross-defendants caused an amendment to be made in the by-laws of The Rosicrucian Fellowship, a corporation, to provide for the adoption by the trustees of rules and regulations for the admission and expulsion of students, probationers and disciples. That a copy of the rules and regulations was mailed by the cross-defendants to each of the students, probationers and disciples of the church institution known as The Rosicrucian Fellowship. That a letter also was mailed to them representing that it was necessary and a condition precedent to their remaining students, probationers and disciples that they agree to be bound by the rules and regulations. That thereafter the cross-defendants removed and suspended the cross-complainant, George Schwenk, who had been a probationer for more than eight years previously.

"That the cross-defendants, and each of them, have refused and excluded students, probationers and disciples who have sought to or taken any steps to organize the said church as aforesaid, from the use and enjoyment of the real property, buildings, improvements, fixtures and personal property located at Oceanside, County of San Diego, State of California. That each and all of said students, probationers and disciples owned and are entitled to the right of use and enjoyment of said real property, buildings, improvements furnishings and fixtures therein and thereat."

The cross-complaint then goes on to state that each of the cross-complainants "claim and assert that they, as students, probationers and disciples and as members of the Rosicrucian Fellowship, a church institution unorganized prior to July 6, 1944, and the Rosicrucian Fellowship Non-Sectarian Church, a church corporation, composed of students, probationers and disciples as believers in the Rosicrucian philosophy as founded by Max Heindel in the year 1909, are entitled to the use and enjoyment of the said real property, buildings, improvements, fixtures, furnishings, printing plant, and all other personal property of every nature and description in and upon said real property as beneficiaries without molestation or interference from the cross-defendants, or any of them.

"That the cross-defendants, by the adoption of said Rules and Regulations, or otherwise, have no power or authority to suspend or expel any of said students, probationers or disciples, or to exclude any of said students, probationers or disciples from such right of use and enjoyment of said assets, or any of them.

"The cross-defendants, and each of them, claim and assert that they have by the amendment of said By-Laws, and by the adoption of the said Rules and Regulations, the right to suspend or expel students, probationers and disciples, who shall become a member of the Rosicrucian Fellowship Non-Sectarian Church, with or without cause, or whenever in the opinion of the trustees suspension or removal of any student, probationer or disciple would be for the best interests and welfare of the Rosicrucian Fellowship, a corporation, and to exclude any student, probationer or disciple from the right of use and enjoyment of the said assets held by the said corporation in trust."

Other matters set up in the cross-complaint relate to the right to use copyrighted insignia and literature, and there is attached to the cross-complaint a copy of an agreement dated October 23, 1931, and an amended agreement alleged to have been executed in November, 1935, between Mrs. Heindel and The Rosicrucian Fellowship, a corporation, providing that she shall receive compensation for the use of copyrights for the duration of her lifetime and an annuity of $1500 payable at the monthly rate of $125. The agreements also provide that Mrs. Heindel shall have living quarters upon the grounds and at the headquarters of plaintiff for life and in addition sustenance at its cafeteria for life.

It was alleged in the cross-complaint that the cross-defendants had padlocked the doors of the cottage at Mt. Ecclesia where Mrs. Heindel had been living.

By the prayer of the cross-complaint the court was asked to "fix, allow and declare the rights and interests of cross-complainants in and to said real property, buildings, improvements, fixtures, furniture and other personal property therein and thereat, and in and to the right to the use and enjoyment of the said real and personal property" and the prayer sought other equitable relief.

At the time of the hearing upon the motion for change of venue various affidavits were before the court, one by Mrs. Heindel, entitled an affidavit of merits, stating in great detail matters to which we have adverted in our remarks upon the pleadings, calling attention particularly to Judge Haines' decision to the effect that the plaintiff corporation holds all of the assets of The Rosicrucian Philosophy, real, personal or otherwise, as trustee for the benefit of the individual defendants and students, probationers and disciples of The Rosicrucian Philosophy; further, that "the Court determined that the plaintiff corporation had not exercised and had no power to exercise any control over the Ecclesiastical functions of the Rosicrucian Fellowship, and that the Ecclesiastical functions of the Rosicrucian Fellowship was vested entirely in the students, probationers and disciples, who were unorganized."

Mrs. Heindel pointed out in this affidavit that if the cause were tried in Los Angeles County it would be necessary to procure certified copies of exhibits, judgment roll and the opinion of Judge Haines. She points out further, that all the transactions of the plaintiff corporation and of the defendants appear from the pleadings to have taken place in the county of San Diego, and that all the property involved, real and personal, is located in that county.

This affidavit closes with the statement that the interests of justice require that the trial be transferred to San Diego county.

An affidavit of Juanita Emerick, vice-president of The Rosicrucian Fellowship, a corporation, filed in opposition to the motion for the change of venue, asserted that the convenience of witnesses required that the trial be held in Los Angeles county; that many witnesses reside in the county of Los Angeles and it would be inconvenient and a hardship for them to travel to and remain in San Diego during the progress of the trial; "That the County of Los Angeles is the proper county for instituting said action and for the trial thereof; and that the convenience of witnesses and the interests of justice require that the trial of said action be held in Los Angeles County, California."

An affidavit by Adam Knieling presents similar matters.

A joint affidavit in opposition to the issuance of the temporary injunction which was requested by the plaintiff corporation was signed by Mrs. Heindel and George Schwenk, one of the defendants in this action. It was served on October 11th upon counsel for appellant and filed that same day, two days prior to the hearing and argument before Judge Hanson. It relates to many matters covered by the pleadings and states that Mrs. Heindel at the date of filing was 79 years of age, that she had spent all of her time and personal fortune of more than $25,000 in building up The Rosicrucian Fellowship, not only in its temporal, but in its esoteric and ecclesiastical functions, as well. That during the lifetime of her husband, Max Heindel, she worked constantly with him and since his death in 1919 has written numerous books, pamphlets, monthly esoteric letters to students, has lectured and delivered sermons on the Rosicrucian philosophy and religion; that she is recognized by hundreds of the students, probationers and disciples, as the spiritual leader of the ecclesiastical functions of the church in succession to her deceased husband; that she caused the defendant corporation, The Rosicrucian Fellowship Non-Sectarian Church, to be organized on July 6, 1944; that she is becoming more infirm from old age, as well as from injuries suffered from an automobile accident in 1942; that she will be unable to conduct the organization of the church government for more than a few months and if the temporary injunction prayed for is granted the effect would be to suspend the business of the church.

While the demand for the change of venue merely asked that the place of trial be transferred to the county of San Diego, the notice of the motion served and filed concurrently with the demand alleged as grounds for the desired action that all the acts complained of in the first and third causes of action were performed by the defendants, if at all, in the county of San Diego; that all contracts or licenses mentioned in the second cause of action were made in or to be performed in that county; that any obligation or liability of the defendants arose in the county of San Diego. Further, that the plaintiff corporation and the defendant corporation each has its principal place of business in the county of San Diego, and all contracts, books, minutes, records and files of both corporations are regularly kept in that county; that approximately 40 exhibits had been offered in evidence in San Diego county in the action entitled Weaver v. Meynke, The Rosicrucian Fellowship, a

Corporation, et al.; that the judgment roll and the opinion of Judge Haines, consisting of 83 pages, are all on file in the office of the county clerk of San Diego county; that all the records, papers, documents and files will be necessary in the trial of the instant action and that the convenience of witnesses requires that the trial be held in the county of San Diego.

The notice also recites that a dispute has arisen between the plaintiff corporation and the moving defendants as to the rights of the defendants as beneficiaries having ecclesiastical and esoteric powers to use and enjoy the real property, buildings, improvements, and facilities, located in the county of San Diego and held by the plaintiff corporation; that they intend to file a cross-complaint in the pending action; "that said issue can only be brought and tried in San Diego County where the said real property and assets are located."

The appellant contends that this is a transitory action, and therefore that section 392, Code of Civil Procedure, relating to actions in which the rights or interest in real property are to be determined, has no application; further, that "in the absence of any language in the motion that the ends of justice will be promoted by the change it is apparent that the motion is fatally defective."

The respondent takes the position that the court did not abuse its discretion in granting the motion without a statement therein of specific grounds, relying upon the fact that the pleadings and affidavits presenting contending issues were before the court and upon the rule that "all presumptions upon appeal are in favor of the order of the court as made changing the place of trial," (Gordon v. Perkins, 203 Cal. 183, 186, 263 P. 231, 232); stating further upon the same authority that: "Where there is substantial evidence to support the action of the trial court, an order based upon conflicting affidavits, either in granting or refusing a change of venue, will not be disturbed [on appeal]."

In answer to the contention by the appellant that section 392, Code of Civil Procedure, does not apply, the respondent points out that "the affidavits of Mrs. Max Heindel show, without any contradiction by plaintiff corporation, that an actual controversy exists between plaintiff corporation and defendant corporation. That plaintiff corporation claims the exclusive ownership and right of possession of real and personal property in the conduct of ecclesiastical functions as against the claims and rights of its beneficiaries of the said trust property to possess, use and enjoy the same in carrying on the ecclesiastical functions of that religious organization." Support for this view arises from the frequent reference in the pleadings to the real estate in Oceanside where the interests of the Rosicrucian organizations center.

It will be remembered that the complaint itself states that the principal place of business of the defendant corporation is situated at the same place as that of the plaintiff corporation, The Rosicrucian Fellowship, to wit: Oceanside, San Diego County, California, and it appears from the record that George Schwenk is resisting an order of removal and suspension, delivered by plaintiff corporation, as an invasion of his right to use beneficially the real property held by the plaintiff. If he is successful in prosecuting that case he may not be expelled from the premises while exercising his beneficial right to the use thereof. Nor may any other student, probationer or disciple similarly situated be expelled, and there seems to be no question that there would be involved in each such case the determination of a right or interest in real property. An order of suspension or expulsion from church property by church authorities, like an order of excommunication, is an ecclesiastical function, and in this case it relates directly to real estate.

The answer and the cross-complaint, both of which were before Judge Hanson at the time he made his decision, refer occasionally to the beneficial rights or interests of the individual respondents in the real property held by the plaintiff corporation, as trustee.

We feel, therefore, that in a broad consideration of the subject, the court may well have concluded that the transfer of this action to San Diego county was justified under the terms of section 392, Code of Civil Procedure. In addition, it may be said that the affidavits before the court raised a question concerning the convenience of witnesses and promotion of the interests of justice, and the decision to grant the motion may have been based upon the court's consideration of those grounds, in which case we are of the opinion that no error could be validly charged against the order transferring the cause to San Diego.

The Emerick affidavit, filed in opposition to the motion, stated "that the convenience of witnesses and the interests of justice require that the trial of said action be held in Los Angeles County."

Other affidavits presented a different view, namely, that the convenience of witnesses would be promoted by transferring the cause to San Diego county.

It was incumbent upon the trial judge to determine, after hearing the argument by both sides, which allegation as to convenience of witnesses was correct. It is quite apparent that he concluded that the convenience of witnesses, as well as the interests of justice would be promoted by his affirmative action on the motion. We cannot say, all the circumstances of the case being considered, that his disposition of the matter constituted an abuse of the discretion vested in him.

The order is affirmed.

SHINN and WOOD, JJ., concur.

72 Cal.App.2d 227

PEOPLE v. VAN WIE.

Cr. 2366.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1945.

1. Bigamy ⚷5

In a bigamy case, the prosecution must allege and prove that a valid marriage existed at time of the allegedly bigamous marriage, but the state is not required to select a prior marriage and to rely upon it to its peril. Pen.Code, § 281.

2. Bigamy ⚷5

In bigamy prosecution, a prior valid marriage may be properly charged in general terms and upon proof of any prior valid marriage, the basis has been laid for the bigamy charge. Pen.Code, § 281.

3. Bigamy ⚷7

Where a former marriage is proved, in prosecution for bigamy, there is a rebuttable presumption of its validity, and it is not necessary for the state to show that there were no impediments to it. Pen. Code, § 281.

4. Bigamy ⚷7

In bigamy prosecution where a former marriage of defendant is proved by the state, the burden is on defendant to establish the invalidity of the prior marriage. Pen.Code, § 281.

5. Bigamy ⚷13

In bigamy prosecution, where state proved a former marriage of defendant, the weight to be given conflicting presumptions and inferences is for the jury. Pen. Code, § 281.

6. Bigamy ⚷2

In bigamy prosecution, if defendant establishes invalidity of prior marriage by proving a valid earlier marriage, but does not establish that earlier marriage was dissolved prior to date of allegedly bigamous marriage, defendant is still guilty of bigamy. Pen.Code, § 281.

7. Bigamy ⚷11

Evidence was sufficient to sustain conviction for bigamy. Pen.Code, § 281.

8. Bigamy ⚷11

In bigamy prosecution, evidence of defendant was insufficient to establish invalidity of prior marriage. Pen.Code, § 281.

9. Bigamy ⚷13

In bigamy prosecution, it was for jury to find on conflicting presumptions and inferences whether valid marriage was still in existence when defendant entered into allegedly bigamous marriages and its finding on such issue was conclusive. Pen. Code, § 281.

10. Bigamy ⚷11

In bigamy prosecution, proof of any prior valid marriage is sufficient, whether the evidence is introduced by the prosecution or the defense. Pen.Code, § 281.

11. Bigamy ⚷14

Instruction that declarations or admissions of defendant together with proof of cohabitation and repute were not sufficient to establish charge of bigamy without some further proof of actual marriage was properly refused as incorrect. Pen.Code, § 281.

12. Criminal law ⚷814(3)

Where marriages involved in bigamy prosecution were proved by testimony of the women involved, by marriage certificates, by affidavits of defendant on application for marriage licenses, and by testimony of minister who performed a marriage, proposed instruction that declarations or admissions of defendant together with proof of cohabitation and repute were not sufficient to establish charge of bigamy was properly refused because not adapted to the evidence. Pen.Code, § 281.

13. Bigamy ⚷14

Where no specific valid marriage was set forth in information charging bigamy, requested instruction that if certain marriage referred to in information was void because of previous valid existing marriage, defendant could not be convicted was properly refused as not stating applicable law.

14. Bigamy ⚷14
Criminal law ⚷1172(1)

In bigamy prosecution, instruction that if the People proved beyond reasonable doubt that defendant went through a marriage ceremony with certain individual that was regular in form, it was no defense that defendant was at that time already married to another, stated a correct principle of law as far as it went, and failure to give a more complete instruction was not prejudicial in view of evidence. Pen.Code, § 281.

15. Criminal law ⚷823(4)

In bigamy prosecution, instruction that if jury believed beyond reasonable doubt and to moral certainty that defendant married the four women referred to in evidence under circumstances set forth, then it would be duty of jury to convict on all three counts of information, was not misleading or prejudicial where court had instructed that weight and credibility of evidence were entirely within province of jury. Pen.Code, § 281.

16. Criminal law ⚷656(5, 9), 1166½(12)

Where court at conclusion of insanity trial, in bigamy prosecution, stated that medical witnesses were experts of highest qualification and were appointed by court, paid by state, and were absolutely under no compulsion to give any particular opinion, but that there was ample evidence in record to show that defendant was perfectly sane, such comment could not be approved, but error, if any, was not prejudicial, in view of evidence and further instruction that jury were sole judges of facts and weight of evidence. Pen.Code, § 281.

17. Criminal law ⚷304(1)

The court could take judicial notice that medical witnesses appointed by court at insanity hearing of defendant charged with bigamy were paid by the state.

18. Criminal law ⚷740

The jury were the sole judges of facts and weight of evidence given at insanity hearing of defendant charged with bigamy. Pen.Code, § 281.

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Francis Van Wie was convicted of bigamy, and he appeals.

Affirmed.

James A. Toner, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Miriam E. Wolff, Deputy Attys. Gen., and Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

After pleas of not guilty and not guilty by reason of insanity defendant was convicted by a jury of three charges of bigamy. This appeal is from the judgment of conviction and from the denial of the motion for a new trial.

Appellant contends that the evidence is insufficient to sustain the judgment because, so it is urged, the state failed to prove that a valid marriage existed at the time of the alleged bigamous marriages.

The information contains three counts charging separate violations of § 281 of the Penal Code. That section provides that: "Every person having a husband or wife living, who marries any other person * * * is guilty of bigamy." The first count alleges that on or about September 24, 1943, the appellant wilfully, knowingly and feloniously married Myrtle Martha Wheeler then "having a lawful wife living." The second count charges, in similar language, a bigamous marriage with Mary J. Bergman entered into on April 8, 1944, while the third count charges that on or about December 12, 1944, appellant entered into a bigamous marriage with Evelyn Brown.

The prosecution proved that in February of 1941, in Verdi, Nevada, appellant entered into a marriage ceremony and thereafter lived with one Sadie Levin. It is contended, however, that the evidence shows that when appellant married Sadie he was already married to another. It is urged, therefore, that the marriage to Sadie was void, and that the state has failed to prove that when appellant entered into the three challenged marriages a valid marriage existed.

[1-5] These contentions are neither supported by the record nor by the rules of law applicable to such cases. It is true, of course, that in a bigamy case it is indispensable that the prosecution allege, and prove, that a valid marriage existed at the time of the alleged bigamous marriage. But the law is equally well settled that the state is not required to select a prior marriage and to rely upon it to its peril. The prior valid marriage may be properly charged in general terms, as was done here, and upon proof of any prior valid marriage the basis has been laid for the bigamy charge. People v. Priestley, 17 Cal.App. 171 118 P. 965; People v. LaMarr, 20 Cal.2d 705, 128 P.2d 345. Where a former marriage is proved, there is a rebuttable presumption of its validity, and it is not necessary for the state to show that there were no impediments to it. See cases collected and commented upon 10 C.J.S. Bigamy, § 16, p. 372. Inasmuch as the facts are peculiarly within the knowledge of the defendant, the burden is on him to establish the invalidity of a prior marriage proved by the state. People v. Huntley, 93 Cal.App. 504, 269 P. 750. The weight to be given to the conflicting presumptions and inferences is for the jury. People v. Burke, 43 Cal.App.2d 316, 110 P.2d 685.

[6] Under these rules, while it is necessary for the prosecution to establish that defendant had a lawful wife living at the time of the alleged bigamous marriages, the burden is on the accused to establish the invalidity of the prior marriage. If he establishes the invalidity of the prior marriage by proving a valid earlier marriage and does not establish that this earlier marriage was dissolved prior to the dates of the alleged bigamous marriages, he is still guilty of bigamy. People v. LaMarr, 20 Cal.2d 705, 128 P.2d 345.

[7] Tested by these standards the record here involved is clearly sufficient. The prosecution produced Sadie Levin, Myrtle Wheeler, Mary Bergman and Evelyn Brown as witnesses. Through them, and through the official records, the prosecution proved that the appellant entered into a ceremonial marriage with Sadie in February, 1941; with Myrtle in September, 1943; with Mary in April, 1944, and with Evelyn in December, 1944. The marriage to Sadie was not dissolved at the time the other three marriages were entered into. Each marriage was followed by cohabitation. It is quite clear that this evidence established a prima facie case that the last three marriages were bigamous. Appellant does not challenge this conclusion but urges that the prima facie case involving the marriage to Sadie was overcome as a matter of law. Sadie testified that when she married appellant in February, 1941, she knew that appellant had been married before to a woman named Mabel; that he had promised Sadie to divorce Mabel; that prior to her marriage he disappeared for over six weeks, telling her he was going to Reno to get a divorce; that she received from him a newspaper clipping indicating that he had secured a divorce from Mabel; that she subsequently learned that he had spent most of the six weeks in Sacramento; that he assured her that nevertheless he had secured a divorce from Mabel; that after her marriage to appellant she learned, through the Red Cross, that there was no record of such a divorce; that when she accused appellant of misleading her he admitted that he had not divorced Mabel but assured her that Mabel had died prior to their marriage. She further testified that: "Yes, I had known she [Mabel] was alive." Whether this referred to a time before or after her marriage is not clear from the context. The most reasonable interpretation is that Sadie meant she had known Mabel was alive prior to her marriage to appellant.

[8] This evidence does not establish, as a matter of law, that the marriage to Sadie was invalid. The burden was on appellant to overcome the prima facie case established by the prosecution. To do so it was incumbent upon appellant to prove that the marriage to Mabel was valid. This he did not do. People v. Spitzer, 57 Cal.App. 593, 208 P. 181; People v. Bisbee, 134 Cal.

App. 181, 25 P.2d 232. Sadie's statements in regard to her knowledge of the existence of a prior marriage to Mabel certainly did not prove that marriage, as a matter of law, nor did they prove that appellant's marriage to Sadie was void. There is a lack of proof that Mabel was alive when Sadie married appellant.

[9, 10] There is another fallacy in appellant's reasoning. If it be assumed, contrary to the fact, that the evidence established, as a matter of law, the validity of the marriage to Mabel, and the invalidity of the marriage to Sadie, then it was for the jury to find on conflicting presumptions and inferences whether the Mabel marriage was still in existence when he married Myrtle, Mary and Evelyn. Its finding on this issue is conclusive. People v. Burke, 43 Cal.App.2d 316, 110 P.2d 685. Under the rule of the LaMarr case, supra, the prosecution cannot be compelled to elect which prior marriage is relied upon as proof of a prior valid marriage. Proof of any prior valid marriage is sufficient whether the evidence is produced by the prosecution or the defense.

[11] It is next urged that the trial court committed prejudicial error in refusing two requested instructions. The first (proposed instruction No. 24) reads as follows: "You are instructed that even the declarations or admissions of a defendant, together with proof of cohabitation and repute, are not sufficient evidence to establish or sustain the charge of bigamy without some further proof of an actual marriage." This instruction was refused on the ground that it was not a correct statement of the law.

There is language in People v. Le Doux, 155 Cal. 535, 102 P. 517, and in People v. Spitzer, 57 Cal.App. 593, 208 P. 181, that supports this instruction. The holding in both cases was clearly dicta. The Le Doux case has been criticized. See 4 Cal.Jur. p. 345, § 10, fn. 6. On principle the instruction would seem to be incorrect. The great weight of authority in other jurisdictions is that a marriage, in a bigamy case, may be proved by circumstantial evidence. See cases collected 10 C.J.S., Bigamy, § 21, p. 377. Section 1106 of the Penal Code provides that: "Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases * * *." In other cases, of course, marriage may be proved by cohabitation and repute. See cases collected 4 Cal.Jur. p. 345, § 10, fn. 6. There is direct authority that in a bigamy case evidence of cohabitation and repute coupled with admissions of marriage, is sufficient to sustain a finding of marriage. People v. Beevers, 99 Cal. 286, 33 P. 844; see, also, People v. Stokes, 71 Cal. 263, 12 P. 71; People v. Du Fault, 1 Cal.App.2d 105, 36 P.2d 196. For these reasons the language in the Le Doux and Spitzer cases, supra, must be interpreted to mean, at most, that the evidence of the type stated in the proposed instruction does not prove a marriage as a matter of law. It would thus appear that the proposed instruction contained an incorrect statement of the law and was properly refused on that ground.

[12] Moreover, even if the proposed instruction contained a correct statement of the law, it was not a proper instruction under the facts of this case. The four marriages involved were not proved by admissions of the defendant coupled with evidence of cohabitation and repute. The marriages were proved by the testimony of the four women involved, by the marriage certificates, by the affidavits of the appellant on the applications for the marriage licenses in three of the marriages, by the testimony of the minister who performed the marriage to Mary Bergman, and by the testimony of the witnesses to the marriage to Evelyn Brown. Obviously, the proposed instruction, even if correct, was not adapted to the evidence here involved.

[13] Proposed instruction No. 25 was also refused. It provides: "You are instructed that if the first marriage alleged in an information charging bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder." The language of this instruction was taken from People v. Spitzer, 57 Cal.App. 593, 208 P. 181. This language was criticized as dictum and expressly overruled in People v. LaMarr, 20 Cal.2d 705, 711, 128 P.2d 345.

Moreover, even if the instruction stated a correct principle, which it does not, it would be inapplicable here. In the Spitzer and LaMarr cases, supra, the indictments set forth specifically the valid marriage relied upon. In the LaMarr case it was held that, where defendant proved a valid marriage existed at the time the marriage charged by the prosecution as the prior valid marriage were entered into, nevertheless proof of any lawful marriage existing at the time of the alleged bigamous marriage is sufficient. In the instant case there was no specific valid marriage set forth in the information, and, as already pointed out, such allegation was unnecessary. Obviously, even if the rule stated in the Spitzer case were good law and the defendant could properly urge a variance, it is entirely inapplicable where no specific prior marriage is relied upon. It should be mentioned that the jury was properly instructed that "the existence of a valid first marriage is an essential element in the crime of bigamy."

[14] Appellant objects to the following instruction given by the court: "You are instructed that if the People have proved beyond a reasonable doubt and to a moral certainty that Francis Van Wie went through a marriage ceremony with Sadie Levin that was regular in form on February 21st, 1941, at Verdi, Nevada, it is no defense on the part of Mr. Van Wie to contend or prove that he was at that time already married to another."

Although this instruction may not be as complete as might be desired, it states a correct principle of law as far as it goes, and, under the evidence here involved, was correct. The only way in which a marriage earlier to the Levin marriage could serve as a defense would be by proof that such earlier marriage was valid when entered into, was valid and existing at the time of the Levin marriage, but had been dissolved prior to the date of the three bigamous marriages. If it be assumed that a valid marriage to Mabel was proved, and the failure in this regard has already been commented upon, the only evidence of its termination was Sadie's hearsay testimony that appellant had told her first that he was divorced from Mabel and that later he told her Mabel had died, and the hearsay testimony of the other wives that appellant had told them before their respective marriages that he was a widower. That testimony was not necessarily inconsistent with the validity of the Sadie Levin marriage because that testimony was to the effect that the death or divorce took place prior to the Levin marriage. Other than this hearsay testimony the defendant did not offer any evidence to prove that Mabel was dead at the time of the alleged bigamous marriages but not dead at the time of the Levin marriage, nor, in fact, did he ever prove the validity of the marriage to Mabel. Under such circumstances he was not prejudiced by a failure to give a more complete instruction as to the effect of proof of a marriage to Mabel and its termination prior to the dates of the three alleged bigamous marriages.

[15] Appellant objects to the court's comments on the evidence both on the trial of the guilt issue and on the trial of the insanity issue. The court, at the conclusion of the first half of bifurcated trial required under our law, fairly summarized the evidence by stating that the people had introduced evidence that appellant went through four marriage ceremonies, that appellant had introduced no evidence in contradiction, and then added: "If you believe beyond a reasonable doubt and to a moral certainty that the defendant married the four ladies referred to in the evidence under the circumstances set forth in the evidence, then it will be your duty to convict on all three counts in the information." It is not contended that the summary of the evidence was biased or that it was not a fair statement of the evidence, but it is contended that the quoted sentence amounted to a judicial directive to convict, and that the court should have made it clear that this "directive" was advisory only. At the beginning of the instructions the court had informed the jury that in giving instructions it was not expressing any opinion upon the weight of the evidence, credibility of any witnesses or "that any alleged fact in the case is or is not proved," and that the weight and credibility of the evidence were entirely within the province of the jury. Although the form of the comment here is not to be commended it could not possibly have misled the jury or prejudiced the appellant.

[16] Error is also claimed in certain comments on the evidence made at the conclusion of the insanity trial. The court then stated:

"Now, pursuant to the State Constitution, the Court desires to make the following comments on the evidence to the jury:

"There is evidence before you in the form of testimony of the defendant given from the witness stand here to the effect that the defendant did know the difference between right and wrong. The defendant testified that he married Edna Eastman only because he thought he was free to marry her. The defendant testified that he was told that he was divorced from Clara Heise.

"Then there is testimony in the case given by the three ladies on the witness stand to the effect that the defendant had told them not to recognize him at certain times and places because of the fact that he was a member of the FBI and on official business. These three ladies likewise testified that the defendant had told them that he had been married to a Mabel, but that she was dead.

"The Court desires further to comment on the information that the defendant gave when he filled out the various applications for marriage licenses. These applications and the information thereon indicated that the defendant's previous wife was either dead or divorced.

"The Court further desires to comment on the qualifications of the medical witnesses in this case. They are experts of the highest qualifications, and they were appointed by the Court, they are paid by the State, and they are absolutely under no compulsion to give any particular opinion on this sort of an issue.

"There is ample evidence in this record to show that the defendant at the time of the commission of these three bigamies was perfectly sane.

"However, the Court further instructs the jury they are the sole judges of the facts and the weight of the evidence."

The court had previously instructed that the jury could disregard expert testimony if it should be found to be unreasonable.

Appellant urges that the description of the experts and the statement that there was "ample evidence" to find the appellant "perfectly sane" went beyond the limits of fair comment and denied him a fair trial.

The form of this comment cannot be approved, but, under the circumstances here involved, such comment, even if erroneous, could not possibly have been prejudicial.

[17, 18] The only experts who testified, two in number, were appointed by the court and called by the prosecution. The only evidence produced by appellant was his own testimony. The two experts testified appellant had a psychopathic personality but that he was both medically and legally sane. They were most positive on this point, and indeed, the testimony of defendant himself demonstrated that he was legally sane. The qualifications of the experts were established without contradiction, it appears from the record that they were appointed by the court, and the court could take judicial notice that they were paid by the state. The summation of the evidence was fair and impartial. It is undoubtedly true that the court should not have stated that there was ample evidence on the issue, since the questions of credibility and sufficiency are for the jury. But immediately thereafter the court told the jury that they were the sole judges of the facts and weight of the evidence. The judge could have properly stated that in his opinion there was ample evidence, and that would not have been error. People v. Gosden, 6 Cal.2d 14, 56 P.2d 211; see, also, People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; IX Wigmore on Evidence, 3d Ed., §§ 2551 and 2551a. The evidence on the sanity issue was so clear and convincing that it is difficult to see how the jury could have reached any other verdict than that appellant was sane. The error did not result in a miscarriage of justice and was not prejudicial.

The judgment and order appealed from are affirmed.

WARD, J., OGDEN, J. pro tem., concur.

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72 Cal.App.2d 318

PEOPLE v. LEWIS.

Cr. 2388.

District Court of Appeal, First District,
Division 2, California.
Dec. 27, 1945.

1. Criminal law 🔑997

Ordinarily, where the remedy by appeal is adequate, relief by coram nobis is not available.

2. Criminal law 🔑997

A delay of more than twenty years in filing application for relief through writ of error coram nobis was ground for its denial, where the only excuse for the delay was that during that time the applicant was a fugitive from justice.

3. Criminal law ⚷997

Unjustifiable and unreasonable delay in applying for relief through a writ of error coram nobis is ground for its denial.

◆

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

George Lewis was convicted of murder, and following affirmance of his conviction, the defendant filed a motion to amend the record, to set out the steps taken on the appeal, and a motion to set aside the judgment. From an order denying his motions, the defendant appeals.

Affirmed.

George Lewis, in pro per.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and B. W. Hirschberg, Asst. Dist. Atty., both of San Francisco, for respondent.

DOOLING, Justice.

The defendant is serving a life sentence in the state prison at Folsom, following his conviction of murder in 1919. An appeal was taken from the judgment which resulted in an affirmance on November 8, 1920 on motion of the attorney general, the order reciting "there being no brief on file and no appearance on behalf of appellant."

On June 26, 1945, the defendant filed in the superior court a motion to amend the record to set out the steps taken and the order of this court on the appeal, and a motion to vacate, annul and set aside the judgment. The motion to set aside was made on the grounds that the defendant was convicted on the uncorroborated testimony of two accomplices, and that defendant's attorney failed and neglected to file a brief or otherwise properly present his appeal, concealed these facts from defendant and assured him that: "Everything is coming along nicely", whereby defendant was prevented from securing other counsel and deprived of the right to a hearing of his appeal on the merits.

The defendant's motions were ordered denied on July 2, 1945 and from that order he takes this appeal.

It is conceded that the motion to vacate, annul and set aside the judgment is the equivalent of a petition for writ of error coram nobis. People v. Superior Court, 28 Cal.App.2d 442, 82 P.2d 718.

[1] Ordinarily, where the remedy by appeal is adequate relief by coram nobis is not available. People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Lewis, 64 Cal.App.2d 564, 149 P.2d 27. We need not decide whether, in a case where the right to present an appeal on the merits is lost through the negligence of counsel who fraudulently represents that he is proceeding with diligence, the defendant upon learning the true facts might by timely application obtain relief through this writ.

Defendant's affidavit recites the following: "That he, George Lewis, upon learning of the duplicity of said paid counsel after many months, and having discovered that there was in fact, a certain limitation in point of time in which such case would, in the normal course of events, have been decided by the said District Court of Appeal, thereafter escaped from the care and custody of the said Sheriff of the City and County of San Francisco, State of California, and was not delivered into the care and custody of the Warden of the State Prison at Folsom to begin serving the aforesaid life sentence, until July 13, 1941."

[2, 3] Assuming, without deciding, that defendant might be held to have proceeded with due diligence to ascertain his rights and present his motions to the court, if the date of his actual imprisonment in 1941 should be taken as a starting point, his delay of over 20 years in taking any legal steps between 1920 and 1941 must be taken into consideration. His only excuse for this long delay appears to be that during that time he was a fugitive.

The case falls within the rule that unjustifiable and unreasonable delay in applying for relief through the writ of error coram nobis is ground for its denial. People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354; People v. Harincar, 49 Cal.App.2d 594, 121 P.2d 751.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

72 Cal.App.2d 75

PEOPLE v. HOLMAN.

Cr. 2329.

District Court of Appeal, First District,
Division 2, California.
Dec. 7, 1945.

Hearing Denied Jan. 3, 1946.

1. Criminal law 🔑1159(4)

The rule that a witness false in one part of his testimony is to be distrusted in other is one solely for guidance of trial court and has no pertinency in an appellate court. Code Civ.Proc. § 2061, subd. 3.

2. Criminal law 🔑553

Where prosecution witness changed her testimony, jury was authorized, but not bound, to reject all her testimony, since such testimony was still evidence for jury to receive and weigh. Code Civ.Proc. § 2061, subd. 3.

3. Criminal law 🔑741(1), 742(1)

Jury is sole judge of credibility of witnesses and of weight of evidence.

4. Criminal law 🔑1159(3)

Contradictions and inconsistencies in testimony of the witness alone will not constitute "inherent improbability" warranting rejection of testimony by court notwithstanding its acceptance by jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherent Improbability".

5. Criminal law 🔑1159(3)

General rule governing reviewing courts in dealing with appeals involving a conflict of testimony applies with same force to cases where conflict arises from testimony of one witness as to cases where conflict arises from testimony of witnesses on opposing sides. Code Civ.Proc. § 2061, subd. 3.

6. Criminal law 🔑553

In prosecution for murder in the perpetration of arson, jury was authorized to accept defendant's testimony on direct examination that he was in witness' kitchen when fire broke out, or his testimony on cross-examination that he was in bed with witness at that time, or to reject both versions and believe witness' testimony that defendant had left her apartment before fire broke out, which latter testimony was corroborated by other witnesses. Code Civ.Proc. § 2061, subd. 3; Pen.Code, § 189.

7. Criminal law 🔑1159(2)

Unless evidence on which a conviction rests appears to be so radically improbable as to amount to no evidence reviewing court is not permitted to examine it merely to determine the preponderance of its probabilities.

8. Criminal law 🔑739(2)

In prosecution for murder in perpetration of arson, whether testimony of passerby concerning defendant's departure from hotel with reference to time of outbreak of fire should be accepted as corroborative of testimony tying defendant with the conflagration or as corroborative of defendant's alibi that he was in bed with one of the residents of hotel at time fire broke out and ran out to escape fire was for jury. Pen.Code, § 189.

9. Homicide 🔑174(7)

In prosecution for murder in the perpetration of arson, evidence that defendant ran from burning building and drove his automobile away from scene of danger was not in itself incriminatory, since such action was consistent with preserving himself from injury and his property from damage, but the matter could be considered by jury in connection with all the other evidence.

10. Criminal law 🔑673(1)

In prosecution for murder in perpetration of arson, testimony of fire marshal, based entirely upon his personal knowledge and upon his own investigation of the ruins after fire, as his duties required, and on physical facts as he found them concerning course which fire had taken, its intensity at certain points, that fire had burned downward as well as upward indicating use of a volatile fluid, was competent, particularly in view of instruction to jury that marshal's opinions were not conclusive and could be regarded as merely advisory. Pen.Code § 189.

11. Arson 🔑37(1)

The mere proof of the burning of a building alone does not establish corpus delicti of arson.

12. Criminal law 🔑409

In prosecution for murder in the perpetration of arson, circumstantial evidence as to manner in which fire burned, presence of liquid on hotel floor, testimony that defendant was seen leaving scene of fire carrying a can and proof of 22 deaths resulting from fire sufficiently established corpus delicti of arson and murder to authorize proof of defendant's extrajudicial admission that he had burned hotel. Pen.Code, § 189.

13. Criminal law 🔑409

In prosecution for murder in perpetration of arson, the corpus delicti need not be proved beyond a reasonable doubt before defendant's extrajudicial statements or admissions are received. Pen.Code, § 189.

14. Witnesses 🔑388(7), 392(1)

The approved method of impeaching a witness on the basis of alleged prior contradictory statements requires that witness sought to be impeached be first asked if she had not made a specified contrary statement on another specified occasion and, if she answers in the negative, then to read into the record such other statements. Code Civ.Proc. § 2052.

15. Witnesses 🔑388(2)

Where defendant sought to impeach prosecution witness by showing prior contrary statements but failed to first interrogate witness as to whether she had made such prior statements on a specified occasion, impeaching testimony was properly excluded. Code Civ.Proc. § 2052.

16. Criminal law 🔑419(10)

Prior contradictory statements of prosecution witness, as independent evidence, were inadmissible as hearsay. Code Civ. Proc. § 2052.

17. Witnesses 🔑388(2)

The methods prescribed in the code for impeachment of a witness are exclusive. Code Civ.Proc. § 2052.

18. Criminal law 🔑1159(2)

In prosecution for murder in the perpetration of arson, argument that testimony of prosecution witness that he saw defendant coming down burning hotel stairway just ahead of the flames and carrying a can could not have been true because defendant could not have done so without being caught in the fire went to weight of testimony, which was for jury, and did not establish "inherent improbability" so as to authorize reviewing court to reject such testimony. Pen.Code, § 189.

19. Criminal law 🔑1159(6)

The rule that circumstances relied upon to establish guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion is one of instruction for jury and is not a rule for guidance of appellate court.

20. Homicide 🔑235

Evidence authorized conviction on 22 counts of murder in the perpetration of arson in the burning of a hotel. Pen.Code, § 189.

21. Criminal law 🔑829(1)

Defendant could not complain of the refusal of tendered instruction where the matter embraced therein was covered by the instructions given.

22. Criminal law 🔑829(3)

In prosecution for murder in the perpetration of arson, where jury could not fail to understand that instructions on corpus delicti as given, when read in connection with all the instructions, meant that jury must be convinced that defendant was person who set fire to, or burned, or caused to be burned, the hotel in question, court was not required to tell jury in so many words that mere proof of the burning of a building does not establish the corpus delicti of arson. Pen.Code, §§ 189, 447a.

23. Criminal law 🔑1216(2)

The code section fixing penalty for first-degree murder at death or confinement in the state prison for life, at the discretion of the jury, creates a penalty "expressly prescribed to be life imprisonment" within meaning of section declaring that, if punishment for any of crimes of which defendant is convicted is expressly prescribed to be life imprisonment, terms of imprisonment on other convictions shall be merged and run concurrently with such life terms. Pen.Code, § 190; § 669, as amended by St.1943, p. 1122.

See Words and Phrases, Permanent Edition, for all other definitions of "Expressly Prescribed to be Life Imprisonment".

24. Criminal law 🔑995(6)

Where defendant was sentenced to life imprisonment on each of 22 counts of murder in the perpetration of arson "said 22 counts to run consecutively," the quoted phrase was surplusage in light of code section providing that, if punishment for any crime is expressly prescribed to be life imprisonment, terms of imprisonment on other convictions shall be merged and run concurrently with life term. Pen.Code, §§ 189, 190; § 669, as amended by St.1943, p. 1122.

25. Criminal law ⚿1188

The error of directing that life sentences on 22 counts of murder in the perpetration of arson be served consecutively, rather than concurrently as required by the Penal Code, did not require a reversal and could be corrected by resentencing defendant. Pen.Code, §§ 189, 190; § 669, as amended by St.1943, p. 1122.

26. Criminal law ⚿872, 892

Where clerk's transcript showed that written verdicts of conviction returned by jury were read to jury and jury declared such to be their verdicts, and thereafter clerk recorded verdicts in minutes of court and reread them to jury, which again confirmed verdicts, statutory requirements as to recording, reading and confirmation of verdicts were fully complied with.

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

George Holman was convicted of murder of the first degree in perpetration of arson with recommendation for imprisonment for life and he appeals.

Affirmed as modified and remanded with directions.

J. Maxwell Peyser, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., Thomas Lynch, Chief Asst. Dist. Atty., and Alvin Weinberger, Deputy Dist. Atty., all of San Francisco, for respondent.

GOODELL, Justice.

The appellant was convicted of murder of the first degree with the recommendation by the jury of imprisonment for life. He was sentenced accordingly, and appeals from the judgment of conviction and from the order denying his motion for a new trial.

The indictment contained 22 counts, each based upon the death of a human being. The prosecution was conducted on the theory that 22 murders were committed in the perpetration of arson, sec. 189, Penal Code, and that a volatile liquid such as gasoline, benzine or kerosene had been used to accelerate the fire. Twenty-one persons were burned to death in the building in question, 13 of them beyond recognition, and one other, named Mamie Pulaski, either jumped or fell from a third story window to escape the flames and died at once from a fractured skull.

The site of the fire was the New Amsterdam Hotel at the southeast corner of Fourth and Clementina streets in San Francisco with a frontage of 50 feet on Fourth street and a depth of 110 feet running along Clementina, a narrow street or alley. The exterior of the building from foundation to second floor was of brick, while the two upper floors were entirely of frame construction. The building contained about 78 rooms most of which were 8 by 11 feet in size, the wooden partitions being covered with cheesecloth and wall paper. Two long halls 4 feet wide, one on the northerly and one on the southerly side, on the second and third floors, ran easterly and westerly, lengthwise of the building and two halls of the same width ran at right angles thereto, one near the front, the other near the rear of the building. There was a large light well in the middle of the structure. In addition to the front stairway, which led up from the Fourth street entrance, there was a stairway in the rear, and it is around this rear stairway that the principal facts of this case revolve, for it was probably near the point where this rear stairway comes into the second floor, that the fire started.

The principal incriminatory evidence in the case has to do with the actions of the appellant just prior to and at the time of the outbreak of the fire, and for that reason a somewhat detailed description of the ground floor, rear, of the building is necessary. About the middle of the Clementina street side of the hotel there was a doorway practically flush with the sidewalk, leading into an uncarpeted hall 43 feet long and 4 feet wide running parallel with Clementina street, off of which hall there were three rooms, 8 by 11 feet, numbered 1, 2 and 3. These rooms were practically at street level, each with a window looking onto Clementina street. This hall joined at a right angle another hall 4 feet wide running northerly and southerly across the rear of the ground floor. Opening into the latter hall was the rear stairway, which leads from the ground floor up to the second (and thence to the third) floor. It had two breaks, so that a person would ascend several steps headed westerly, turn left for several steps, then turn again to the left for several steps, headed easterly, and step onto the second floor. The stair well in which these stairs were built was 5 feet 6 inches wide by 8 feet 10 inches long.

Room 1 on the ground floor and nearest to and just east of the doorway, was occupied by one Johnnie Anderson, a colored man, who had lived there for some months. Room 2, next door to the east, was the bedroom of one Gertrude Jordan, a colored woman, and room 3, at the east end of the hall and fartherest from the doorway, was her kitchen.

On Monday, March 27, 1944, shortly before midnight, fire broke out in the hotel and spread with terrific rapidity. There were 70 or more persons in the hotel at the time. The house was full, one room having as many as 4 occupants. By the time the fire department arrived in response to the first alarm, which was sounded at 11:55 p. m., flames were coming out of the windows of the third floor on Fourth street and out of the upper windows on the Clementina side, toward the rear of the building. The testimony shows that the fire was at its worst on the easterly or rear end of the building on the Clementina street side, although it had spread in other directions through the second and third floors with such speed as to trap many of the unfortunate people who were burned alive.

On the evening in question one Hosey Moore, a colored man, was a visitor of Gertrude Jordan, having arrived at her apartment about the time she returned from work around 6 p. m. They had been friends in Mississippi, 15 years before. He was there all evening and had gone to bed with her. Somewhere around 11:30 p. m. the appellant, a colored man, nicknamed "Bubber", drove into Clementina street headed east, turned his car around, and parked it facing west with lights dimmed, partly on the sidewalk and partly on the street with its back to that of Gertrude Jordan's car already parked facing in the opposite direction. Both cars were close to and abreast of the windows of Gertrude Jordan's apartment, appellant's beside her bedroom. The appellant rapped on her bedroom window; she asked if he wanted to come in and he said yes. On being admitted to her kitchen (room 3) he asked if she had company and she replied "No more than my half brother", whereupon the appellant testified that he said, "Well, if your half brother is here come on, we will go out in the car and talk". She replied, "No, it is too late". While they were talking in the kitchen she testified that she saw two faces of colored persons (whom she did not recognize) peering through her kitchen window, and became alarmed. She called to Moore and asked if he had any money. This was simply to awaken him because of her fright at seeing the faces outside. Moore got out of bed and came into the kitchen. She introduced Moore to the appellant as her half brother and according to her testimony she introduced the appellant to Moore as her "ex boy-friend". The men shook hands and, as far as the record shows, chatted in a friendly enough way. The appellant at Moore's invitation had a drink of whiskey with him. Gertrude Jordan testified that the appellant asked her how she and her new boy-friend were getting along. This apparently had reference to one Cecil Frazier who lived in room 50 upstairs with another man and a married couple. Room 50 was in the same relative location on the third floor as Anderson's room, number 1, was on the ground floor. She testified that she told the appellant she and her new boy-friend were moving out within a few days and were going to live together. Frazier was burned to death in the fire.

The appellant and Gertrude Jordan had lived together in this same apartment, rooms 2 and 3, for about two months at a time in 1943 while appellant's wife was absent from San Francisco. On the return of appellant's wife this cohabitation ceased but after his wife's return the appellant visited Gertrude Jordan periodically in her apartment on a number of occasions. The relations between the two had become known to the appellant's wife and the police authorities had intervened with a view to putting a stop to them. A day or two before the fire Gertrude Jordan sent word to the appellant through a woman friend that instead of sending her gifts (he used to bring and send her money, groceries and other things) he should call to see her. The appellant testified that his call on the night in question was in response to this invitation. "She sent for me, and I wanted to see what she wanted". The foregoing facts are essentially without contradiction.

Anderson, who had lived for some months in room 1, next to Gertrude Jordan's bedroom, testified that about 11:30 p. m. as he was on Fourth and Clementina streets he "heard a noise like people fighting, a man and woman fighting" and his attention was drawn to the two parked cars. He proceeded along Clementina to the window of Gertrude Jordan's kitchen, which window was open about 4 inches from the top, "peeped through" and saw "Holman * * * and this girl Jordan, and he was arguing; they was talking loud"; he stood back to avoid discovery from the inside and heard appellant say to her "I will get you for this" and he sounded angry. He made a mental note of the number of the license plate on the automobile outside the window headed west and on reaching Fourth street wrote it on a magazine. He went up the front stairway of the hotel to the second floor, looked in at the office for his mail, walked to the rear, down the rear stairs, and entered his own room. He sat on the bed reading the paper and could hear a conversation between Gertrude Jordan and Moore in her apartment, and although he listened intently, he could not make out what was said. Within a few minutes he heard a loud noise upstairs which sounded like fighting, a sort of a roaring noise with loud voices and screaming and, on stepping into the hall, saw the house was on fire. He testified that as he went along the hall the appellant was coming from the direction of the rear stairway and of the fire, carrying a can which Anderson described as a large can (of possibly four or five gallons content). The appellant, he said, was coatless and was running, and bumped into him, knocking against his left shoulder, the impact throwing him against the wall. He testified that the flames were coming down the rear stairway behind the appellant "like avalanche". Anderson testified that he blew a whistle which he carried with him, and a Chinese tenant of a room on the ground floor came out and he told the Chinaman to sound the alarm and get everybody out that he could. Anderson then testified that he ran to the Southern police station to give the alarm and then returned to the alley and rendered aid.

There is no conflict as to the presence of the appellant in Gertrude Jordan's kitchen shortly before the outbreak of the fire. His own testimony shows it. As to his movements from that point on the record is conflicting, and his acts and conduct thenceforth are of course of crucial importance.

The appellant testified on direct examination that he and Moore and Gertrude Jordan were talking in her kitchen when the fire started (that he had been there about 25 or 30 minutes) and that he ran into the hall, got into his car and drove "right straight". On cross-examination when asked how he happened to leave the kitchen he first said he heard the noise above "just like somebody fighting", and that Gertrude Jordan stepped outside the door for just a second, and on returning said there was a fire. He changed this testimony so fast that we quote it:

"Q. Had you been in the kitchen all the time? A. Yes.

"Q. From the time you went in there until the fire broke out you were in the kitchen? A. Yes.

"Q. With Gertrude Jordan and Hosey Moore? A. Yes.

"Q. Had you been in the bedroom? A. Well, yes, I was in the bedroom. I didn't tell it because I didn't want that, because I didn't want my wife to know that I had been in the bedroom with her. I said that's where I was when the fire started, but I didn't want to.

"Q. Where were you when the fire broke out? A. In the bed with Gertrude.

"Q. Then when you stated here on direct examination that you were in the kitchen when the fire broke out, you were not telling the truth, were you? A. Well, you see, I didn't want to tell that on account of the ladies in here. I didn't want to explain just where I was."

He testified that Moore waited in the kitchen while appellant and Gertrude Jordan occupied her bedroom. She denied this, saying, "That is too imprudent and low".

Gertrude Jordan, called by the prosecution on direct examination, testified that when the fire started the appellant was in her kitchen talking to her and Moore. This took the prosecution by surprise and on cross-examination she was confronted with her testimony before the grand jury and with statements she had given to the district attorney's staff and other investigators to the effect that appellant had left her apartment before the fire started. She explained this discrepancy by saying that she and the appellant had agreed on the latter version because of the trouble that already existed between the appellant's wife and herself, and the truth which she then asserted—that he was in her apartment when the fire started—would cause further trouble.

Toward the end of the trial she was recalled to the stand. The judge indicated that information had come to him that she desired to explain her former testimony. On this examination she testified that the appellant had *not* occupied her bedroom that night, but had visited her kitchen and had left at least 10 or 15 minutes before she discovered the fire and that after he left she and Moore had returned to bed and were in bed when the noise above was heard.

Moore testified that at the time when he heard noises upstairs indicating something was wrong he and Gertrude Jordan had returned to bed and the appellant had been gone for about 5 or 6 minutes. During that interval he said she told him she was nervous.

The witness Melvin Warren Grau, an enlisted man in the navy, testified that at about 11:45 p. m. he was walking south on Fourth street, toward the bay bridge (on his way to Vallejo) and immediately on reaching Clementina street saw a woman coming out of a third-story window of the hotel, and land "partly on the sidewalk and partly on the street". He went over and looked at her "and she looked dead". He saw no evidence of fire when she came out of the window. He marked on an exhibit where an automobile was "parked partly on the sidewalk and on the street", indicating abreast of Gertrude Jordan's window. He testified that a colored man "kind of heavy set" (the appellant is heavy set) came running out of the side door, got into an automobile, and "It drove off and drove over the woman that was laying in the gutter", "run right over her knees" and was driven toward Fourth street. The witness "saw the signs of the fire when I got him coming out of the building; I got him and the fire at the same time". The fire was "Towards the back of the building. * * * It was * * * a terrific fire". On cross-examination Grau testified that the woman struck the sidewalk "Possibly between this first window [Anderson's room] and the doorway." The witness did not see flames coming out of the doorway as the man came out, but "from the back of the building, shooting upwards". The fire was on the second and third floors. The witness said 10 or 15 minutes elapsed after the man ran out until the engines came. About an hour later he spotted the car that ran over the woman, parked on the other side of Clementina and across Fourth street.

The witness Ira Eisenhauer, an occupant of rooms 22 and 23, on the second floor (immediately above Gertrude Jordan's two rooms), testified that about 11:40 flames came through the transom; he "couldn't make it" through the door, so he and his wife got out the window. When he raised the window he saw "A party screaming, and someone jumped out the window" on the top floor. He saw Mamie Pulaski falling through the air. "She hit on the sidewalk there. And I seen a car run over her" legs. She fell forward of his room. He saw two automobiles in the alley at that time. He first saw the person (who got into the automobile) on the sidewalk running. He saw him drive out of the alley. The body lay in front of the automobile. The automobile "went over it". The witness could not say whether the man was white or colored or where he came from. This witness also estimated that it was "about 10 or 15 minutes, probably" before the fire department got there. The witness did not see anything in the hands of the man who was running. "I didn't pay no attention to what he had. I just noticed him running."

Fire Marshal Frank P. Kelly, whose duty it is to investigate and determine the cause of all fires occurring in San Francisco, has been connected with the fire department for 35 years, for 18 of those years he has been fire marshal, and has investigated thousands of fires. He happened to have been close to the scene and arrived within a minute or so after the first alarm was sounded at 11:55 p. m. He testified to what he observed when he arrived, which was before the fire apparatus got there, and to other matters connected with the fire and rescue work, but we are concerned chiefly with his testimony as to the origin of the fire. However, he testified that upon his arrival fire was coming out of the windows on the third floor, Fourth street side, and out of the window off the fire escape on the second floor (Clementina side) which is just above room 2. "There was not very much evidence of fire on the ground floor at that particular time" he said.

He inspected the premises six to eight times after the fire and expressed the opinion that the fire originated in the rear stairway on the easterly end of the building and "right in the vicinity of the second story landing" "between the second floor and the ground floor". He based this opinion on the "manner in which the floor had been burned, together with all of the flooring, and a great number of the wooden joists that supported the floor at that particular point, together with the wooden stairway completely burned away from the first floor to the third floor and through the roof; and then, as it travelled from that particular point down the northerly hallway in a westerly direction, and down the southerly hallway in a westerly direction—and the burning, as it travelled, not showing as much burning as what it would at the point of origin". He testified that most signs of burning were "in * * * the rear stairwell, from the first floor up to the second, together with the floor and the wooden joist that supports the floor, all in the vicinity of the stairwell." He testified as to his observations of the fire first coming out of the upper story, and on the second floor, and later on the first floor, of the building. He would not say that that was the usual course for a fire to follow. From the manner in which it burned he would not attribute the fire solely to the materials within the building, but "to the rapidity with which it traveled—that something had been used to accelerate the fire" some volatile liquid such as gasoline, benzine or kerosene. He testified that the usual course of a fire in a wooden building was to burn upward. When asked what would cause a fire to burn downward, he answered, "There could be a liquid used flowing down the stairs, ignite it, and cause the fire to travel downward".

Forty-four witnesses testified in this trial, which lasted several weeks. Many of them gave descriptions of the fire and their own particular experiences, in no way relating to the origin of the fire. It is needless to summarize all this testimony, but is sufficient to say that the fire had gained such headway in the first few minutes that the firemen on arrival could get no further into the front of the building than the first landing, midway between the street and the second floor. The building was not burned down but the two upper floors were thoroughly gutted. We have summarized only such evidence as bears, or might bear, on the actions of the appellant, with particular relation to the time when he left the apartment.

The appellant denied having had a can on the premises or having run down the stairs or having bumped into Anderson in the hall. The appellant at the time operated a restaurant on Sixth street, and some days after the fire a 5 gallon gasoline can was found by the police at his restaurant. The witness Franklin testified that on Saturday, two days before the fire, the appellant had bought from him 5 gallons of "black market" gasoline, and he identified the can, not as the same one he had sold to appellant on that occasion, but as one of his containers. Appellant had bought gasoline from this witness before on several occasions and testified that he needed it in touring through the country to pick up food for his restaurant. Gertrude Jordan testified that after the appellant's departure that night and she and Moore had returned to bed they heard a noise "after he walked down the hall a piece" which sounded like a tin can outside the apartment being picked up. The 5 gallon can in court was lifted, by way of demonstration, made a noise, and Gertrude Jordan testified that the sound they had heard was similar. Moore gave similar testimony.

Moore also testified that as he went down the hall, after the fire had been discovered, he "noticed something like it was wasted on the floor". It was wet. And Gertrude Jordan testified that as she went into the hall after the fire broke out she saw "something on the floor that looked greasy" and later "something on the floor that looked like water or grease" it looked "dark-like" and "There was a great deal of it right at my door". She was certain it was not there when she came in from work that evening. She admitted that she did not smell anything. Moore testified that he heard the appellant say to Gertrude Jordan, as she was going into her bedroom and as appellant was leaving her kitchen, that he would get even with her. This, of course, was corroborative of Anderson's testimony that he had heard a similar threat, but in different words, through the kitchen window. Moore admitted that the appellant did not look mad when he uttered these words. Gertrude Jordan testified definitely that she did not hear any threat that night. Moore testified that he did not tell her of having heard the threat until they were out in the alley, when the fire was almost over. He said that she then remarked that she had not heard the threatening words spoken.

In addition to the testimony already summarized Gertrude Jordan gave some very damaging testimony against the appellant. It was toward the end of the trial and after she had been recalled to the stand by the judge and had stated that appellant had left her apartment *before* the fire was discovered by her (which was in accord with her testimony before the grand jury) and well after the evidence establishing the corpus delicti had been introduced. It was as follows:

Appellant's counsel on cross-examination read to her as follows: "Q. You also testified before the Grand Jury, and you testified here, that on several occasions, that you asked Holman if he had burned the building down, did you not? A. Yes, I asked Holman". The witness then volunteered the following: "And you don't know the answer he give me. If you did it would hush your mouth; you would shut up and wouldn't say another word". There was no motion made by the appellant to strike out this volunteered statement. On re-direct examination by the people she testified: "Mr. Lynch: Q. Mrs. Jordan, just before you left the stand this morning you testified that you had a conversation with Mr. Holman, at which time you asked him if he had burned the building down. Is that correct? A. Yes, I did." This conversation was out on Oakdale street, about 3 days after the fire, she thought, and nobody was present but herself and the appellant.

"Q. After you asked him if he burned down the building, what did he say? A. He said yes, he burned the building.

"Q. Did he say anything else? A. He told me I better let it alone; if I didn't I would be found in the Bay."

Following that she was asked if the appellant ever threatened her on any other occasion and answered "Yes. I was frightened of Holman". He had threatened her several times, she said. Some time back she testified, "He told me if—after I quit him, he told me, in the presence of my husband, he told me before I quit him, in the presence of my husband, if I did him like I did my husband he would kill me.

"Q. When was that, Mrs. Jordan? A. That was some time back.

"Q. Was that after you left Mr. Holman? A. It was after I quit Mr. Holman.

"Q. On how many occasions did he make a statement of that kind? A. He made statements like that to me quite often, after we got on bad terms.

"Q. What else did he say to you? A. During that time?

"Q. Yes. A. He told me about this fellow Ola Bell told him about. He told me he bet I never moved in the house with him—the boy that got burned up. And I asked him if he burned the building up on that account. He said, 'Well, it is a good thing Hosey was there that night.' "

At several places in the record Gertrude Jordan gave conversations she had had with the appellant after the fire. At one of them "He said 'Well, Baby, one thing, you can save me or sink me' ". On other occasions "Don't tell nobody I was there" and "He told me to tell them he was in the room if I had to" and again "If the law happened to ask me anything concerning the fire, to tell them he was in the kitchen—me and him and Hosey".

The testimony of Anderson is claimed to be self-contradictory and "either a fantastic mass of perjury or else the product of a disordered mind". It is argued that Anderson could not have heard loud talking when he was at the corner of Fourth street, when Moore, who was right in the apartment, heard no loud talking. Anderson's testimony that he peeped in through the window is corroborated by Gertrude Jordan's testimony that she saw faces through the window. The evidence is uncontradicted that the window was open about 4 inches from the top. And the jury may have believed that Anderson heard loud talking, and Moore did not, because Moore was asleep until Gertrude Jordan awakened him after she had seen the faces at the window, and that thereafter the talk toned down. There is nothing inherently improbable about this. Appellant admits that Moore's testimony as to the threat is corroborative of Anderson's, and vice versa, except as to the details of the words used. It is altogether possible that two threats were made, one in a loud tone first heard by Anderson, the other in a milder tone later heard by Moore. This was purely a question of fact and the physical surroundings, as detailed earlier, were all laid before the jury.

The testimony of Moore, likewise, is claimed to be self-contradictory. Moore, unlike Gertrude Jordan and the appellant, never changed his testimony. The only particular in which the appellant claims self-contradiction is where, before the grand jury, Moore testified that Anderson had come into Gertrude Jordan's kitchen during the evening to wash some clothes, and at the trial gave no such testimony. This might appear to be collateral matter but its importance is in connection with the testimony already discussed, of Gertrude Jordan and Moore that they saw something wet on the floor outside her door from which it is argued by the defense that when Anderson returned to his room, next door, water might have dripped onto the floor from the wet clothes, thereby accounting for the liquid which Moore and Gertrude Jordan both said they saw.

[1-5] The testimony of Gertrude Jordan is likewise claimed to be self-contradictory, and it certainly is. She told the grand jury, the district attorney's staff and fire authorities investigating the case that the appellant had left her kitchen *before* the fire broke out. She told the trial jury that the appellant was *in* her kitchen when the fire broke out. And, finally, when she resumed the stand she went back to her original version. She gave a lengthy explanation as to her reasons for switching. The rule "That a witness false in one part of his testimony is to be distrusted in others", Code of Civil Procedure, sec. 2061, subd. 3, "is one solely for the guidance of the trial court, and can have no pertinency in an appellate court." Robinson v. Robinson, 159 Cal. 203, 113 P. 155, 156; Pedrow v. Federoff, 77 Cal.App. 164, 172, 173, 247 P. 212; see Winning v. Board, 114 Cal. App. 658, 670, 300 P. 866. The jury might have rejected all her testimony had they seen fit, in view of her admitted contradictions, but they were not *bound* to do so. Such "testimony is still evidence in the case which they must receive and weigh. While they may reject it, they may, as they determine, accept as true one of the contradictory asseverations". 8 Cal.Jur. p. 283, sec. 342; see also In re Vandiveer, 4 Cal.App. 650, 653, 88 P. 993. No authority need be cited in support of the proposition that the jury is the sole judge of the credibility of the witnesses and of the weight of the evidence. "Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability" (People v. Amadio, 25 Cal. App. 729, 731, 145 P. 151, 152) and "it is well settled that the general rule governing reviewing courts in dealing with appeals involving a conflict of testimony applies with the same force to cases where the conflict arises from the testimony of one witness as it does to cases where the conflict arises from the testimony of witnesses on opposing sides." People v. Crownover, 34 Cal.App.2d 7, 9, 92 P.2d 929, 930, citing cases.

[6, 7] In People v. Avena, 34 Cal.App. 500, 168 P. 148, the prosecuting witness and her sister both admitted that their testimony at the trial was directly contrary to that given by them at the preliminary examination, and was false. Their explanation of the change was that they had been told that if their father was convicted he would be sent to the penitentiary and they to the detention home or reform school. The court said: "It was for the jury to decide whether these contradictory statements, under all the circumstances and facts placed before the jury, so far impeached these witnesses as to render their testimony at the trial improbable or unbelievable. People v. Preston, 19 Cal.App. [675], 685, 127 P. 660." Similar cases of admitted self-contradictions with similar holdings are People v. Bond, 13 Cal.App. 175, 180, 109 P. 150; People v. Crawford, 24 Cal.App. 396, 403, 141 P. 824; and People v. Castro, 85 Cal.App. 228, 259 P. 117. See also People v. Haydon, 18 Cal.App. 543, 553, 554, 123 P. 1102, 1114. In People v. Billings, 34 Cal.App. 549, 551, 168 P. 396, 397, the court said: "* * * unless the evidence upon which a conviction rests appears to be so radically improbable as to amount to no evidence at all, we are not permitted to examine it merely to determine the preponderance of its probabilities."

All this may be said with equal force with respect to the testimony of the appellant. The jury might have believed his testimony on direct examination that he was in the kitchen when the fire broke out or his testimony on cross-examination that he was in bed with Gertrude Jordan at that time. Or it might have rejected both versions and believed that Gertrude Jordan's first and last version—that he had left her apartment—corroborated as it was by Moore's testimony, and by Anderson's testimony as to the hallway and can episode, was the truth.

People v. Casillas, 60 Cal.App.2d 785, 141 P.2d 768, relied on by the appellant is not in point for the reason that there, while there were self-contradictions in the testimony of the prosecutrix there was not, as there is here, any corroborative testimony of *any* version.

[8] Then, too, the jury may have treated as incriminating, the testimony of the witness Grau. He was a pedestrian, a total stranger to the New Amsterdam Hotel and its ground floor occupants and visitors, and the jury may have treated as significant, in considering the time element, his testimony that he saw a heavy-set colored man running, jump into the automobile headed west and drive over the knees of Mamie Pulaski. She had jumped or fallen to escape the fire, and Grau testified that he first saw the fire when he saw the man running out the side door. The jury might have believed that the appellant had left the apartment (and had spent the time in the interval in lighting the fire). On the other hand the jury could have treated the Grau testimony as *corroborative of the appellant's version* that he was in bed with Gertrude Jordan when the fire broke out and concluded that when Grau saw him running out the side doorway he was running directly from her bedroom. It was wholly a jury question.

The testimony of the witness Eisenhauer was along the same line, and corroborative of Grau's testimony with respect to the appellant's driving away after Mamie Pulaski had fallen.

[9] Parenthetically, it might be said in fairness to the appellant that the fact that he ran from a burning building and drove his automobile away from danger is not in itself incriminatory. Such action is consistent with preserving himself from injury and his property from damage. But in the light of all the facts the jury might have taken it against him. It was *their* question. Further, in fairness to the appellant it should be said that the autopsy surgeon testified that the lacerations on Mamie Pulaski's legs might have been caused by the same violent contact with the pavement that caused her skull fracture, and need not necessarily have been caused by being run over. The appellant denied that he ran over the body.

[10] The appellant attacks the testimony of Fire Marshal Kelly on the ground tnat "it was not based upon the personal knowledge and investigation of the witness, but was totally speculative and conjectural". This testimony (already rather fully summarized) shows, in our opinion, that it was based entirely upon his personal knowledge and upon his own investigation of the ruins after the fire, as his duties required. It was based on the physical facts as he found them; on the course which the fire had taken; on its intensity at certain points; on the fact that the rear stair well had been entirely burned out from the ground floor to and through the roof; on the fact that the fire had burned downward as well as upward. His testimony was in nowise based on that of other witnesses, nor was he asked any hypothetical question. Whatever conclusion is to be drawn from his testimony is no stronger than the physical facts upon which it is based, which facts were all before the jury. In addition to all the testimony in the case, there were numerous photographs in evidence showing the way in which the fire had gutted the interior of the hotel, and in particular how the rear stair well had been entirely burned out. Then, too, the jury viewed the premises and could see for themselves. Four carefully drawn instructions told the jury that they might consider the opinion with the reasons stated therefor, and were not bound to accept the opinion as conclusive, but should give it the weight to which they should find it to be entitled, and might disregard and reject it if found to be an unreasonable one. Further that they might regard it as merely advisory and form their own conclusions from all the evidence.

In his 35 years in the department, with over half that time devoted to the investigation of the origin of fires (a highly specialized occupation) the Fire Marshal certainly had accumulated a vast store of experience and knowledge which citizens generally do not possess, and still, the jury was distinctly told that his opinions were not at all conclusive, but could be regarded as "merely advisory". We are satisfied there was no error in the admission of the Fire Marshal's testimony, particularly in view of the instructions.

The appellant, relying on People v. Simonssen, 107 Cal. 345, 40 P. 440; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Saunders, 13 Cal.App. 743, 110 P. 825; People v. Jenkins, 67 Cal.App. 631, 228 P. 405; and People v. Bispham, 26 Cal. App.2d 216, 79 P.2d 166, contends that there was no separate and independent evidence tending to establish the corpus delicti.

[11-13] It is argued that "no evidence of any kind has been produced to show that it was a set fire". It is true that no witness detected the odor of gasoline or any other such agent. The Fire Marshal himself found no such evidence, his findings being confined to the physical conditions already discussed, from which he drew certain deductions. Nobody saw the fire started. Anderson's testimony that he saw the appellant with a can (later identified as one of Franklin's containers) although purely circumstantial in character is nevertheless some evidence of incendiary origin. The testimony of several witnesses that they saw liquid on the floor of the hall just outside Gertrude Jordan's apartment, is some evidence, the weight and value of which was solely for the jury. They might have considered it very unconvincing, or the contrary. The Fire Marshal's testimony tends likewise to prove the corpus delicti. The appellant cites several cases on this subject holding that "mere proof of the burning of a building alone does not establish the corpus delicti of the crime of arson." People v. Roganovich, 77 Cal.App. 158, 246 P. 132, 133; People v. Saunders, 13 Cal.App. 743, 110 P. 825. This, of course, is settled law. But by the testimony of the witnesses just touched on we are satisfied that the prosecution made independent prima facie proof of the body of the offenses of arson and murder before the introduction of any admissions or other extra-judicial statements and it is well settled that the corpus delicti need not be proved beyond a reasonable doubt (People v. Jones, 123 Cal. 65, 55 P. 698; People v. Hatch, 13 Cal.App. 521, 531, 109 P. 1097) before such statements are received.

The appellant claims that the court committed prejudicial error in refusing to admit the testimony of several witnesses to show that Gertrude Jordan had made contradictory and inconsistent statements, "thus depriving the defendant of an opportunity to impeach the witness and deprive [ing] the jury of the right to determine the truth or the falsity of the witness."

After Gertrude Jordan had testified that her testimony before the grand jury to the effect that the appellant had left her apartment before the fire started was the truth, and that her testimony in court to the effect that he was still there was false, Robert Colman, a stepson of the appellant, was called to the stand. A series of questions was put to him to develop the fact that prior to the trial there was an afternoon meeting in an automobile at the corner of Stockton and Broadway, at which he, his wife, William Leath, Jr., and Gertrude Jordan were present, on which occasion Gertrude Jordan had told those present that she had lied when she testified that George Holman had left her rooms before the fire. The purpose was avowedly impeachment. Objections by the district attorney to these questions on the ground that they were collateral were consistently sustained. The witness was permitted to say that he had a conversation with Gertrude Jordan on that occasion, but when asked what they talked about he was not permitted to answer. This culminated in a tender of proof made in the presence of the jury as follows: "* * * I offer to show by this witness that Gertrude Jordan, in the company of Robert Colman, his wife, and William Leath * * * met in an automobile at Stockton and Broadway; that they conversed for a period of half an hour, and during that conversation Gertrude Jordan told those present that she had lied when she testified that George Holman had left the premises, had left her rooms, before the fire. I further will show that on the Fourth of July, that Gertrude Jordan, in company with Robert Colman, came to the office of Attorney Peyser, and there made a voluntary statement, and that during that time, that the statement was given; that it was given in her own language, by herself; and that nobody volunteered or interfered, or told her what to say."

The same tender was repeated while Louella Colman (Robert's wife) and William Leath, Jr., were on the stand, and likewise rejected.

Theresa Sexton, a secretary in the office of appellant's counsel, was questioned respecting a telephone call from Gertrude Jordan to herself on July 14, three days before the trial, which conversation the witness later reduced to memorandum form from her notes. She was asked to state what Gertrude Jordan had said, whereupon the court asked the purpose and the following colloquy occurred:

"Mr. Peyser: The purpose is to establish the conversation in which she still reaffirmed everything that she said upon this witness stand when she first testified.

"The Court: Well, why repeat it, then?

"Mr. Peyser: So that the jury may know that when this woman testified, that she was still repeating that which she intended to say when she took the witness stand, which was on the 17th, two days following.

"The Court: That is not the proper way to proceed. Objection sustained."

An offer was then made outside the presence of the jury, to prove the contents of the memorandum of what Gertrude Jordan had said over the telephone. It is very lengthy. Its substance is as follows: It opens with a statement that Gertrude Jordan had come to the end of all the lying; it was getting too involved. Holman did not burn down the building. "She lied, Holman lied, and Hosey Moore lied". The reason for the lying was to keep from Holman's wife, because of the previous trouble, the fact that he had been visiting Gertrude Jordan's apartment. The story had been thought up by Holman while the fire was going on and she and Moore and Holman "were to stick to it and remember it". Then the questioning by the police added to the complexity. "It all got messed up, and if she and Holman and Hosey did not lie, Bubber [Holman] would never be where he is". "She said the story about Holman being there on the couch with her was not true". "This is what happened the night of the fire: They were all there in her rooms, the three of them. It was Holman who first was attracted to the fire. It was he who went to the door. He told them the place was on fire, and that he was going at once to put his car where it would be safe. They sort of shifted for themselves then for awhile. He returned, and after getting her things out as much as they could, then they got together and hatched the story." The memorandum concludes as follows: "She says Johnny was paid to say he saw Holman with the can in his hand. That Johnny was the only one she was afraid, because she knew he would tell any kind of a lie for a very small sum of money. She would never have anything to do with him, because he did not work, and she is afraid of any man who does not work. She said there is no doubt about it that Johnny was paid for his part in it." After the tender the prosecution made the further objection that no foundation had been laid. The court rejected the offer of proof.

[14, 15] The respondent answers this attack by showing that no foundation had been laid for the introduction of any of this evidence, by first interrogating Gertrude Jordan as required by sec. 2052, Code of Civil Procedure, as to whether or not she had made the claimed contradictory statements. And a careful examination of the record shows that she was not asked whether she had made the statements as to which the defense was later to put in contradictory evidence. In People v. Foster, 117 Cal.App. 439, 445, 4 P.2d 173, 176, the approved method of impeachment is said to be to *first ask the witness sought to be impeached if she had not made such and such a contrary statement on another specified occasion* and if she answered "no", then to read into the record such other statement. The court then says: "That this method might require several questions as to whether the witness had testified in a certain manner and a number of answers does not obviate the necessity of calling the witness' attention to the testimony given in answers to questions at the preliminary examination or justify the blanket procedure adopted by appellant in this case." See, also, as to the proper method of examination: People v. Nonella, 99 Cal. 333, 33 P. 1097; McLaughlin v. Los Angeles R. Corp., 180 Cal. 527, 539, 182 P. 44; Barsotti v. Imperatrice, 97 Cal. App. 569, 575, 275 P. 892; 10 So.Cal.Law Rev. 137–165. In Rignell v. Font, 90 Cal. App. 730, 737, 266 P. 588, 591, this court said, "It would be eminently unfair to a witness to seek to impeach him without calling his attention to the specific statements which it is claimed he has fabricated, and giving him an opportunity to explain or correct the alleged discrepancy. This is absolutely necessary before one may impeach either his own or an adverse witness (citing cases)."

In People v. Rulia Singh, 182 Cal. 457, 481, 188 P. 987, 997, the court says: "Considered as independent evidence, the statements were clearly hearsay, and, as such, incompetent and inadmissible," and at page 482 of 182 Cal., at page 998 of 188 P. 997: "Apart from the lack of foundation [testimony], the question put to the impeaching witness called for the entire conversation, and under no theory whatever was the defense entitled to more than the variant statements." In the case at bar, Robert Colman was asked just before the tender, "What did Gertrude Jordan say to you, and what did you say to her?" and in the Singh case the objectionable question was "Will you state to the jury what your questions were and what answers were made by her * * *?"

[16] Neither the July 4 statement (which was received into evidence, and of which the appellant cannot complain) nor the Stockton and Broadway conversation nor the telephone conversation of July 17, was admissible as original or independent evidence, such as an admission (as was the case in People v. Sprado, 72 Cal.App. 582, 593, 237 P. 1087; People v. Ferrara, 31 Cal. App. 1, 5, 159 P. 621; People v. Morley, 89 Cal.App. 451, 460, 461, 265 P. 276; People v. Barr, 134 Cal.App. 383, 387, 25 P.2d 503) for the reason that they were the statements of a mere witness who was not a defendant. As we have seen, as independent evidence they were hearsay. People v. Rulâ Singh, supra. Moreover, each of them, if admitted, would have followed the "blanket procedure" condemned in People v. Foster, supra, and would have placed before the jury, as an examination of the tenders will show, a mass of "irrelevant and incompetent matter". See People v. Nonella, supra, 99 Cal. at page 335, 33 P. at page 1098.

[17] The methods prescribed in the code for the impeachment of a witness are exclusive. People v. Harlan, 133 Cal. 16, 20, 65 P. 9; In re Estate of Gird, 157 Cal. 534, 547, 108 P. 499, 137 Am.St.Rep. 131; People v. Sprado, 72 Cal.App. 582, 600, 237 P. 1087, supra.

The rule is not peculiar to this state. It has been the law generally in most English speaking jurisdictions since the early 1800's (see Secs. 1025–1029, III Wigmore on Evidence, 3d Ed.) Wigmore says (sec. 1028), "In all but a few jurisdictions the rule is recognized, and is enforced as an inflexible one * * *."

The admission of this proffered testimony of Robert and Louella Colman, William Leath and Theresa Sexton, would have been in direct violation of this rule and therefore the court's rejection of it was proper.

The appellant claims that under the holding in People v. Campos, 10 Cal.App.2d 310, 317, 52 P.2d 251, it was not necessary to first confront Gertrude Jordan with her claimed inconsistent statements "with the circumstances of times, places and persons present", but an examination of that case shows it is not in point. The text in *27* Cal.Jur. p. 159, sec. 133, upon which the court relies in the Campos case explains the distinction. It reads: "Although a proper foundation must be laid before inconsistent statements may be proved by the testimony of other witnesses, yet, for the purpose of discrediting a witness by his own admissions, it is proper, upon cross-examination, to question him as to prior inconsistent statements, without calling attention to the time, place, circumstances and persons present * * *" (citing numerous cases). It will be seen at a glance that what was being attempted in the case at bar was not an examination such as that sanctioned in the Campos case.

The case of People v. Brazil, 53 Cal. App.2d 596, 128 P.2d 204, 206, cited by appellant, in so many words holds the questions asked Mrs. Brazil to be proper *"for the purpose of laying a foundation for the impeachment of the witness"* pursuant to sec. 2052. In People v. Crow, 48 Cal.App. 2d 666, 120 P.2d 686, cited by appellant, the opinion does not show how the question arose. It was apparently a situation similar to that in the Campos case, supra. And in People v. Pollock, 31 Cal.App.2d 747, 89 P.2d 128, 132, cited by appellant, just as in the Brazil case, the court said that the question was proper *"in laying the foundation for impeachment of Mrs. Pollock."* The Brazil and Pollock cases do not militate against the rule just discussed; they support it.

[18] The appellant makes a strong attack on the testimony of Anderson and other witnesses, based on inherent improbability. Counsel argues that Anderson could not have told the truth about the appellant coming down the burning stairway just ahead of the flames for the reason—argued and analyzed at considerable length—that the appellant could not have done this without being caught in the fire. Other similar arguments with respect to physical facts are contained in the briefs, but (to quote from Bechtold v. Bishop & Co., 16 Cal.2d 285, at page 291, 105 P.2d 984, at page 988) "Appellants' argument is one which might be persuasive if addressed to a trial court. Addressed to an appellate court, it fails to carry conviction. In this state the credibility of a witness and the weight to be accorded to his testimony are questions directed to the trial judge * * *" (citing

cases). On this subject, what is said in People v. Bolton, 215 Cal. 12, 15, 8 P.2d 116, 117, is particularly apt: " 'It is strenuously insisted by appellant that the evidence adduced before the jury was insufficient to warrant their verdict or to support the judgment. Much of the evidence of witnesses called by the prosecution is criticized as improbable, unworthy of belief, or otherwise of questionable weight, but with these questions the trial court and jury were vested with conclusive jurisdiction except where their implied findings can be said to be unsupported by substantial evidence, regardless of evidence contrary to such findings. People v. Dant, 68 Cal. App. 588, 229 P. 983.' "

[19, 20] The appellant's contention that "circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion" cannot of course be gainsaid, and the jury in this case was given an instruction substantially to that effect. The testimony of Anderson that he saw the appellant with a can in his hands running from the fire; that of Gertrude Jordan and of Moore that they noticed some liquid on the floor outside her apartment, although neither detected the odor of gasoline; that of Franklin that he had sold 5 gallons of gasoline to the appellant only two days before the fire, and the finding of the can on appellant's premises; that of Moore and of Anderson that they heard threats made by the appellant not more than 30 minutes before the fire was discovered, and that of Gertrude Jordan that he had threatened her life some time before the fire—all this evidence was consistent with guilt and inconsistent with innocence. The testimony of Gertrude Jordan that the appellant had admitted to her that he had burned the building could not possibly be consistent with innocence.

It was clearly pointed out in People v. Newland, 15 Cal.2d 678, 682, 104 P.2d 778, 780, quoting from People v. Perkins, 8 Cal. 2d 502, 519, 66 P.2d 631, that "the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. It [the Supreme Court in the Perkins case] said: 'The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury.' "

[21, 22] We are satisfied that the appellant's complaint is not well founded that four tendered instructions were refused. They dealt with the burden of proving the corpus delicti in an arson case. Appellant cites no supporting authorities on this point. The instructions which were given fully and fairly covered this phase of the case. The jury were repeatedly instructed on reasonable doubt, and although (as appellant complains) they were not told in so many words that mere proof of the burning of a building does not establish the corpus delicti of the crime of arson, that crime was defined to them and they were told that "As applied to a particular offense, corpus delicti means the actual commission *by someone* of the particular crime charged". (Emphasis added.) When read in connection with all the instructions the jury could not fail to understand that the instructions meant that they must be convinced that the defendant on trial was the person who set fire to, or burned, or caused to be burned the building in question as defined in the section on arson, which was read to them. Pen.Code, § 447a.

In pronouncing sentence the court ordered and adjudged that the defendant "be punished by imprisonment in the State Prison of the State of California at San Quentin, for the term of life, on each of the twenty-two counts, said twenty-two counts to run consecutively."

The appellant points out that the court could have rendered a judgment of life imprisonment only, and that that part of it to the effect that the sentences were to run consecutively was mere surplusage.

[23-25] The respondent claims that such sentence was permissible under the authority of Ex parte Quinn, 25 Cal.2d 799, 154 P.2d 875, but that case is not in point for it did not involve one or more sentences *expressly prescribed* by law to be for life, but several indeterminate sentences with a maximum of life and a minimum of a term of years. In holding that such sentences might be imposed to run consecutively, the court expressly pointed out at page 804 of

25 Cal.2d, on page 878 of 154 P.2d, that: "it is obvious that the punishment is not as to any of the counts *expressly prescribed* to be life imprisonment. Hence the quoted amendment [to Penal Code, sec. 669] has no application to the present case in any event." Sec. 190, Penal Code, prescribes that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury * * *" and in our opinion such express provision brings this situation squarely within the proviso of Sec. 669, Penal Code (as amended in 1943, p. 1122) that "if the punishment for any of said crimes is *expressly prescribed* to be life imprisonment, whether with or without possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term." (Emphasis added). Accordingly, we agree with the appellant's contention on this point. The surplusage did not, however, constitute reversible error. It may be corrected by the resentencing of the appellant (the procedure indicated in People v. Bender, Cal.2d, 163 P.2d 8).

[26] Finally it is claimed that the verdicts were not first recorded and thereafter read to the jury as recorded, and inquiry then made whether the verdicts as recorded were their verdicts. The clerk's certified record on appeal shows the following proceedings immediately after the jury returned from the jury room: "Thereupon the Court asked the Jury if they had agreed upon a verdict. The Foreman of the Jury replied 'We have', and thereupon presented to the Court the written verdicts of the Jury. Thereupon the Clerk read the verdicts to the Jury and the Jury declared the same to be their verdicts. Thereupon by order of Court, the Clerk recorded the verdicts in the minutes of the Court and read the same to the Jury as they appear of record, to-wit:" [here follow, in the clerk's transcript, the 22 separate verdicts]. We are satisfied that the case of People v. Sing Chan, 64 Cal.App.2d 167, 173, 174, 148 P.2d 81, answers this point.

The judgment is modified so as to eliminate and strike from the sentence as heretofore pronounced and imposed the words "said twenty-two counts to run consecutively", and as so modified is affirmed. The cause is remanded to the trial court with directions to pronounce judgment on the defendant on each of the twenty-two counts sentencing him to imprisonment in the state prison for the term prescribed by law for murder of the first degree, to-wit, for the life of said defendant.

NOURSE, P. J., and DOOLING, J., concur.

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72 Cal.App.2d 168

SHELDON v. SHELDON.

Civ. 15013.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1945.

1. Divorce 🔑165(3), 184(1)

Where matter on which defendant relied for modification of interlocutory divorce decree occurred prior to entry of the interlocutory decree, it was subject to review on appeal from the interlocutory decree or by proceeding pursuant to statute for relief from the decree on account of mistake if taken within six months after entry of the interlocutory decree. Code Civ.Proc. § 473.

2. Divorce 🔑184(1)

Where defendant did not appeal from interlocutory divorce decree or institute proceedings within six months for relief from decree on account of mistake, the interlocutory decree was not subject to attack on appeal from the judgment granting a final decree of divorce. Code Civ.Proc. § 473.

3. Divorce 🔑184(4)

Where defendant did not show any error in order setting aside final judgment of divorce because of clerical errors therein and ordering a new final decree of divorce, and did not point out any error in judgment granting final decree of divorce, defendant waived any objection to the order or judgment.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke and William S. Baird, Judges.

Action for divorce by Caryl M. Sheldon against Louis Wilson Sheldon, known as

Lois Wilson Sheldon, wherein the defendant filed a cross-complaint. From an order denying a modification of an interlocutory decree of divorce, from a final judgment of divorce, and from an order setting aside a final judgment of divorce and ordering another final judgment of divorce, the defendant appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Pacht, Pelton, Warne, Ross & Bernhard, of Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from (1) an order denying a modification of an interlocutory decree of divorce entered March 1, 1944, (2) a final judgment of divorce entered March 5, 1945, and (3) an order of March 6, 1945, setting aside a final judgment of divorce entered March 5, 1945, and ordering another final judgment of divorce.

The chronology of the material facts here involved is as follows:

On July 14, 1943, plaintiff filed an action for divorce against defendant. On January 12, 1944, the respective parties executed a property settlement agreement. On March 14, 1944, defendant filed a cross-complaint in which it was alleged among other things, "That plaintiff and defendant by a separate agreement have settled and determined all of their property rights and divided all of the community property; that a copy of said agreement is marked Exhibit A, attached hereto and made a part thereof by reference as though set out in full."

Plaintiff did not answer the cross-complaint and thereafter his default was entered and on March 1, 1944, an interlocutory decree of divorce was entered in favor of defendant in which decree the court approved the property settlement agreement hereinabove mentioned. No appeal was ever taken by either party from the interlocutory decree of divorce which became final.

On February 23, 1945, defendant obtained an order to show cause why plaintiff should not (a) assign to defendant certain furniture, (b) be restrained from entering a final decree of divorce, and (c) why the interlocutory decree of divorce should not be modified so as to provide that defendant be allowed to visit the minor child of the parties. The order to show cause was heard on March 5, 1945. The trial court denied defendant's application with the exception that an order dated March 2, 1945, was entered March 6, 1945, pursuant to stipulation of counsel for the respective parties, permitting defendant to visit with her son at reasonable times and that said son might go to the home of defendant every Sunday from 10 a. m. until 5 p. m.

[1, 2] (1) *The appeal from the order denying the modification of the interlocutory decree and refusing to restrain defendant from having a final decree of divorce entered.* The matter which defendant relies upon for modification of the interlocutory decree of divorce occurred prior to the entry of the interlocutory decree and therefore was subject to review (1) on appeal from the interlocutory decree, or (2) by proceedings pursuant to the provisions of Section 473 of the Code of Civil Procedure if taken within six months after the entry of the interlocutory decree. Since defendant did not avail herself of either method of attacking the interlocutory decree it is not subject to attack on appeal from the judgment granting a final decree of divorce. Greenwood v. Greenwood, 101 Cal.App. 736, 741, 282 P. 433; Bauer v. Bauer, 81 Cal.App. 414, 416, 253 P. 969; Bancroft v. Bancroft, 178 Cal. 367, 368, 173 P. 582. See also Litvinuk v. Litvinuk, Cal., 162 P.2d 8.

[3] (2 & 3) *Appeals from the final decree of divorce and order of March 6, 1945.* Defendant has failed to furnish us with either argument or authority showing any error in the order of March 6, 1945, setting aside the final judgment of divorce of March 5, 1945, because of clerical errors therein and ordering a final decree of divorce which was entered March 6, 1945. Defendant has likewise failed to point out any error in the judgment granting a final decree of divorce. Therefore defendant must be deemed to have waived any objection which she had to the order or judgment.

We are unable to see the applicability of Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175, and Duncan v. Duncan, 175 Cal. 693, 695, 167 P. 141, relied on by defendant. The first case was a suit for the recovery of a money judgment for alleged accumulations of alimony. The Duncan case merely held that since the parties had stipulated regarding the status of their property the issue had been removed from the action, and that, by entering into a stipulation relative to their property rights, the parties did not waive the right to appeal from a judgment granting or denying a divorce.

For the foregoing reasons the judgment and orders appealed from are and each is affirmed.

MOORE, P. J., and FOX, J. pro tem., concur.

72 Cal.App.2d 247

PEOPLE v. DUNCAN.

Cr. 2371.

District Court of Appeal, First District,
Division 2, California.
Dec. 20, 1945.

1. Criminal law ⊂⇒525, 736(2)

Evidence that defendant was unconscious or in such mental condition as result of drugs that he did not understand what he was saying when he made confession to police officers two days after homicide, did not affect admissibility of confession, but weight thereof was properly left to jury.

2. Criminal law ⊂⇒683(1)

Where defendant's medical expert witness testified that person under influence of barbiturate drug would be more apt to tell that which was untrue, offered to show that when accused stated that he had stabbed deceased, he was impelled by the drug to boast of murder which he had not committed, it was not error to permit state to rebut such testimony by expert testimony that a person under influence of such drug would be unable to tell a falsehood or would be more apt to tell truth.

3. Homicide ⊂⇒169(6)

In prosecution for murder of accused's paramour by stabbing, involving defense of suicide, refusal to permit accused to show by testimony of deceased's former husband that deceased was an habitual drinker and had threatened suicide was properly excluded as too remote, where such former marriage had been dissolved by divorce about eight years before the homicide and in view of evidence.

4. Criminal law ⊂⇒371(12)

Evidence of the commission of other crimes by accused is admissible to show motive.

5. Criminal law ⊂⇒371(12)

In murder prosecution, admission of evidence of intimate relations of accused and deceased was not error as tending to prove another crime of adultery, when under theory of prosecution it was pertinent to prove motive for homicide in that accused had become so involved in his relations with deceased that he deemed it necessary to either secure a divorce from his wife or get rid of deceased.

6. Criminal law ⊂⇒404(3)

In murder prosecution, a hunting knife found on roof of adjoining apartment house under accused's window, but which was not positively identified as the knife used in the homicide, was properly admitted where accused admitted ownership of a similar knife, and there was evidence that witness saw a similar knife on accused's dresser prior to day of homicide, and there was expert testimony that such knife might easily have been the one used.

◆

Appeal from Superior Court, San Francisco County; William F. Traverse, Judge.

Stanley W. Duncan was convicted of second-degree murder, and he appeals.

Affirmed.

James A. Toner, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Harding McGuire, Asst. Dist. Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Defendant appeals from a judgment entered on a jury verdict finding him guilty of second-degree murder, and from the denial of his motion for a new trial.

Soon after the beginning of the late war the defendant left his employment with an oil company and entered the United States army where he attained the rank of major and was assigned to the duties of oil transportation in the army offices located at 200 Bush Street, San Francisco.

Employed in the same offices and assigned to Major Duncan was one Dorothy Vivell, a woman of about thirty-five years, who had been divorced in 1937, and who was the mother of two girls nine and ten years of age. Major Duncan was a man of about forty-seven, married, with a wife and daughter residing at the Duncan home in Glendale. The major and Mrs. Vivell soon began to associate outside the office and for more than a year their relations were intimate—at his apartment in San Francisco, at hers, and at a summer resort in the northern part of the State.

The relations reached the stage where the parties agreed that if the major could procure a divorce from his wife the parties would be married. The wife appeared unexpectedly at the defendant's apartment on the evening of January 27, 1945, and the three parties met on the 30th and discussed at great length the involvement in which they found themselves.

Some time after 8 p.m. Mrs. Pisano, a close friend of the deceased, was called in as a sort of referee or arbitrator. What occurred on that occasion is best told through Mrs. Pisano's testimony.

"Well, when I was greeted at the door they were—all three of the parties were quite, oh, excited, hysterical; they were all pretty well intoxicated; and they said they were cleaning up a big mess, and asked me to sit down and hear it more or less as a judge and decide for them what they ought to do.

"Dorothy said to me, 'Oh, to the effect that she liked Mrs. Duncan and that she was willing to give up Dunk; and Mrs. Duncan also said the same thing: That she was perfectly willing to give the major a divorce. So I said, 'Well, then, the question seems to remain up to the major what he wants to do.' And I asked the major if he wanted to marry Dorothy or if he wanted to stay on and live with his wife. He wouldn't answer. He said, 'Let me wait until tomorrow and let me think it over.' And I said, 'Well, do you mean to say that you don't love Dorothy and that you want to remain with your wife?' He said, 'No, I still love Dorothy.' And I said, 'Well, it looks like you loved two women.' And he said, 'I guess that's about right.'

"* * * And I suggested to Mrs. Duncan for her to stay and that I would take Dorothy home; that I would see to it to the best of my ability that Dorothy went some place else. And I said that I would try through my mother, perhaps, to get Dorothy a job away from San Francisco so she would not have to see the major any more and the major would not have to see her, and everything would be fine—I mean Mrs. Duncan and Mr. Duncan could go back to living with each other and it would just be forgotten as a very unfortunate circumstance. And he said, 'Well, I don't think that is necessary for her to transfer or leave; I am going to get a transfer.'"

Mrs. Duncan left for her home in Glendale on February 4th and on the following day Mrs. Vivell notified the defendant that she had an opportunity of employment in Sacramento which she desired to take, but the defendant urged her not to do so. He told her that if she stayed where she was he believed that the family relations would be adjusted.

Mrs. Vivell accompanied the defendant to his apartment at about noon of that day where the two remained throughout the afternoon and early evening continuously drinking brandy. Some time about 2:30 p.m. defendant took a tablet of seconal for a "headache and nervousness." He testified that he could remember nothing after 4 p.m. until he awakened in the hospital on the morning of February 8th. At about 9:30 p.m. of the night of February 5th he answered a telephone call from a business associate of his living in Burlingame, at which time he told his friend that "Dorothy (meaning Mrs. Vivell) was gone, or Dottie was gone, she was dead; that he had killed her." At 9:07 p.m. of the same evening the defendant placed a long distance call for his wife at Glendale. This call was completed at 9:23 p.m. and Mrs. Duncan talked with both the defendant and Mrs. Vivell. At 9:52 p.m. defendant placed another call to his wife in Glendale and connection was made at approximately 10:21. In this conversation the defendant informed his wife that Dorothy was dead.

In some manner not disclosed in the record the police learned of the trouble and when they arrived at the apartment they found the doors locked and bolted from the inside. They made entry by breaking a window and upon entering the living room found Dorothy Vivell sitting on a couch, and the defendant lying on the floor unconscious, presumably from an overdose of sleeping powders. The deceased had been stabbed through the heart with a sharp instrument, no evidence of which was found in the apartment. The officers did find a scabbard in one of the closets which was used to hold a hunting knife. Such a knife was found the following day on the roof of an adjoining apartment house underneath the bath room window of appellant's apartment. It had been wiped clean and oiled but upon examination traces of human blood were found upon it. The deceased was dead when the officers arrived. The defendant was taken to the emergency hospital where he was found to be near death from an overdose of sleeping powders. On February 7th at 5:45 a.m. an entry was made on his chart that he was not yet rational; at 11 a.m. of that day the attending physician informed the police inspector that it would be all right for him to interview the defendant. At 1:15 p.m. of that day two police inspectors, a stenographer and a deputy from the district attorney's office talked to the defendant in his hospital room. They testified that he then appeared normal and rational. They asked him about the various telephone calls made on the night of the killing and showed him the knife which they had found on the roof of the adjoining apartment house. In this conversation the defendant recalled the conversation with his wife and the deceased heretofore mentioned; his telephone conversation with his friend in Burlingame on the night of the 5th; his trip with his wife to the airport on Sunday and his conversations with deceased on the afternoon and evening of February 5th. He identified the scabbard of the hunting knife as belonging to him, but did not admit that the knife was his. He was shown a picture of the deceased sitting upon the couch, a picture taken after her death, and was informed that she had passed away and that a knife had been plunged through her heart. He then stated: "Well, I stuck her with a knife but I didn't think I stuck her very deep."

The defendant objected to the admission of the evidence of this confession on the grounds that he was unconscious at the time or that he was in such a mental condition as the result of drugs that he did not understand what he was saying. The court left the question to the jury. Considerable evidence was offered on both sides tending to show the mental condition of the defendant and the effect of the drug which he had taken. For the defendant, expert testimony was offered tending to show that the defendant was in a continued state of coma from about 4 p.m. of February 5th until some time on February 8th after the statement had been made to the police authorities. For the state, expert testimony was offered tending to show that a period of coma or unconsciousness resulting from the use of seconal would not possibly extend for more than 36 hours after it had been taken. Expert testimony was also given tending to show that the effect of seconal, particularly when used with intoxicating liquors, was that certain inhibitory fibers of the brain would be released so that the person would be unable to falsify and would therefore be more apt to tell the truth than if he were fully conscious and free from the effects of the drug.

[1] The first ground assigned by appellant is that the court erred in admitting the evidence of appellant's confession. The assignment relates only to the testimony of the police inspector covering his conversation with appellant two days after the homicide. No objection was made to the testimony of the witness detailing a like confession made by appellant on the night of the homicide and that confession of guilt stands unattacked. The grounds of the objection are that appellant was unconscious or comatose and did not understand the purport of the conversation. Wide latitude was given appellant to make that showing, but the evidence to the contrary was unimpeachable. Throughout the trial the appellant contended that he remembered nothing after about 4 p.m. of February 5th until he "awoke" in the hospital sometime on February 8th. During that period he was shown to have dialed the telephone and placed local and long distance calls, to have answered the telephone and engaged in conversations, and to have recalled the names of friends who had visited him in the hospital and the conversation he had had with them. Expert testimony was given by both sides as to the effect of seconal as to the capacity, or inclination, of the individual to tell the truth or to tell falsehoods while under its influence. Positive evidence was given that the effect of the drug was completely eliminated within a maximum of thirty-six hours after it had been taken, and ordinarily within a period of two or three hours. The conversations with the police inspectors was held approximately forty-eight hours after the drug had been taken. The testimony was that appellant's mind was then clear and that, before the

confession was made, he was frequently asked if he was "all right" and if he felt in condition to talk with them, and that he answered in the affirmative.

In essence all that is said in argument on the point goes to the weight of the evidence, and not to its admissibility. Whether the confession was voluntary was left to the jury under an instruction that it must determine from all the circumstances connected with the confession whether it was entitled to weight and credibility. The rulings of the trial court on this issue were in full accord with the principles followed in People v. Lehew, 209 Cal. 336, 341, 287 P. 337; People v. Dias, 210 Cal. 495, 499, 292 P. 459; People v. Rucker, 11 Cal.App. 2d 609, 612, 54 P.2d 508; People v. Hoyt, 20 Cal.2d 306, 314, 125 P.2d 29. Appellant's criticism of the conduct of the district attorney and "his abettors" in taking the confession and offering evidence of it is wholly unjustified by anything appearing in the record.

[2] Appellant complains of the ruling permitting the witness Dr. Proescher to testify in rebuttal that a person under the influence of barbiturate drugs such as seconal would be unable to tell a falsehood—or would be more apt to tell the truth. The testimony was in response to that of Dr. Catton who was called by the defense to testify that such a person would be given to fantasy and more apt to tell that which was untrue. The purpose of Dr. Catton's testimony was to show that when the appellant stated to his friend on the night of the homicide, and to the police inspectors two days later that he had stabbed the deceased, he was impelled by the drug to engage in fantasy and to boast of a murder which he had not in fact committed. It was in line with the old question, which has never been answered satisfactorily and which is founded on the aphorism "in vino veritas," whether a person is more apt to tell the truth when he is drunk than when sober. Fantasy may lead to braggadocio, but seldom to the confession of a murder in which the party had no hand. When this is done the condition is more apt to be insanity than mere coma. However, the appellant tendered the issue and he cannot complain that the State met it by adverse testimony.

[3] The appellant complains that he was not permitted to show by the testimony of deceased's former husband that deceased was an habitual drinker and had threatened suicide. The testimony was excluded as too remote. The ruling was sound. The parties had been divorced in 1937. The homicide was committed in 1945. The excessive drinking by deceased and appellant was carried down to the very point of the homicide. Threats of suicide made prior to the divorce had no bearing on the issues of this case. The photograph in evidence which was taken at the time the homicide was discovered and which shows the deceased seated upright on the davenport, the condition of the apartment, and the discovery of the knife upon the roof of an adjoining building all preclude any possible inference that the deceased came to her death by her own hand. Any threat of suicide by the deceased made while living with her former husband could therefore have no part in this case.

[4, 5] The appellant assigns error in the admission of evidence of the intimate relations of appellant and deceased. It is said that this evidence tended to prove another crime—that of adultery. The theory on which the case was prosecuted was that the appellant had become so involved in his relations with the deceased that he deemed it necessary to either secure a divorce from his wife or get rid of deceased. This evidence was pertinent to that theory and tended to prove a motive for the homicide. Evidence of the commission of other crimes is admissible for that purpose. People v. Kynette, 15 Cal.2d 731, 746, 104 P.2d 794; 20 Am.Jur. p. 293 et seq.; 22 C.J.S., Criminal Law, § 683, page 1089 et seq.

[6] Finally, it is argued that the court erred in admitting a hunting knife in evidence and in permitting it to be exhibited to the various witnesses and to the jury. The ground of the objection seems to be that the knife was not properly identified and People v. Hill, 123 Cal. 571, 56 P. 443, is cited for the statement that where there is "no evidence to identify" the instrument as the one used in the commission of the crime it was error to admit it in evidence. Respondent does not quarrel with the rule stated but denies its relevancy to this case. Here the appellant admitted ownership of a knife similar to the one offered in evidence. This knife was found on the morning following the homicide on the roof of an adjoining apartment house underneath the bathroom window of appellant's apartment. The scabbard fitting the knife and

also offered in evidence was found in a closet of appellant's apartment on the top of a canvas zipper bag. The manager of the apartment house saw a similar knife on appellant's dresser some time prior to the day in question. Dr. Bostich, the autopsy surgeon, testified that this knife might easily be the one used. Dr. Carr, the pathologist in the coroner's office, testified that the knife had been recently cleaned and oiled but when tests were made it showed evidence of human blood spots. A daughter of the deceased testified that appellant had given such a knife to her mother while they were spending their vacation together during the preceding summer and that he demonstrated to the deceased how it could be used on another person. The case is in line with People v. Hightower, 40 Cal. App.2d 102, 107, 104 P.2d 378, 381, where the court said, "The fact that there was testimony that the gun introduced in evidence was similar to one of those used in the robbery, coupled with the fact that it was found on the premises where appellant had resided, sufficiently satisfies the rules of law to warrant its reception into evidence." (Citing numerous cases.)

The judgment and order are affirmed.

GOODELL and DOOLING, JJ., concur.

PEOPLE v. DORMAN et al.*

Cr. 3865.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1945.

Rehearing Denied Dec. 14, 1945.

Hearing Granted Jan. 3, 1946.

1. Criminal law 🔑1144(13)

On defendant's appeal from conviction, evidence must be viewed in the light most favorable to the people.

2. Criminal law 🔑1028

An appellate court will not consider an alleged error of trial court in refusing to grant a continuance which is not supported by affirmative proof in open court, upon reasonable notice, that the ends of justice require its continuance. Pen.Code, § 1050.

3. Criminal law 🔑1028

Where neither affidavit nor oral testimony was offered showing any reason why trial should be continued to future date, alleged error in refusing to grant continuance would not be considered. Pen.Code, § 1050.

4. Kidnapping 🔑5

Evidence supported conviction of kidnapping for the purpose of robbery. Pen. Code, § 209.

5. Kidnapping 🔑6

In prosecution for kidnapping for purpose of robbery, an instruction on the elements of the offense, and stating that the seizing and the carrying away of the victim was not necessary to constitute the offense, was not erroneous on ground that under another statute, not involved, the arrest of the victim without holding him is kidnapping only where there is the intention of taking the victim out of the state. Pen.Code, §§ 207, 209.

6. Homicide 🔑289

An instruction on killing done in attempt to perpetrate a felony was erroneous as indicating that jury must find homicide to be first degree murder if it was murder at all.

7. Criminal law 🔑814(16)

An instruction that if jury found defendant's confessions were not voluntarily made, or were obtained while he was irrational of mind, jury could disregard confessions, was erroneous where there was no evidence tending to show that the confessions were not voluntarily made or obtained while defendant was not irrational.

8. Criminal law 🔑814(16)

Where the evidence admits of no rational conclusion other than that confession of defendant was freely and voluntarily made, there is no necessity to instruct on the general rule relating to the receipt and consideration of a confession.

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Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Proceeding by the People against William Neal Dorman and others, wherein Merlin James Smith was convicted of murder in the first degree, robbery in the first degree, and kidnapping for the purpose of robbery, and he appeals.

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* Subsequent opinion 172 P.2d 686.

Judgment of conviction on the murder count reversed, and judgment on other counts affirmed.

Frederick W. Kant, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondent.

McCOMB, Justice.

From judgments of guilty of (1) murder in the first degree, (2) robbery in the first degree and (3) kidnapping for the purpose of robbery, after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

At about 10:30 a.m., April 17, 1944, Ralph William Bigelow, now deceased, and defendant Smith entered the Brite Spot Cafe at 5214 Lankershim Boulevard, North Hollywood. They stayed in the cafe about four hours drinking beer. At the cafe defendant Smith left Mr. Bigelow and talked to his co-defendant Dorman who was standing at the bar. During the time that the two defendants were in the Brite Spot Cafe they frequently retired to the rest room and on one occasion defendant Dorman suggested to defendant Smith that they "roll" Mr. Bigelow, to which defendant Smith replied that the deceased was a good guy and he was buying him a lot of drinks and he did not want to "roll" him. Mr. Bigelow and the two defendants left the Brite Spot Cafe about 3:30 p.m. on April 17, 1944, at which time defendant Smith was sober. At about 6:00 p.m. the same day Mr. Bigelow was seen near the North Hollywood Post Office with defendant Smith driving Mr. Bigelow's car, and defendant Dorman and Mr. Bigelow in the rear seat of the car. The two men in the rear seat were fighting. The car was later parked in an alley near the post office. Defendant Smith struck Mr. Bigelow who was fighting with defendant Dorman. Mr. Bigelow was injured and his head and face were bleeding. The car then drove away and started north on Highway No. 6 where defendant Dorman hit Mr. Bigelow in the head with a rock. They then drove to a point six miles north of San Fernando where the car was stopped and the two defendants removed Mr. Bigelow from the car, defendant Dorman taking Mr. Bigelow's wallet and $30 in money, half of which he gave to defendant Smith. Mr. Bigelow's body was then rolled over an embankment at the foot of which he was found dead on April 23, 1944.

After disposing of the deceased's body the two defendants drove to Tehachapi, California, where they abandoned Mr. Bigelow's car, spent the night, and later went to Stockton where on April 20, 1944, defendant Smith pawned the deceased's watch. The rear seat of the deceased's car when found was covered with blood, and there were also found in the car buttons which were similar to buttons on defendant Smith's clothing and from which clothing similar buttons were missing. Human blood was found on defendant Smith's hat at the time of his arrest.

Both defendants were arrested in Sacramento and returned to Los Angeles for trial.

Defendant Smith relies for reversal of the judgments on four propositions which will be stated and answered hereunder seriatim:

First: *The trial court abused its discretion in denying defendant Smith a continuance of the time of the trial.*

[2, 3] This proposition is untenable. The law is established in California that an appellate court will not consider alleged error of the trial court in refusing to grant a continuance which is not supported by affirmative proof in open court upon reasonable notice that the ends of justice require a continuance. (Section 1050, Penal Code; People v. McClain, 55 Cal.App.2d 399, 403, 130 P.2d 978; People v. Rokes, 18 Cal.App.2d 689, 694, 64 P.2d 746. See also People v. Ward, 105 Cal. 335, 337, 38 P. 945, and People v. Whinnery, 55 Cal.App.2d 794, 798 et seq., 131 P.2d 33). At the time of the hearing in the instant case neither affidavit nor oral testimony was offered showing any reason why the trial should be continued to a future date. Since defendant Smith has failed to meet the requirements of the foregoing rule he has failed to show any error which will be considered by this

court, in the trial court's ruling denying him further time to prepare his case for trial.

[4] Second: *There is not any substantial evidence to support the judgment on count three, to wit, kidnapping for the purpose of robbery.*

This proposition is likewise untenable. In view of the evidence set forth above, it is clear that the jury was justified in believing that defendant Smith and his codefendant kidnapped the deceased for the purpose of robbing him. After killing Mr. Bigelow they removed his wallet and money from his clothing and defendant Smith subsequently pawned Mr. Bigelow's watch. Further discussion of the evidence would serve no useful purpose.

Third: *The trial court committed prejudicial error in instructing the jury as follows:*

(a) [1] *"It is the law of this State that every person who seizes, entices, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever, with intent to hold or detain, or who holds or detains, such individual to commit robbery, or who aids or abets any such act, is guilty of Kidnaping, a felony, and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State Prison for life without possibility of parole at the discretion of the jury trying the same, in cases in which the person subjected to such kidnaping suffers bodily harm.*

[2] *"It is not necessary that there be both a seizing and carrying away of the victim in order to constitute the crime of Kidnaping. The mere seizing of an individual with intent to commit a robbery is as much a violation of the law of kidnaping, even though such person was not moved.*

[3] *"There is nothing in the law of this state which requires that to constitute the crime of kidnaping for the purpose of robbery the victim of such offense shall have been moved or carried away for any particular distance or any distance at all, nor does the law require that to constitute the crime of kidnaping for the purpose of robbery that a robbery actually be committed. The gist of the offense is the intent with which the individual kidnapped is held or detained.*

[4] *"To constitute the crime of kidnaping for the purpose of robbery it is not necessary that, if a robbery is perpetrated, the kidnaping precede the robbery, for it is the law of this state that the crime of robbery is not completed the moment the stolen property is in the possession of the robbers. The crime of robbery, which is a combination of the crime of assault with that of larceny, includes the element of a taking away of the property stolen and this taking away is a transaction which continues as the perpetrators depart from the place where the property was seized. Therefore, if a robbery is perpetrated and the person from whom the property is taken is thereafter kidnapped as a part and in pursuance of the robbery, the perpetrators are guilty of kidnaping for the purpose of robbery."*

[5] Defendant Smith urges that the foregoing instruction was erroneous because of the second and third paragraphs thereof, since arrest of a victim without moving him is defined by Section 207 of the Penal Code[1] to be kidnapping only where there is the intention of taking the victim out of the state. Section 207 of the Penal Code is not here involved. Defendant Smith was charged with violating Section 209 of the Penal Code[2] which defines the offense of

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[1] Section 207 of the Penal Code reads thus:

"Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free-will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping."

[2] Section 209 of the Penal Code reads thus:

"Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnapping for the purpose of robbery. The foregoing instruction was a fair and accurate statement of the principles of law involved.

[6] (b) *"If the unlawful killing is done in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing the offense committed would of course be murder of the first degree."*

In view of the decision in People v. Thomas, 25 Cal.2d 880, 898, 156 P.2d 7, the foregoing instruction was prejudicially erroneous. Mr. Justice Schauer speaking for our Supreme Court said at page 898 of 25 Cal.2d, at page 17 of 156 P.2d:

"A still more serious error appears in the instruction that 'If the unlawful killing is done without the provocation and sudden passion *which reduces the offense to manslaughter,* or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, *unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.'* (Italics added.) Such instruction is egregiously erroneous. If the jury followed it they were bound to find, upon the facts of this case, that the homicide was murder of the *first* degree if it was murder at all."

Such instruction was applicable to count one in the indictment charging defendant Smith with murder in the first degree.

[7, 8] Fourth: *The trial court committed prejudicial error in refusing to instruct the jury as follows:*

"In the event that you find that any of the confessions of a defendant introduced by the prosecution were not freely and voluntarily made by such defendant or were obtained from such defendant while he was irrational of mind, then you are free to disregard such confession in its entirety."

This proposition is untenable. There was not any evidence received tending to show that defendant Smith's confession was not freely and voluntarily made or obtained from him while he was irrational. On the contrary the confession which he made when arrested in Sacramento was received in evidence without objection, and at the time of the trial defendant Smith said that it was true except in certain particulars which he claimed he had related upon hearsay from his co-defendant Dorman.

The evidence disclosed that defendant Smith had been drinking when arrested. However, as pointed out above, he subsequently, at the time of his trial, admitted the statements he had made were true. Therefore the fact of his alleged intoxication would not make his confession involuntary or inadmissible. Where, as here, the evidence admits of no rational conclusion other than that the confession of defendant was freely and voluntarily made there is no necessity of the court instructing the jury as to the general rule of law relating to the receipt and consideration of confessions. (People v. Hubbell, 54 Cal.App.2d 49, 74, 128 P.2d 579.)

In view of our conclusions it is unnecessary to discuss other points urged by counsel.

Since the trial court committed prejudicial error in instructing the jury as to count one, murder in the first degree (see proposition Two (b), supra), the judgment of guilty as to count one is reversed.

No error appearing in the record as to

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kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

counts two and three, the judgments of guilty as to each count and the order denying the motion for a new trial as to such counts are and each is affirmed.

MOORE, P. J., and FOX, Justice pro tem., concur.

MARTIN et ux. v. LOPES et ux.*

Civ. 7174; Sac. 5730.

District Court of Appeal, Third District, California.

Dec. 21, 1945.

Rehearing Denied Jan. 18, 1946.

Hearing Granted Feb. 18, 1946.

1. Boundaries 🔑48(6)

Where joint owners of real property divided the land employing a surveyor to ascertain boundaries which boundaries were recognized and acquiesced in by respective owners as true boundaries by occupying and cultivating land and claiming title to respective parcels to boundary fences, for more than five years they and their successors in title were estopped from asserting that the line fences thus erected and maintained by agreement were not the true boundaries.

2. Boundaries 🔑48(6)

The title to an agreed boundary line by acquiescence is an equitable doctrine which estops the parties and their successors in title from disputing title to land thus acquired.

3. Trial 🔑395(9)

Reference in findings to title by adverse possession may be disregarded as surplusage where other findings adequately supported judgment quieting title on doctrine of title by agreement and acquiescence.

4. Boundaries 🔑48(7)

Where co-owners of land divide their property by deeds of conveyance for purpose of separating their interests and are uncertain of proper dividing lines, but mutually agree upon definite division lines upon which they construct and maintain fences acquiescing therein as the true line for period of more than five years, they and their successors in title may in absence of fraud be estopped from thereafter disputing such division lines.

5. Boundaries 🔑48(6)

When real boundary line between contiguous landowners is known to them, neither of them may acquire title by acquiescence beyond such line by merely building a fence upon the other's property and cultivating and claiming the land to that point.

6. Boundaries 🔑48(7)

Title to land by acquiescence is founded on an agreement when an uncertainty exists as to the true line.

7. Boundaries 🔑48(7)

Title to real property may be acquired by agreement or acquiescence without actual dispute between the parties regarding the true division line, it being sufficient if it appears that they were uncertain of the true line, and therefore agreed to a designated and certain boundary.

8. Boundaries 🔑49

The determination of an uncertain boundary line between the owners of real property should be controlled by their intention with respect to its location.

◆

Appeal from Superior Court, Merced County; H.S. Shaffer, Judge.

Action by John C. Martin and wife against Joe R. Lopes and wife seeking to quiet title to real property, wherein defendants filed a cross-complaint. Judgment for plaintiffs and defendants and cross-complainants appeal.

Affirmed.

Gilbert Moody, of Turlock, for appellants.

Preston, Braucht & George, of Merced, for respondents.

THOMPSON, Justice.

The defendants and cross-complainants have appealed from a judgment quieting title to real property in plaintiffs.

The plaintiff, John C. Martin, and his brother Frank were joint owners of the East half of the Southeast quarter of Section 28, Township 5 South, Range 11 East, M.D.B. and M., consisting of 80 acres of farm land in Merced County. They purchased the land from the Commercial Bank of Turlock, February 19, 1924, and farmed it jointly, as copartners, for eight years. In 1932 they agreed to sever their interests and to divide the ranch equally between themselves. They employed a surveyor, divided the cost of his services and personally assisted him in running the lines. The surveyor marked the lines by driving stakes at the corners, but inadvertently placed them in the ground 20 to 30 feet on Frank's portion of the land. Believing that the stakes marked the proper lines, the brothers then constructed fences along the lines marked by the stakes, and thereafter occupied and cultivated their respective portions to the fence lines for more than eight years without knowledge that the fence lines did not conform to the surveyed descriptions. They assumed the fences marked the correct division lines in accordance with the descriptions prepared by the surveyor. No controversy between the brothers ever occurred in that regard.

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* Subsequent opinion 170 P.2d 881.

When the surveys were completed, in accordance with their agreement to divide the ranch equally between them the brothers and their wives conveyed the 80 acre ranch to Pearl Polley on February 29, 1932. She was a mere intermediary through whom the titles were conveyed. On the last-mentioned date Pearl Polley deeded to Frank C. and Olga A. Martin the southwesterly 40 acres of the ranch described as follows: "Beginning at a point 544.7 feet West of the true southeast (SE) corner of Section 28, Township Five (5) South, Range Eleven (11) East, Mount Diablo Base and Meridian, Merced County, California, thence North 2254 feet, thence west 788.5 feet, thence South 2254 feet, thence East 779.3 feet to the place of beginning and containing 40.3 acres of land, more or less."

On the same date Pearl Polley deeded to John C. and Mary D. Martin the following described tract: "Beginning at the true southeast (SE) corner of Section Twenty-eight (28) Township Five (5) South, Range Eleven (11) East, Mount Diablo Base and Meridian, Merced County, California, thence North 2640 feet, thence West 1349 feet, thence South 386 feet, thence East 788.5 feet, thence South 2254 feet, thence East 544.7 feet to the place of beginning, and containing 40.3 acres of land, more or less."

June 17, 1941, for a valuable consideration, Frank C. Martin, then a widower, conveyed to his daughter Mary, and her husband, Joe R. Lopes, the appellants herein, his 40 acre tract described in exact accordance with the deed to him and his wife. Thereafter Mr. and Mrs. Lopes occupied and cultivated that land to said line fences.

The Lopes tract is adjacent on the west to the east lines of separate properties owned by J. J. Moran and Arthur C. and Eva May Rapp, respectively. In 1943, W. E. Bedesen, County Surveyor of Merced County, made a survey, at the request of Mr. Rapp, of all the quarter section of land in question. He testified that he found all four true section corners marked by monuments, from which he took his courses and distances, and ascertained that the fence which encloses the Lopes property does not conform to the description, location or distances stated in the deed from Frank Martin. For instance, Mr. Bedesen said that the actual distance from the monument which he found at "the true southeast corner of section twenty-eight," from which the first course of the Lopes deed was figured, to the southeast corner of the Lopes property, where the fence stands, is actually 555.19 feet instead of only 544.7, as that deed states. That would place the southeast corner of the Lopes property over 10 feet east of the fence at that point. The county surveyor also stated that the Lopes fence on his westerly side overlapped the Rapp property more than twenty feet. That may be immaterial in this action. Mr. Rapp is not a party to this suit. The surveyor communicated those erroneous descriptions to Mr. Lopes, who then, for the first time, claimed that he owned the strip of land some 20 feet in width east of the fence intervening between his property and that of the plaintiffs. Lopes dug a ditch along that disputed strip and claimed the property. This suit was commenced by plaintiffs September 23, 1944, to quiet title to all of that portion of the original 80 acre ranch formerly owned by the Martin brothers, which is located east and north of the fences enclosing the Lopes property. The plaintiffs' property is described in the complaint by metes and bounds, with reference to the existing fences. The measurements contained in plaintiffs' complaint conform to the map which was prepared by the County Surveyor in 1943, which was received in evidence. It discloses the errors which occurred in the survey made by the Martin brothers.

The defendants answered the complaint, denying the material allegations thereof. They also filed a cross-complaint asking to quiet title to land described as: "Beginning at a point 544.7 feet west of the true Southeast corner of Section 28, Township 5 South, Range 11 East, Mount Diablo Base and Meridian, Merced County, California, thence North 2285.4 feet; thence West 788.5 feet; thence South 2296 feet, thence East 779.3 feet to the place of beginning."

Upon trial, both Frank and John Martin testified to the division of their 80 acre ranch by agreement as previously related, together with the building of the fences and subsequent possession and use of their respective tracts. The map of the quarter section containing the measurements of property lines, prepared by W. E. Bedesen in 1943, was received in evidence, and its accuracy confirmed by his testimony that the measurements were true and correct. There is no conflict of evidence regarding the true measurements. It is uncontradicted that the deeds to the two brothers do not conform to the lines upon which the fences were constructed.

Upon that evidence the court adopted findings determining that the allegations of the complaint are true; that the allegations of the answer and cross-complaint in conflict therewith are untrue; that the two brothers who were joint owners of the 80 acre tract "agreed to divide the property between themselves" and "being uncertain as to the line between their agreed parcels" executed deeds and built fences and occupied and used their respective tracts in conformity with the fence lines. The court definitely determined that "the true and agreed boundary line" is established by the fences which were built and recognized as the property lines for more than the statutory period of five years.

Judgment quieting title in plaintiffs was thereupon rendered. The judgment does not specifically refer to the cross-complaint. That is, however, immaterial since the findings which were adopted are adverse to the defendants on every essential issue presented by the cross-complaint, and the judgment affirmatively quiets title in plaintiffs and against the defendants. No issue presented by the cross-complaint is left undecided. There is no merit in appellants' contention that the court failed to determine the issues presented by the cross-complaint.

[1] We are of the opinion the findings and judgment quieting title in plaintiffs to their land to the division fences on the north and east boundaries of defendants' land are supported by the evidence. There is ample evidence that title to plaintiffs' land up to said fences was acquired by them, under the well-established rule in California, by agreement and acquiescence. There is satisfactory proof that Frank and John Martin were co-owners of the 80 acre ranch prior to 1932, and that they then agreed to separate their interests and divide the ranch; that, being uncertain of the proper dividing lines, they constructed fences between their separate allotments along lines indicated by stakes which were set by a surveyor whom they jointly hired and paid and that, for more than eight years thereafter those division fences were recognized and acquiesced in by the respective owners of the adjoining properties as the true boundaries, by occupying and cultivating the land and by claiming title to their respective parcels to those boundary fences. Deeds of conveyances to their respective parcels of land were executed by the brothers. Under the circumstances of this case, the brothers and their successors in title are estopped from asserting that the said line fences thus erected and maintained by agreement are not the true boundaries of their respective properties.

[2, 3] It is true that the court included in its findings a statement that plaintiffs "have had the open, notorious and exclusive possession and occupancy [of their land] and have paid all the taxes or assessments levied or assessed on said property." There may be an absence of evidence to show that plaintiffs paid taxes on the narrow strips of land adjacent to the division fences which were not included in the description of land contained in their deed. Pedersen v. Reynolds, 31 Cal.App.2d 18, 29, 87 P.2d 51. But that is immaterial since the court very fully and explicitly determined that plaintiffs acquired title to those disputed strips of land by agreement and acquiescence, as distinguished from title by adverse possession. Clearly this case was tried and determined on the theory of title by acquiescence, which does not depend upon payment of taxes on the disputed strip. Title to an agreed boundary line by acquiescence is an equitable doctrine which estops the parties and their successors in title from disputing title to land thus acquired. The reference in the findings to

title by adverse possession, by the use of the foregoing quoted language, may be disregarded as surplusage. Other findings adequately support the judgment quieting title in plaintiffs on the doctrine of title by agreement and acquiescence.

The California decisions uphold the doctrine of estoppel, in support of title by acquiescence, under circumstances similar to the facts of this case. It has been held that the location of a division fence in accordance with stakes placed in the ground by a surveyor jointly employed by the parties, and the maintenance of that fence for more than five years as the true line, even though that line is subsequently discovered to be at variance with the descriptions of the parcels prepared by that surveyor, are nevertheless persuasive evidence of title by acquiescence. The intention of the parties, in that regard, is the controlling element.

[4] When co-owners of land divide their property by deeds of conveyances for the purpose of separating their interests therein, and they are uncertain of the proper dividing lines, but mutually agree upon definite division lines upon which they construct and maintain fences acquiescing therein as the true lines for a period of more than five years during which they occupy and cultivate their respective parcels to the said division fences, they and their successors in title may, in the absence of fraud, be estopped from thereafter disputing such division lines. Silva v. Azevedo, 178 Cal. 495, 173 P. 929. The rule of title by agreement or acquiescence, under such circumstances, is the same which applies to similar titles by agreement between separate owners of contiguous real property where the owners are uncertain of the boundaries and agree to definite dividing lines upon which they build fences and thereafter possess and cultivate their respective parcels for five years or more to such fences, or construct valuable improvements on said portions, even though they were mistaken as to the true dividing lines. Numerous California cases and those from other jurisdictions recognize the last-mentioned rule. Hannah v. Pogue, 23 Cal.2d 849, 856, 147 P.2d 572; Park v. Powers, 2 Cal.2d 590, 599, 42 P.2d 75; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; Young v. Blakeman, 153 Cal. 477, 95 P. 888; 4 Cal.Jur., sec. 53, p. 427, and sec. 61, p. 439; 97 A.L.R. 58 note.

[5, 6] It is true that when the real boundary line between contiguous land owners is known to them, neither of them may acquire title by acquiescence beyond such line by merely building a fence upon the other's property and cultivating and claiming the land to that point. Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353. Title to land by acquiescence is founded on an agreement when an uncertainty exists as to the true line.

[7] For the purpose of acquiring title to real property by agreement or acquiescence, it is not necessary there should be an actual dispute between the parties regarding the true division line. It is sufficient if it appears that they were *uncertain* of the true line and therefore agreed to a designated and certain boundary upon which they construct a fence and occupy and cultivate or improve their respective properties to that division fence for more than the statutory period of five years. Moniz v. Peterman, supra; Price v. De Reyes, 161 Cal. 484, 119 P. 893; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877; 4 Cal.Jur. 429, sec. 54; 8 Am. Jur. 804, sec. 82.

In the case of Silva v. Azevedo, supra, judgment for plaintiff, ejecting the defendant from a six and a half acre strip of land in dispute, was reversed. In 1908, the parties to that suit agreed that Azevedo would take a deed to 126 acres of land to be purchased by them, with a stipulation that they would subsequently divide it equally. Azevedo took title and executed a deed to Silva for the east half thereof. The Silva deed described his tract by metes and bounds. A fence was built by them on a line indicated by stakes driven in the ground to mark the boundary. The stakes did not conform to the description in the deed. The respective parcels of land were thereafter occupied and cultivated to the division fence by the respective parties for a period of six years. Later Mr. Silva discovered that the fence had been placed, by mistake, 70 feet over on his land. He then brought suit to eject Azevedo from that 70-foot strip. The trial court rendered judgment in favor of Silva. On appeal the judgment was reversed.

Azevedo claimed that, regardless of the mistake in locating the fence, and despite the discrepancy between the location of the stakes and the description contained in the deed, the fence was agreed upon by the parties as the dividing line between their properties, and that he therefore acquired title to the disputed strip by acquiescence, both parties having occupied and cultivated their respective tracts to the division fence for more than five years, and that Silva was estopped from disputing that boundary line. The Supreme Court so held. That is the exact situation in the present case.

The Silva appeal was based on facts comparable to those of the present case. It appears to be determinative of the issues in this action. The trial court in that case found "there was no uncertainty as to the location of the boundary line, and no agreement between the parties that the fence line should be taken to be the true boundary." The Supreme Court said, "We think, however, that these findings * * * are without support in the evidence." In the Silva case, the Supreme Court quotes with approval the rule with respect to titles of adjoining property owners acquired by agreement or acquiescence, found in Young v. Blakeman, 153 Cal. 477, 95 P. 888. Applying that rule to the facts of the Silva case, the court said:

"* * * Before the execution of the deed from Azevedo to Silva the entire tract theretofore acquired by Azevedo had not been divided, nor had the boundary line between the east and west halves thereof been marked upon the ground; that Azevedo and Silva, acting jointly, engaged a surveyor to survey the tract, to divide the same into east and west halves, to furnish a particular description by metes and bounds of the east half for use in the deed to be executed, and to locate upon the ground, by means of stakes, the division line between the east and west halves. The surveyor made the survey and furnished the description, which was carried into the deed. * * * He also established a line of stakes upon the ground, *but by mistake located these stakes too far to the east,* thus throwing the disputed strip into the westerly subdivision of the tract. *Neither Silva nor Azevedo knew of said mistake. The two joined in building a substantial fence on the line marked by the stakes, believing such line to be the true line called for by the deed.* * * * It appears, further, that one-half of the surveyor's charge was paid by each of the parties, and that each contributed one-half of the money and the labor expended in the building of the fence.

"On this state of facts, we think there was no room for any other inference than that the line indicated by the surveyor [by fixing the stakes on the ground] as the dividing line between the two holdings, and followed by the erection of a fence by the two parties, was agreed on by them as the true boundary." (Italics added.)

[8] It is true that the determination of an uncertain boundary line between the owners of real property should be controlled *by their intention* with respect to its location. Miller & Lux, Inc., v. Secara, 193 Cal. 755, 762, 227 P. 171; Mammoth Gold Dredging Co. v. Forbes, 39 Cal.App.2d 739, 750, 104 P.2d 131; Machado v. Title Guarantee & Trust Co., 15 Cal.2d 180, 186, 99 P.2d 245; 4 Cal.Jur. 373, sec. 2. But the Silva case determines that, under the circumstances of this case, where the respective parties hire a surveyor and build a dividing fence on the line indicated by stakes driven in the ground by the surveyor and the owners thereafter use, possess, and cultivate their respective tracts to that party line fence for the statutory period of more than five years, the fence prevails as the agreed dividing line over the description contained in the deed, notwithstanding the variance in description or the mutual mistake of the parties in that regard. In the Silva case, the Supreme Court said: "When, then, acting upon the information so given them, they joined in the construction of a substantial fence on the line, and proceeded, respectively, to improve and cultivate up to the fence, the only theory upon which their acts can reasonably be explained is that they had agreed upon the fence line as the true location of the west boundary of the land conveyed to Silva. It is true that both were mistaken in believing that the line so fixed was the true line. But this does not prevent the application of the rule. Sneed v. Osborn, [25 Cal. 619]; Biggins v. Champlin, 59 Cal. 113."

The foregoing decision of the Supreme Court leaves no room for doubt with respect to the conclusiveness of the title by acquiescence, under the circumstances of this case, notwithstanding the variance between the description of the land contained in the deed to John C. Martin and his wife, and the actual location of the fence upon the ground in accordance with the stakes placed by the surveyor employed by the brothers. The subsequent reference to and approval by the Supreme Court of the Silva case in Vowinckel v. N. Clark & Sons, supra, 217 Cal. at page 261, 18 P.2d at page 59, and in Moniz v. Peterman, supra, 220 Cal. at page 437, 31 P.2d at page 357, render the Silva case determinative of this appeal.

The authorities cited and relied upon by appellants on the subject of title by agreement or acquiescence are not in conflict with the Silva case. They are based on different facts which failed to show that the parties agreed to a definite dividing line between their properties. In those cases it was held the intention of the parties to accept the asserted division fences as the true lines was not established. The intention of the parties in that regard is the controlling element in establishing title by acquiescence.

The case of Janke v. McMahon, 21 Cal. App. 781, 133 P. 21, was a suit to recover possession of a disputed strip of land, and to quiet title thereto, on the doctrine of adverse possession, as distinguished from title by acquiescence. The elements of proof necessary to establish title by adverse possession are quite different.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

PEOPLE v. SANTA FE FEDERAL SAVINGS & LOAN ASS'N.*

Civ. 7128; Sac. 5961.

District Court of Appeal, Third District, California.

Dec. 21, 1945.

Hearing Granted Feb. 18, 1946.

1. Taxation 🔑585

The word "delinquent" as used in statutes relating to taxation means nothing more than overdue and unpaid.

See Words and Phrases, Permanent Edition, for all other definitions of "Delinquent".

2. Constitutional law 🔑284(2)
Taxation 🔑319(1)

While a taxpayer, if he demands it, is entitled to a hearing at some stage of the proceedings for the collection of a tax, an administrative hearing is not a prerequisite unless made so by statute and constitutional requirements are met if taxpayer is given an opportunity for a hearing in subsequent proceedings for collection of tax or in an action for a refund where it is provided by statute that he may pay tax under protest and sue for its recovery.

3. Taxation 🔑586

Taxpayer, sued for delinquent bank and corporation franchise tax on ground of fraud in sale of assets showing a purported loss, was not entitled to an administrative hearing before action was brought to collect the tax, since the statute provides for hearing in the proceeding for collection of tax or in an action for refund pursuant to statute authorizing payment of tax under protest and suit for recovery. Code Civ.Proc. § 338, subd. 1, 4; § 340, subd. 2, § 343. Gen. Laws 1937, Act 8488, §§ 25, 28, 30, 31.

4. Action 🔑35

A "cumulative remedy" is one created by statute in addition to one which still remains in force.

5. Constitutional law 🔑284(2)
Taxation 🔑37

The statute authorizing action for collection of delinquent bank and corporation franchise taxes without affording taxpayer an opportunity to administrative hearing is not unconstitutional as depriving taxpayer loan association of opportunity to be heard on issue of fraud in a sham sale of assets as fully as if it had been granted an administrative hearing. Gen.Laws 1937, Act 8488, § 31.

6. Taxation 🔑836

The amendment to the Bank and Corporation Franchise Tax Act authorizing imposition of penalty against taxpayer in case of fraud does not apply to fraudulent returns made prior to its enactment. Gen. Laws 1937, Act 8488, §§ 19, 24(b).

7. Statutes 🔑263, 266

Laws creating new obligation and imposing new duties or exacting new penalties because of past transactions do not operate retrospectively and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears.

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* Subsequent opinion 171 P.2d 713.

8. Taxation ⚷407, 586, 835, 845

Franchise tax commissioner, assessing a deficiency and penalty against a loan association on ground of fraud in return, was not required to proceed under statute requiring notice to taxpayer and if requested, an oral hearing, but could bring an action for collection of tax without any such administrative hearing. Gen. Laws 1937, Act 8488, §§ 24(b), 25, 28, 31.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the People of the State of California against Santa Fe Federal Savings & Loan Association to recover an amount alleged to be due for franchise tax. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

Robert W. Kenny, Atty. Gen., and John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for appellant.

Surr & Hellyer, of San Bernardino, for respondent.

ADAMS, Presiding Justice.

The State of California, through the Franchise Tax Commissioner, instituted this action to recover from defendant and respondent the sum of $21,212.76, together with interest thereon at the rate of six percent per annum from March 15, 1935. The complaint alleged that defendant was a corporation engaged in lending money on security of real estate and was subject to the provisions of the Bank and Corporation Franchise Tax Act, Deering's Gen. Laws, Act 8488; that on March 1, 1935, defendant filed its franchise tax return for 1935 and therein deducted from income of $176,773 a purported loss arising from a sale to one John C. Ralphs, and by reason of such deduction reduced its franchise tax liability from $14,466.85 to $325.00; that the sale was a sham and was fraudulent and was made to establish a fictitious loss and with intent to evade the tax; that about May 1, 1939, the Franchise Tax Commissioner discovered that the sale was fraudulent and made with intent to evade franchise taxes, and that the state was defrauded of $14,141.84; that on July 19, 1939, he issued and mailed to defendant an assessment against it of said amount; and that on July 3, 1940, the commissioner, having determined that the deficiency of $14,141.84 was due to fraud and was the result of intent of defendant to evade the tax, assessed a penalty of 50% of the deficiency, pursuant to section 24(b) of the act, and thereupon mailed defendant a notice thereof.

There was no demurrer to the complaint. A demurrer would have tested the legal questions now before this court. However, respondent chose to answer, and in so far as it is material to a determination of this appeal, its answer denied the fraud and set up several separate defenses, namely: that no notice of proposed additional tax was ever mailed or given as required by section 25 of the act; that the assessment was arbitrarily made without notice and without allowing defendant any opportunity to protest or be heard and therefore was made without authority of law and is wholly void; that within sixty days after the Franchise Tax Commissioner mailed notice of the additional assessment, defendant served the commissioner with a written protest under oath against the levy of the additional tax, in which protest it requested an oral hearing, and that the commissioner never acted upon such protest and request; that the additional assessment had not become final because of the failure of the commissioner to grant the requested oral hearing, and that such hearing was a necessary prerequisite to the institution of the action. It also invoked the provisions of subdivisions 1 and 4 of section 338, subdivision 2 of section 340, and section 343, of the Code of Civil Procedure.

Upon the trial of the action evidence was introduced by both parties, and at the conclusion the trial court filed a written opinion in which it stated: "It seems to the Court that there can be no question but that the purpose of the purported sale to Ralphs was merely an attempt to avoid payment of the tax to the State. * * * As a matter of fact, it has been frankly admitted that one of the reasons for the conveyance was to avoid payment of the franchise tax * * * and the so-called sale was in fact no sale at all, but a pretended sale and a sham"; and in that opinion the evidence supporting its conclusion that fraud had been intentionally committed by defendant was reviewed. However, judgment was rendered for defendant on procedural grounds, the court concluding that the provisions of section 25 of the act were applicable, that defendant was entitled to notice of the proposed additional assessment and to a hearing thereon before the commissioner as a prerequisite to the filing of the action, and that no such hearing having been granted, defendant was entitled to judgment.

The paramount question on this appeal is whether defendant was entitled to such administrative hearing before action brought.

Section 25 of the act, during the period involved in this action, provided that upon the filing of an original return the commissioner should examine it and if he determined that the tax disclosed was less than that disclosed by his examination, he should mail notice to the taxpayer of the additional tax proposed to be assessed, said notice to set forth the details of the proposed additional assessment; that within 60 days after mailing of said notice the taxpayer might file a written protest under oath against the levy of the additional tax, specifying the grounds of protest; that if no protest was so filed the amount of the tax should be final upon the expiration of 60 days, but if protest were filed it should be the duty of the commissioner to reconsider the computation and levy, and if so requested, grant to the taxpayer an oral hearing; that the commissioner's action after such hearing should be final after 30 days from date of mailing notice thereof to the taxpayer unless appeal was taken to the Board of Equalization; that upon such appeal the board should hear and determine same, its determination to be final upon the expiration of 60 days. Said section also provided that *except in the case of a fraudulent return,* every notice of additional tax proposed to be assessed should be mailed to the taxpayer within three years after filing of the return, and, if not so mailed, no deficiency should be assessed or collected with respect to the year for which said return was filed. Section 28 of said act then provided:

"In the event that fraud or evasion on the part of a taxpayer is discovered by the commissioner, he shall have the power and it shall be his duty to determine the extent to which the state has been defrauded and to compute and charge against the taxpayer a tax in that amount which shall be immediately due and payable."

The state contends that since fraud was discovered the commissioner had the power, under section 28, to make the additional assessment without giving defendant a hearing and that the provisions of section 25 did not apply. Defendant argues that the commissioner must, in all cases, follow the procedure outlined in section 25, and that the act is unconstitutional if no right to an administrative hearing is given.

The trial court's findings and its opinion indicate that its judgment was based upon a conclusion that under the statute respondent was entitled to an administrative hearing under section 25 in all such cases. The reasoning of the court seems to be based upon the language of section 31 of the act as it read before its amendment in 1939, as it said, in substance, that a taxpayer could not be said to be "delinquent" when he had had no notice that he was charged with the payment of the tax imposed by the commissioner; and that authority to bring an action such as this was dependent upon the delinquency of the taxpayer.

Section 31 as it read before the 1939 amendment provided:

"At any time within three years after *the delinquency of any tax,* penalties, and interest, or any installment thereof, the commissioner may bring an action in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California to collect the amount delinquent, together with penalties, and interest * * *. In such action a writ of attachment may be issued, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the commissioner showing the delinquency shall be prima facie evidence of the levy of the tax, penalties, and interest, of the delinquency and of compliance by the commissioner and the State Board of Equalization with all the provisions of this act in relation to the computation and levy of the tax." (Italics added.)

[1] But said section refers to the delinquency of the tax and not of the taxpayer; and the word "delinquent," as used in statutes relating to taxation, means nothing more that "overdue" and "unpaid." Jenswold v. Minnesota Canal Co., 93 Minn. 382, 101 N.W. 603, 604; Casareto v. Johnson, 63 S.D. 460, 260 N.W. 705, 707; Ryan v. Roach Drug Co., 113 Okl. 130, 239 P. 912, 918; Tallman v. Board of Commissioners, etc., 185 Ark. 851, 49 S.W.2d 1039, 1040. And as under section 28 the tax be-

came "immediately due and payable" when the commissioner, after discovery of the fraud, had computed and charged it against the taxpayer, the tax was delinquent from and after that date. The provision of section 28, that where the state has been defrauded the tax shall become *"immediately due and payable,"* indicates that the legislature intended that the commissioner should act in a more summary manner in cases of fraud. If it had intended that the provisions of section 25 should apply where fraud was discovered, it would not have provided that the tax should become immediately due, since, where proceedings are had under section 25, the tax does not become immediately due, but only after the expiration of the time allowed for protest, and not then if protest be filed, for it provides that "when a deficiency has been determined and the tax has become final *under the provisions of this section,* the commissioner shall mail notice and demand to the taxpayer for the payment thereof, and such tax shall be *due and payable at the expiration of ten days* from the date of such notice and demand." (Italics ours.) Also the provision that *except in the case of a fraudulent return* every notice of additional tax proposed to be assessed should be mailed to the taxpayer within three years after the return was filed and no deficiency should be assessed or collected unless such notice was mailed within such period, indicates an intention that a different course was to be pursued in case of fraud. It is entirely reasonable that the legislature should have provided a different procedure in such cases, since summary action against those who have resorted to fraud in order to deprive the state of taxes justly due, may well be necessary to protect the state and to enable it to take immediate steps to protect its revenues by suit and attachment or by seizure and sale. For it is not unfair to assume that a taxpayer who has resorted to fraud in the making of its return might resort to delaying tactics in order to dispose of or encumber its assets to defeat collection.

[2, 3] As for respondent's argument that the act is unconstitutional if no right to an administrative hearing is provided, while it is doubtless true that a taxpayer, if he demands it, is entitled to a hearing at some stage of the proceedings for the collection of a tax, an administrative hearing is not such a prerequisite unless made so by statute. Constitutional requirements are met if a taxpayer is given an opportunity for a hearing in subsequent proceedings for collection of the tax or in an action for a refund where it is provided by the statute that he may pay the tax under protest and sue for its recovery. Both proceedings are provided for in the act under consideration. Section 30 provides for the latter course, and section 31 for the former, which was pursued here.

In Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247, the court held that the Constitution of the United States was satisfied if an opportunity was given to question the validity of a tax either before the amount was determined or in subsequent proceedings for its collection. That case is cited in Weyerhaeuser v. Minnesota, 176 U.S. 550, 20 S.Ct. 485, 44 L.Ed. 583. Also see McMillen v. Anderson, 95 U.S. 37, 24 L.Ed. 335; People v. Skinner, 18 Cal. 2d 349, 115 P.2d 488, 149 A.L.R. 299, and cases therein cited; State Tax Commission v. Board of Supervisors, 43 Ariz. 156, 29 P.2d 733, 739; Powell v. Gleason, 50 Ariz. 542, 74 P.2d 47, 51, 52, 114 A.L.R. 838.

Central of Georgia R. Co. v. Wright, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134, 12 Ann. Cas. 463, is relied upon by respondent. There actions were begun by the railroad company to enjoin the enforcement of executions issued for taxes assessed on shares of the stock of a railway company owned by plaintiff. Respondent reads that case as holding that an administrative hearing was essential; but such was not the decision, for there the decision of the comptroller as to valuation was, by the statute, made conclusive unless it could be shown that he had acted in bad faith. There was no provision for relief in the courts upon proceedings brought to collect the taxes, or by bill to enjoin their collection. The opinion states, 207 U.S. at page 141, 28 S.Ct. at page 52, 52 L.Ed. at page 143, 12 Ann. Cas. 463:

"As we have seen, the system provided in Georgia by the statutes of the state as construed by its highest court requires of the taxpayer that he return all his property, whether its liability is fairly contestable or not, upon pain of an ex parte valuation, against which there is no relief in the tax proceedings *or in the courts,* except in those cases where fraud or corruption can be shown in the action of the assessing officer." (Italics added.)

In that very case the court cited Security Trust & S. V. Co. v. Lexington, 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204, stating that it had been there held that, before an assessment of taxes could be made upon omitted property, notice to the taxpayer, with an opportunity to be heard, was essential; that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace; but it further held that where the procedure in a state court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax, in a proceeding to enjoin its collection, the requirement of due process of law was satisfied.

Furthermore, since 1933 section 31 has provided that the remedies therein set forth shall be cumulative. It states:

> "It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the commissioner shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act."

[4] It is said in 1 Bouv.Law Dict., Rawle's Third Revision, p. 737, that "A cumulative remedy is one created by statute in addition to one which still remains in force." Also in 3 Cooley, Taxation, 4th Ed., p. 2633, sec. 1332, it is stated: "If two or more statutory remedies are provided for, one of them being a personal action to collect the tax, it is generally held that the remedies are cumulative." In Shriver v. Woodbine Savings Bank, 285 U.S. 467, 479, 52 S.Ct. 430, 434, 76 L.Ed. 884, 892, the court said: "Administrative remedies for the collection of taxes, if not made exclusive by statute, do not preclude the recovery of the tax by a common-law action of debt." Also see Commissioner of Banks v. Highland Trust Co., 283 Mass. 71, 186 N.E. 229, 231. In United States v. Chamberlin, 219 U.S. 250, 262, 263, 31 S.Ct. 155, 159, 55 L.Ed. 204, 210, the rule is thus stated: "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used. But whether the government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive."

The foregoing rule was adopted by our Supreme Court in Scripps Memorial Hospital v. California Employment Commission, 24 Cal.2d 669, 673, 151 P.2d 109, 112, 155 A.L.R. 360. That case involved the question of whether the plaintiff, which had paid a tax and was suing for its recovery, was compelled to pursue a course before the commission before it was entitled to institute an action at law. In deciding the matter the court said:

> "Section 45.5 which was added to the act in 1939, provides that an employer against whom an assessment has been made may ask for a reassessment but it is not provided that this must be done before any other relief will be available. On the other hand, section 45.10, which was added to the act in the same year, expressly provides that any employer may pay any contribution sought to be collected under protest and may then bring an action to recover the amount thus paid.
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> * * * * * *
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> "If it may be said that there was here an administrative remedy provided by this statute and by the rules of the commission which was available to the respondent it cannot be said that that remedy was exclusive or that its exercise was a necessary precedent to the use of the other remedy expressly given by the statute. None of the cases cited in support of the usual rule go to the extent of holding that that rule applies as against another remedy expressly provided in the same statute, which creates the administrative remedy. It would be somewhat illogical to require one who claims an exemption from such an assessment to follow a precedure in which he must ask for a pretended reassessment before he may follow the direct remedy applicable to his case which is also provided in the same statute and expressly made available to him. While the Legislature could have so provided we cannot believe that it intended to do so here. The right to pay under protest and bring such an action is directly given in this statute without qualification, and it is not for the courts to add conditions to the exercise of that right which are not imposed by the statute. Assuming that an administrative remedy existed the most that can be said is that alternative remedies were available to the

respondent, and the court correctly refused to grant the motions to dismiss."

[5] Respondent seems to take the position that because it was not granted a hearing pursuant to the provisions of section 25 of the act, it has not been granted a hearing at all. But such is not the case. It has not paid the tax, and in the action filed by the state for its collection it has been afforded and has taken full advantage of an opportunity to be heard. The issue of fraud was raised in plaintiff's complaint, and in its answer respondent not only denied the fraud but set up six separate defenses; and both parties produced evidence on the issues tendered. Therefore it cannot be said that the act is unconstitutional as depriving respondent of an opportunity to be heard on the issue of fraud as fully as if it had been granted an administrative hearing.

While we are satisfied that the commissioner was not required to grant an administrative hearing in this case as a prerequisite to the filing of the action, whether or not he was justified in imposing the 50% penalty assessed against respondent for fraud presents another question. The return which he found to have been fraudulent was made March 1, 1935. The amendment to the act providing for the imposition of the penalty in such cases, subd. (b) of sec. 24, was not enacted until 1937. Said act as amended, Stats.1937, p. 2349, sec. 19, also provided:

> "The provisions of this act effecting changes in the computation of taxes imposed by the Bank and Corporation Franchise Tax Act shall be applied only in the computation of the taxes for taxable years commencing after December 31, 1937. The remaining provisions of this act shall become effective on the effective date of this act."

[6-8] In view of this intention expressed by the legislature, and the nature of the amendment to section 24, we are of the opinion that the provision for the imposition of the 50% penalty was not intended to and does not apply to fraudulent returns made prior to its enactment. Statutes imposing penalties for past omissions by a taxpayer have been held invalid as retrospective (2 Cooley, Taxation, 4th ed., sec. 526). But whether such statutes are invalid or not, it is well established, as was said in Pignaz v. Burnett, 119 Cal. 157, 160, 51 P. 48, 49, that "Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect, unless the contrary clearly appears." To the same effect see Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 77 A.L.R. 1327; In re Estate of Childs, 18 Cal.2d 237, 247, 115 P.2d 432, 136 A.L.R. 333; In re Estate of Potter, 188 Cal. 55, 65, 204 P. 826; In re Estate of Parker, 200 Cal. 132, 142, 251 P. 907, 49 A.L.R. 1025; Anderson v. Derrick, 220 Cal. 770, 775, 32 P.2d 1078. And as was said in Lewellyn v. Frick, 268 U.S. 238, 252, 45 S.Ct. 487, 69 L.Ed. 934, 937, laws are not to be considered as applying to cases which arose before their passage when they impose an unexpected liability that, if known, might have induced those concerned to avoid it. Also see Blodgett v. Holden, 275 U.S. 142, 149, 276 U.S. 594, 48 S.Ct. 105, 72 L.Ed. 206, 211; Massa v. Nastri, 125 Conn. 144, 3 A.2d 839, 841, 120 A.L.R. 939, and cases there cited.

Here not only do the foregoing principles apply, but the legislature has specifically limited the application of the amendments of 1937; and had it intended them to apply retrospectively it would doubtless have so stated.

[9] We have reviewed the testimony adduced before the trial court and are satisfied that it amply supports the conclusion expressed in its opinion that the return made by respondent was fraudulent and that the sale upon which it based its purported loss was a sham and was made for the purpose of establishing a fictitious loss and with intent to evade the state franchise tax. We are also satisfied that it was not essential that the commissioner proceed under the provisions of section 25 of the act. The judgment is therefore reversed with directions to the trial court to amend its findings and conclusions of law in conformity with the views herein expressed and to enter judgment accordingly.

PEEK and THOMPSON, JJ., concur.

ROBINSON et al. v. PULS et al.
PULS v. ROBINSON.*

Civ. 12842.

District Court of Appeal, First District,
Division 2, California.

Dec. 20, 1945.

Rehearing Denied Jan. 19, 1946.

Hearing Granted Feb. 14, 1946.

1. Jury 🔑13(14)

Where an action involves both legal and equitable issues, any party is entitled to trial by jury of the legal issues.

2. Jury 🔑25(8)

In an action involving issues both legal and equitable, a general demand for jury trial of the entire action is insufficient, and a denial of such a general demand is not error.

3. Jury 🔑25(6)

Announcement that a jury is required must be made at time the cause is first set for trial, and, if announcement is not made to court at time of such setting, a waiver of right to jury results. Code Civ.Proc. § 631, subd. 4.

4. Jury 🔑25(8)

Where case involves both legal and equitable issues, the trial court should be specifically pointed to the particular issues as to which a jury trial is demanded, so that the judge may then determine whether the designated issues are legal or equitable. Code Civ.Proc. § 631, subd. 4.

5. Jury 🔑25(8)

Denial of jury trial in case involving both legal and equitable issues was not error, where counsel demanding a jury trial did not designate particular issues as to which a jury trial was demanded. Code Civ.Proc. § 631, subd. 4.

6. Evidence 🔑376(1, 6)

In the case of books kept by person still living and available as a witness, one of the items of foundational proof for the admission of such books is that the entries were made at the time or within reasonable proximity to the time of the respective transactions.

7. Evidence 🔑376(1, 4, 8), 383(8)

Books of account of deceased may be introduced into evidence on proof that they are in his own handwriting without requiring the additional foundational proof of the times at which the entries were made, the weight of such evidence being left to the trier of the facts. Code Civ.Proc. §§ 1953e–1953h.

8. Evidence 🔑376(1, 4, 8)

Book entries made by person since deceased, although ambiguous on their face, were properly admitted on proof that they were made in handwriting of deceased where supporting documents made their meaning clear.

9. Fraud 🔑58(1)

Proof of fraudulent conduct must be clear and convincing.

10. Appeal and error 🔑1011(1)

Trial court had duty of weighing evidence on subject of fraudulent conduct where evidence in respect thereof was conflicting.

11. Mortgages 🔑86(3)

In action to cancel note and deed of trust for fraud and want of consideration, finding of trial court against claim of fraud based on fact that decedent allegedly kept two sets of books covering transactions between decedent and plaintiffs, was not error.

12. Stipulations 🔑14(7)

Counsel, by stipulating that handwriting expert might submit his written findings without personal appearance, waived the right of cross-examination.

13. Trial 🔑377(2)

Where case was reopened for single purpose of securing the opinion of an expert to be chosen by the court on the genuineness of signature to a questioned receipt, request of counsel to produce other evidence was properly denied.

14. Action 🔑6

Failure of court to make any declaration concerning rights and duties of parties in response to prayer for declaratory relief was not error, where there were no issues on which a declaratory judgment was necessary or proper, and all the rights and claims between the parties were merged in the judgment rendered.

15. Mortgages 🔑25(6)

Burden of proof was upon makers to rebut presumption that note and deed of trust were supported by valuable consideration.

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* Subsequent opinion 171 P.2d 430.

16. Witnesses ⚷317(1)

Under statute providing that witness false in one part of his testimony is to be distrusted in others, party introducing receipt shown by ample evidence to have been a forgery was thereby impeached and his other evidence thereby discredited. Code Civ.Proc. § 2061, subd. 3.

17. Appeal and error ⚷1011(1)

Reviewing court is bound by trial judge's determination on conflicting evidence.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action for declaratory relief by George Durham Robinson and wife against Vera Puls, as administratrix of the estate of Fred Puls, deceased, wherein defendant filed a cross-complaint. Judgment for defendant and cross-complainant, and plaintiffs appeal.

Affirmed.

William Berger and Abraham Setzer, both of San Francisco, for appellants.

James R. Agee, Breed, Burpee & Robinson, and Lester Perry, all of Oakland, for respondent.

DOOLING, Justice.

This action was commenced by the filing of a complaint for declaratory relief, for a decree of the court adjudging that a $7000 note given by plaintiffs, who are husband and wife, to decedent Fred Puls, and secured by a deed of trust, was obtained by fraud and without consideration and to have the same cancelled, for similar relief with regard to a $2000 promissory note secured by a chattel mortgage, for an accounting and for a money judgment in favor of plaintiffs. Defendant filed a cross-complaint on the $2000 note and chattel mortgage and for a money judgment against plaintiff George Robinson on two book accounts, one for merchandise sold and the other for money advanced. During the trial the defendant dismissed the count on the $2000 note and chattel mortgage with prejudice.

Judgment went against plaintiffs on their complaint and in favor of defendant on the two counts based on the book accounts. It was appellants' theory that decedent Puls and appellant George Robinson had entered into a partnership for the purchase and drying of fruit, that decedent had agreed to advance $7000 as capital to be matched by $7000 advanced by appellant George Robinson, that the $7000 note and deed of trust were to cover Robinson's share of the capital, but that in fact decedent had never put any money into the enterprise either for himself or for Robinson and in consequence Robinson had received nothing for his note. Appellants also claimed a balance owing from decedent arising from decedent's handling of George Robinson's money.

Respondent denied any agreement for a partnership, asserted that the notes were given for money advanced to George Robinson by decedent, and claimed a balance due as shown by the decedent's books of account. Except for the $2000 note and chattel mortgage securing it all issues were decided against appellants and in respondent's favor. It was undisputed that for many years decedent had acted in the capacity of private banker for George Robinson, receiving money from him and disbursing it on his order.

At the outset appellants contend that the court erred in denying their demand for a jury trial. The clerk's transcript shows that appellants filed a written demand on December 7, 1942, for "a trial of the above entitled cause by the above entitled Court, sitting with a jury." It further shows a minute order of the same date setting the cause for trial without a jury. This minute order contains the following recitals: "Counsel for Plaintiffs move this Court to amend their demand for trial by jury on its face, and said Motion is denied and counsel for Plaintiff move this Court for a trial by jury, and said motion is denied." The record fails to show the particular in which counsel for appellants asked leave to amend their demand for a jury trial, except by certain affidavits filed by counsel for the respective parties on motion for new trial. An affidavit of one of counsel for appellants states that on December 7, 1942, when this case was called for setting counsel filed their written demand and "moved the court * * * for a jury trial of said cause which demand and motion were refused and denied respectively, the Court stating that said written demand for a jury was defective in failing to state the issues to which said demand related.

"That affiant * * * thereupon moved the Court for its order permitting the amendment of said Demand upon its face to comply with the expressed views of the Court as aforesaid, but without prejudice and without admission of the inadequacy of said Demand, which motion said Court did then and there deny.

"That affiant * * * thereupon moved said Court for a continuance * * * to enable the plaintiffs and cross-defendant to serve and file a formal amended and elaborated Demand for Jury Trial in accordance with and in compliance with said Court's ruling * * * which motion was likewise denied by the court."

The affidavit of counsel for respondent avers that on December 7, 1942, the appellants' demand for a jury was denied "upon the stated ground that the demand * * * was general and that the action involved both legal and equitable issues, and that the demand was therefore insufficient because it did not distinguish between such legal issues; that thereafter said counsel for plaintiffs and cross-defendant orally requested permission to amend said demand but did not state what the said proposed amendments were nor did said counsel at that time or at any other time or any subsequent time ever present to any department of the above entitled Court any demand for a trial upon the legal issues involved in said action."

Upon the trial date counsel again orally demanded "a jury trial" before the presiding judge and at the opening of the trial stated that "As we proceed to trial at this time we simply want the record to show we have not waived our demand for trial by jury."

[1, 2] Where an action involves both legal and equitable issues any party is entitled to a trial by jury of the legal issues. Connell v. Bowes, 19 Cal.2d 870, 123 P.2d 456; Crouser v. Boice, 51 Cal.App.2d 198, 124 P.2d 358; Hutchason v. Marks, 54 Cal.App.2d 113, 128 P.2d 573. However in such an action, involving issues both legal and equitable, it has been held that a general demand for a jury trial of the entire action is insufficient and the denial of such a general demand is not error (Meek v. De Latour, 2 Cal.App. 261, 83 P. 300; Whittier v. Auth, 99 Cal.App. 759, 279 P. 491), and the same rule has been generally followed in other jurisdictions where the question has arisen (35 C.J. 217 and cases cited in notes 94 and 95). We must assume in support of the action of the trial court in setting the entire cause for trial without a jury that counsel for appellant did not single out for the court the issues which were purely legal in nature and move the court for a jury trial on those issues alone. It nowhere appears from the record that they did so and it affirmatively appears from the affidavit of counsel for respondent from which we have quoted that they did not.

Section 631 Code of Civil Procedure provides:

"Trial by jury may be waived by the several parties to an issue of fact in manner following: * * *

"4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice * * *."

[3, 4] The announcement required by this section must be made at the time the cause is first set for trial (Mutual Bldg. & Loan Ass'n v. Corum, 220 Cal. 282, 30 P.2d 509) and if the announcement is not made to the court at the time of such setting the waiver provided for by Code Civ.Proc. sec. 631, subd. 4 results. Stern v. Hillman, 115 Cal.App. 156, 159, 300 P. 972. Counsel for appellants should have been prepared to make the proper demand at the time of setting, instead of which they asked leave to amend their written demand without specifying the particulars of their proposed amendment. No demand, so far as the record shows, was either made or suggested for the trial of any particular issue or issues by a jury so that the trial court could then determine, or we can now determine, whether on the particular issue or issues, the court should have allowed a jury trial. Where the case involves both legal and equitable issues the trial court should be specifically pointed to the particular issues as to which a jury trial is demanded so that the judge may then determine whether the designated issues are legal or equitable. The burden should be on counsel to make the designation, and not upon the court to search the pleadings and cull out for counsel the legal from the equitable issues.

The argument that sec. 631, subd. 4, Code Civ.Proc., in a case involving both legal and equitable issues, requires no more than a general announcement that a jury trial is required does not impress us. The section provides that: "Trial by jury may be waived * * * *to an issue of fact* * * *: * * * By failing to announce that a jury is required * * *." The italicized words are consistent with the requirement that where some, but not all, of the issues are legal the failure to designate the legal "issues of fact" and announce "that a jury is required" for the trial of those issues accomplishes the waiver therein specified.

That certain of the issues presented by the complaint were equitable is obvious. We single out the relief sought by the cancellation of the two secured promissory notes. 4 Cal.Jur. 795 and cases cited in notes 2 and 3.

[5] Upon the showing made by the record before us no error is shown in the denial of a jury trial.

[6] Certain account books of the decedent Puls were introduced into evidence over the objection of the appellants that "there is no showing, no proper foundation laid that the entries therein contained were made contemporaneously with the items appearing therein." There was testimony that these books were the books kept by the decedent in his place of business and the administratrix testified that they were found by her after the decedent's death among his effects and that the entries are in his handwriting. In the case of books kept by a person still living and available as a witness it is settled in this state that one of the items of foundational proof for the admission of such books is "that the entries * * * were made at the time or within reasonable proximity to the time, of the respective transactions." Chan Kiu Sing v. Gordon, 171 Cal. 28, 31, 151 P. 657.

In O'Neill v. O'Neill, 45 Cal.App. 772, 774, 188 P. 603, the court held that a sufficient foundation was laid for the introduction of the book of a decedent by proof that the entries were in the handwriting of the decedent and that he kept correct books, although the witness testified that he had never seen the particular book before. The case has never since been cited to this point and we have found no later decision in California on the precise question. The rule is thus stated in 32 C.J.S., Evidence, § 684, p. 557:

"Under ordinary circumstances mere proof of handwriting is not sufficient to admit books of account, but the books must be supported by the suppletory oath of the party by whom the entries were made. The circumstances may, however, be such as to render it proper to admit the books on mere proof of handwriting, without the suppletory oath of the person by whom the entries were made. Thus the books of account of a deceased person are competent evidence in favor of his executor or administrator if supported by the oath of the personal representative, or if they [be] proved by a competent witness to be in decedent's handwriting; and a similar rule is applied where the party since making the charges has become insane, the books being offered by his guardian."

In Foster v. Wehr, 114 Pa.Super. 101, 173 A. 712, at page 714, the court quotes from Hoover v. Gehr, 62 Pa. 136, 138:

"The book of a decedent appearing on its face to contain charges of merchandise sold and delivered, is admissible in evidence on proof of his handwriting alone. It is not necessary to accompany it with any evidence as to the time and manner in which the entries were made. This would generally be impossible from the death of the only party having any knowledge of the matter. The presumption, prima facie, is, that the book of a decedent was regularly kept as a record of his daily transactions. If testimony is subsequently introduced which raises any question upon the subject, it is for the jury to determine, under proper instructions from the court."

See to the same effect: Davie v. Lloyd, 38 Colo. 250, 88 P. 446; Dicken v. Winters, 169 Pa. 126, 32 A. 289; Robinson v. Dibble's Administrator, 17 Fla. 457; Cain v. Campbell's Adm'x, 265 Ky. 843, 98 S.W. 2d 17; Burton v. Phillips, 161 Ala. 664, 49 So. 848; New Haven & Northampton Co. v. Goodwin, 42 Conn. 230; Odell v. Culbert, 9 Watts & S., Pa., 66, 42 Am.Dec. 317.

[7] The rule is not uniform throughout the United States. (See 20 Am.Jur. 930, where the statement is made concerning the books of a decedent that: "It must be shown * * * that they were made * * * at or near the time of the transaction recorded," the contrary rule being stated in the same section on page 929 in the following language: "Moreover, it is not necessary to accompany such books with any evidence as to the time and manner in which the entries were made.") The tendency has been to enlarge the use

of business records in evidence (see the discussion of the purpose of the "Uniform Business Records as Evidence Act," Code Civ.Proc. secs. 1953e–1953h, in Loper v. Morrison, 23 Cal.2d 600, 608, 609, 145 P.2d 1), and we are satisfied to follow the rule permitting the introduction of the books of account of a deceased person into evidence on proof that they are in his own handwriting without requiring the additional foundational proof of the times at which the entries were made, the weight of such evidence being left to the trier of the facts.

[8] It is further objected that the books were not clear on their face and were only explained in some cases by reference to other documents. The books were examined by an accountant who testified that "they were kept in an orderly manner, certainly not in a modern up-to-date accounting procedure such as a system that would be installed today, but in a manner common to the generation of people and merchants who did business before income tax and other things brought them up-to-date with accounting methods." Certain entries showed payments to "self." It was established by comparison with orders drawn on the decedent by appellant George Robinson, and found among decedent's effects, that "self" in these entries indicated payments to Robinson's order and not to the decedent. While these entries were ambiguous on their face, the supporting documents made their meaning clear. "The fact that some parol testimony is necessary in order to fully explain an account will not make it insufficient to be put in evidence." 20 Am.Jur. 907, 908.

[9-11] Appellant George Robinson testified that the decedent kept two sets of books covering the account of their transactions, a false account being entered in the books produced in court and a correct account being kept in another book not produced, the purpose being to deceive creditors of Robinson by the false entries in the books produced. Other witnesses corroborated Robinson to the extent of describing the book in which decedent kept Robinson's account as being a different book in outward appearance and size from any produced in court. The administratrix testified that she found no such book among decedent's effects. Proof of fraudulent conduct must be clear and convincing (12 Cal.Jur. 832) and it was for the trial court to weigh the evidence on this subject. We cannot hold that its determination against the existence of the claimed "secret book" was error.

[12, 13] Appellant produced in court a document purporting to be a receipt signed by decedent Puls for "Deed of Trust and Note of $7000 to apply on Partnership agreement." The body of the receipt was admittedly in the handwriting of Robinson and the administratrix testified that the signature was not that of the decedent. After judgment had been entered the court on motion for new trial ordered "that in lieu of a New Trial, Judgment and Findings be and the same are set aside, and said action is reopened for further proceedings on the sole issue as to the genuineness of Plaintiffs and Cross-Defendants Exhibit #9 in evidence" (the disputed receipt). This order further recites the stipulation of the parties to the appointment by the court of a handwriting expert, the expenses to be borne equally by the parties. A subsequent minute order recites a stipulation that the questioned receipt and other exhibits chosen by the parties as exemplars shall be submitted to Clark Sellers for analysis and report and that "said Clark Sellers may submit his written finding to the Court without personal appearance." Later the written report of Clark Sellers finding the signature not genuine was received and admitted. Appellants' counsel demanded the right to cross-examine Sellers. The failure to grant this demand was not error. Counsel by stipulating that "Clark Sellers may submit his written findings * * * without personal appearance" waived the right of cross-examination. Their request to produce other evidence was likewise properly denied, the case having been reopened for the single purpose of securing the opinion of an expert to be chosen by the court on the genuineness of the signature to the questioned receipt.

[14] Appellants complain that the court failed to make any declaration concerning the rights and duties of the parties, in response to their prayer for declaratory relief. The count of the cross-complaint on the $2000 note and chattel mortgage was dismissed with prejudice during the trial and the court so expressly found. All of the other issues were expressly decided against appellants, the court finding that the $7000 note and deed of trust were a

valid and subsisting obligation and that appellant George Robinson was indebted to the respondent on two open book accounts in the amounts determined. There were no issues on which a declaratory judgment was necessary or proper, since all the rights and claims between the parties were merged in and settled by the judgment rendered, and all of the issues presented by the pleadings will become res adjudicata when the judgment becomes final.

[15, 16] Several of the findings are attacked as not supported by the evidence. The finding that the $7000 note and deed of trust were given for value received is supported by the presumption of a valuable consideration. The burden of proof was on appellants to rebut this presumption and the court chose not to believe their evidence. There was ample evidence that the disputed receipt above discussed was a forgery, and if that was true the appellant George Robinson who produced and vouched for it was thereby impeached and his other testimony was thereby discredited to the extent that the trial judge refused to believe it. Estate of Friedman, 178 Cal. 27, 32, 172 P. 140; Code Civ.Proc. § 2061, subd. 3.

[17] The judgment for respondent on the book accounts was supported by the book entries. Appellant George Robinson produced a document in his own handwriting which he testified was a copy of a will that decedent had written in his presence containing an admission that decedent was indebted to Robinson in the sum of $7148. This testimony was evidently disbelieved by the trial court and we are bound by the trial judge's determination on conflicting evidence.

Other matters argued either depend on the weighing of conflicting evidence or are not sufficiently substantial to justify our extending this opinion to consider them in detail.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

27 Cal.2d 384

In re PHILLIPS' GUARDIANSHIP.

PHILLIPS et al. v. PHILLIPS.

S. F. 17172.

Supreme Court of California.
Dec. 14, 1945.

1. Guardian and ward 🔑13(8)

Where petition for appointment as guardian of child stated jurisdictional facts but, after reversal of order granting motion for change of venue, opponents took no further part in proceeding, though order fixing time and place for hearing was served on their attorney, the subsequent filing of amended petition without service thereof on opponents did not deprive the court of power to proceed. Probate Code, §§ 1440, 1441.

2. Guardian and ward 🔑13(8)

Where on remand of cause and failure of opponents of petition for appointment of guardian of child to participate further in proceedings although served with notice, the court, as a matter of judicial discretion, could permit the filing of amended petition without further notice on opponents. Probate Code, §§ 1440, 1441.

3. Guardian and ward 🔑13(8)

Where order appointing guardian for child was amply supported by the evidence, it could not be said that court had abused its discretion in permitting the filing of amended petition without further notice to opponents of petition who had failed to participate further after reversal of order granting change of venue. Probate Code, §§ 1440, 1441.

◆

In Bank.

Appeal from Superior Court of City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the person and estate of Deanne Phillips, a minor, wherein Donald E. Phillips and another opposed the petition of Bertrice Marie Phillips for the appointment of herself as guardian. From an order granting the petition, Donald E. Phillips and another appeal.

Order affirmed.

Prior opinion, 156 P.2d 268.

W. C. Dorris, C. Fleharty, Jr., and R. W. Henderson, all of Bakersfield, for appellants.

Fabian D. Brown, of San Francisco, for respondent.

SHENK, Justice.

This is an appeal from an order granting letters of guardianship of the person and estate of Deanne Phillips, a minor, to her mother, Bertrice Marie Phillips.

In 1941 Bertrice Marie Phillips and Donald E. Phillips were husband and wife and were living in Kern County with their two-year-old child, Deanne. In November of that year the superior court in Kern County granted an interlocutory decree of divorce to the wife. In the decree it was provided that the wife was entitled to the custody of the child, but that the immediate care and control should be in Mrs. Mary Phillips, the child's paternal grandmother, who also resided in Kern County. The mother was given the right to visit and take the child on holidays and for a few days at a time not exceeding six days in any one month.

In October, 1942, the mother took the child to her home in San Francisco, and several days later she filed in the Superior Court in the City and County of San Francisco a petition to have herself appointed guardian of the person of the minor pursuant to section 1440 of the Probate Code. The father and paternal grandmother, the appellants herein, received notice of the proceeding and moved for a change of venue to Kern County on the ground that the superior court in San Francisco had no jurisdiction to appoint a guardian of the minor, and that the superior court in Kern County had exclusive jurisdiction of the subject matter. The court granted the motion. On the mother's appeal from the order it was decided that the superior court in either the county of legal residence, Kern County, or of temporary domicile, San Francisco, had jurisdiction to appoint a guardian pursuant to section 1440 of the Probate Code. The order was reversed with directions to the trial court to pass upon the merits of the petition. In re Guardianship of Phillips, 60 Cal.App.2d 832, 141 P.2d 773.

Upon the going down of the remittitur the trial court appointed January 20, 1944, as the day for a further hearing. A copy of the court's order fixing the time and place was served on the appellants through their attorney, but no appearance was made by them or on their behalf. At the time the matter was called for hearing the petitioner offered for filing an amended petition which contained the additional allegation that the minor would have an estate of $5,000 conditioned upon the appointment of petitioner as guardian of her person and estate, and that it was both necessary and convenient that the court appoint petitioner as such guardian. The court permitted the filing of the amended petition and proceeded with the hearing. A written agreement was introduced, dated December 1, 1943, wherein Mrs. Fawn A. Thompson, the petitioner's mother, promised the petitioner, on condition that the latter was appointed guardian of the person and estate of the minor, that she would pay the minor a total sum of $5,000, $500 thereof on the execution of the agreement (payment of which was in evidence) and $500 annually until the entire sum was paid. The agreement contained provisions purporting to give it the binding force of a judgment.

There was evidence that while the child was in the care of her paternal grandparent she was badly clothed, without under or night clothing, that she was not clean, that she was sick and unruly, and that in other ways she was not given proper care and protection. After her removal from Bakersfield to San Francisco the child was kept in a clean and healthy condition, was in a good home, in the frequent company of her mother, who earned $180 a month as a bus driver, and who was able to provide adequately for the child and give her personal care and attention. It also appeared at the hearing that the provision giving the immediate care of the child to the paternal grandparent, notwithstanding the fact that the mother was awarded legal custody, was inserted in the interlocutory decree because of the then circumstances of the mother which seemed to make it impossible for her to give to the child any personal attention.

The court granted the petition, appointed the mother as guardian of the person and estate of the minor, and required her to furnish a $5,000 guardian's bond.

The appellants contend that the court exceed its jurisdiction in proceeding without additional notice to them and service upon them of a copy of the amended petition.

Section 1440 of the Probate Code provides: "When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor * * *."

Section 1441 provides: "Before making the appointment, such notice as the court or a judge thereof deems reasonable must be given to the person having the care of the minor and to such relatives of the minor residing in the state as the court or judge deems proper. In all cases notice must be given to the parents of the minor * * *."

In the decision on the former appeal it was determined that the jurisdictional facts had been established; that the requirements for notice had been complied with, and that the Superior Court in the City and County of San Francisco had jurisdiction to entertain the petition and to appoint the petitioner as the guardian of the minor.

The appellants do not argue that the notice given was insufficient if the amended petition had not been filed. Neither do they say that the showing, other than that concerning the estate of the minor, was insufficient to support the order appointing the petitioner as guardian. We have here, therefore, a situation where the petitioner was the legal custodian of the minor child under a decree of divorce; where the child in the care of the grandparent was not given proper attention and protection; where the parent having legal custody was a fit, proper and capable person to have the care of the minor; where the welfare of the child was best served by placing her in the care of her mother; where the appellants, including the father, were content to permit the court in their absence to decide the question of the proper care and welfare of the child on whatever showing could be made in that respect by the petitioner. Their only objection now is that the child will come into a $5,000 estate and that they were not given notice of the amended petition alleging that fact. They say that if they had been notified by service of a copy of the amended pleading, they might have been able to show that the petitioner's mother was unable to provide the promised estate for the child.

[1-3] The appellants rely on cases holding that if an amended complaint be not served on the defaulting defendant there is no pleading upon which a judgment against the latter can be sustained. Linott v. Rowland, 119 Cal. 452, 51 P. 687. The rule is not applicable here. By enactment of the provisions of the Probate Code there was omitted from jurisdictional requirements any provision for the service of pleadings on anyone. The requirements are the filing of the petition stating the jurisdictional facts, the giving of notice to the persons designated in section 1441, and proof of those facts, and the additional showing of facts establishing necessity or convenience for the appointment. Appellants were the only persons to whom notice was required to be given, and they had notice both of the original and of the further hearing. Whether on the filing of the amended petition additional notice should have been given to them was, under the circumstances here shown, a matter of judicial discretion. The court in the exercise of such discretion proceeded with the hearing and made the appointment on the facts presented without requiring additional notice to the appellants. If the court had been persuaded that the best interests of the child would not be served by appointing the mother as the guardian, that no necessity or convenience in that regard existed, and that the agreement, as the appellants urge, was therefore merely simulated to meet the requirement of necessity or convenience, it undoubtedly would either have denied the petition or in the exercise of its discretion have required additional notice to the appellants and postponed the hearing. The exercise of the court's discretion in the present case may not be said to have been abused unless it may also be said that there was no support for the order appointing the petitioner as guardian of the minor. The facts in evidence, however, establish both necessity and convenience for the appointment of the petitioner, the child's legal and natural custodian, as guardian of her person, Cf. In re Guardianship of Burket, 58 Cal.App.2d 726, 137 P.2d 475, and therefore furnish ample support for the court's order appointing the petitioner as guardian of the person and estate of the minor. The evidence supports the order and no abuse of discretion in proceeding without additional notice of the hearing has been shown.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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27 Cal.2d 431

HOPPER v. BULAICH.

L. A. 19372.

Supreme Court of California, in Bank.

Dec. 21, 1945.

1. Appeal and error 🔑1064(2)
Highways 🔑214
Trial 🔑194(16)

Where county ordinance in evidence authorized road commissioner to specify in excavation permits precautions to be taken and excavation permit and application therefor provided that excavation should not be left open between sunrise and sunset without written permit from road commissioner, and it appeared that latter permit was not obtained by contractor and that pedestrian had fallen into open ditch at 5:30 a. m. on a dark foggy morning in November, instruction that there was no county ordinance or law or regulation prohibiting the excavation from being left open at night was contrary to the evidence, though court read ordinance to jury, and such instruction and refusal to charge standard of care imposed by unobtained permit were prejudicial error though contractor could have been penalized only for failure to obtain excavation permit.

2. Trial 🔑296(3, 4)

Where court erroneously charged jury as to standard of care owed by defendant and plaintiff's contributory negligence was question for jury, error in instruction was not cured though jury was correctly instructed on issue of contributory negligence and jury returned a general verdict for defendant.

3. Highways ⚿210(2)

Where there was no evidence that holes had been cut in pigeon coops adjacent to excavation in highway or that pigeons had been stolen on night prior to accident to pedestrian who fell into open excavation, admitting in evidence that on occasions such holes had been cut and that they were large enough to admit torso of child probably intent on stealing pigeons, as tending to show that the lights on barricade along ditch might have been snuffed out by children on night prior to accident, was error.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Charles Hopper against Nick Bulaich to recover damages for injuries suffered when plaintiff fell into an uncovered ditch excavated by defendant in public highway. From a judgment for defendant, plaintiff appeals.

Judgment reversed.

Prior opinion, 156 P.2d 770.

Arthur E. Briggs, of Los Angeles, and Perry G. Briney, of San Pedro, for appellant.

Parker & Stanbury, Harry D. Parker, and A. P. G. Steffes, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff sued to recover damages for injuries suffered when he fell into an uncovered ditch excavated by the defendant along 101st Street near the town of Lennox in Los Angeles County. The jury returned a verdict for the defendant. The plaintiff appealed from the judgment specifying as grounds for reversal prejudicial errors in the giving of certain instructions, in the refusal to give others, and in the admission of certain evidence.

The defendant was under contract with the county of Los Angeles to install sewer pipe along 101st Street from Hawthorne Boulevard easterly toward Freeman Avenue. Work began on Monday, November 9, 1942, at Hawthorne Boulevard. An excavation was commenced which was two feet wide and eight feet deep. It extended along and about three feet from the south boundary of 101st Street, a narrow country road, for approximately 1,160 feet. A portion of the south boundary of 101st Street formed the north boundary of the property of a Mr. Berry, the entrance to which was on 101st Street west of Freeman Avenue.

The plaintiff, a man of 62 years, and Mr. Berry were employed at an aviation plant. For about five weeks prior to November 14, 1942, the plaintiff each morning had been calling for Berry, whence they proceeded to the plant in the plaintiff's automobile. Usually the plaintiff stopped his car in front of the entrance to the Berry place. On leaving he proceeded westerly on 101st Street to Hawthorne Boulevard. On Thursday, November 12th, he stopped as usual on 101st Street, but upon leaving and proceeding further he found that the exit to Hawthorne was closed. He turned about and left 101st Street at Freeman Avenue. At that time the digging had progressed to a point about 200 feet west of Berry's place. The next time the plaintiff called for Berry was two days later, Saturday, November 14th, at 5:30 a. m. It was dark and foggy and somewhat damp. Instead of turning into 101st Street which he had previously found closed at Hawthorne, he parked his car on Freeman Avenue in front of the Berry property and walked west along the fence on 101st Street toward the Berry entrance. He did not observe the ditch which by that time had been excavated along the Berry property to within about 90 feet of Freeman Avenue, and he saw no barricades or lights. He fell into the uncovered ditch at a point about 28 feet from the easterly end of the excavation.

Ahead of the easterly end of the ditch three or four tile lengths had been set upright, with a 2x4 scantling lying across them on or near which there were three red-globed lanterns which were not lighted. The first lighted lantern appeared about 50 feet west of where the plaintiff fell.

Ordinance No. 3597 (New Series) of the county of Los Angeles in effect at the time was introduced in evidence, and particularly sections 82 and 83 thereof. The ordinance provided that a person who caused an excavation to be made in any highway without a permit from the Road Commissioner was guilty of a misdemeanor. The Road Commissioner was given authority to impose such conditions as in his opinion were necessary for the protection of the highway, for the prevention of undue interference with traffic, and for the safety of persons using the highway. By section 82 he was authorized in any permit issued by him to specify what lights, barriers, warning signs, or other measures, must be erected or provided by the permittee to protect the traveling public. Section 83 prescribed the safeguards to be adopted in the absence of a specification in the permit. The defendant obtained a permit from the Road Commissioner which, together with his application therefor, was introduced in evidence. The application and the permit specified that "no excavation authorized by this permit shall be left open between sunset and sunrise without first securing written permission from the Road Commissioner." Permission to leave the ditch uncovered between sunset and sunrise was not obtained.

Plaintiff requested an instruction to the effect that if the defendant violated the foregoing provision of the ordinance and the permit, the violation constituted negligence as a matter of law, with the proviso that the violation would be of no consequence unless it was the proximate cause of the plaintiff's injury. The court refused that instruction and instructed the jury "that there was no county ordinance or law or regulation at the time of this accident prohibiting the ditch in question from being left open at night, or in other words, requiring the ditch to be covered at night."

The court read to the jury section 83 of the ordinance which provided that if the permit did not specify what lights, barriers, warnings, signs, or other measures, should be placed or erected by the permittee, he should maintain from sunset to sunrise warning lights at each end of the excavation and at a distance of not more than 50 feet along the excavation, and three-foot barriers at each end with warning signs of specified dimensions, lettering and diagonal stripes. The jury was told that if the defendant violated section 83, his conduct constituted negligence, which, however, was of no consequence unless it was the proximate cause of the injury.

The defendant attempts to meet the plaintiff's contention that the jury was erroneously instructed by the statement that the ordinance did not expressly prohibit the excavation of the ditch; that neither the ordinance nor the permit expressly required the excavation to be covered at night, and that if he was guilty of any violation it was the failure merely to *obtain a permit* to leave the excavation uncovered at night. The defendant attempts to compare the situation with that of a person failing to obtain a required license, and wherein it has been held that the mere failure to have the license had no causal connection with the injury. Page v. Mayors, 191 Cal. 263, 216 P. 31; Shimoda v. Bundy, 24 Cal.App. 675, 142 P. 109; Roos v. Loeser, 41 Cal.App. 782, 183 P. 204; Arrelano v. Jorgensen, 52 Cal.App. 622, 199 P. 855; Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160.

[1] The analogy may not be accepted. True, under the ordinance the violation, if any, for which the defendant may have been prosecuted criminally was the failure to *obtain the permit* to leave the ditch uncovered. But if it be conceded that the only violation committed by the defendant was his failure to obtain permission to leave the ditch uncovered after sunset, that fact does not necessarily dispose of his civil liability. So long as the defendant had not applied for and obtained permission to leave the ditch uncovered at night, under the terms of the permit which had been issued to him, he was required to cover the ditch between sunset and sunrise unless the circumstances excused his failure. Therefore, the ordinance and the permit, the validity of which is not challenged, formulated a standard of conduct which the court should have adopted in submitting to the jury the question of the defendant's civil liability. Siemers v. Eisen, 54 Cal. 418; Mathers v. Riverside County, 22 Cal.2d 781, 141 P.2d 419. Cf. Restatement of the Law, Torts, § 286. The standard so established is based on experience to the effect that an excavation in a street which is left uncovered at night may cause harm to persons traveling on the highway. After receiving the pertinent provisions of the ordinance and permit in evidence the court not only refused to adopt the standard there formulated for the guidance of the jury, but it went further. It instructed the jury in effect that there was no standard in that connection set up by any ordinance or regulation. That direction was contrary to the evidence.

In Mathers v. Riverside County, supra, 22 Cal.2d 781, 141 P.2d 419, it was recognized that the rule that a criminal statute furnishes a standard of care in civil cases is not without qualification. An act of violation may occur in an emergency which under some circumstances will afford excuse or justification. In Berkovitz v. American River Gravel Co., 191 Cal. 195, 199, 215 P. 675, it was pointed out with supporting authorities that the presumption of negligence arising from the violation of an ordinance may be rebutted by evidence that it was justifiable or excusable under the circumstances. Whether the circumstances in a given case afford excuse or justification is ordinarily a question of fact for the jury under appropriate instructions. Had such instructions been given in the present case the jury might have concluded that adequate protective measures had not been provided and that there was not excuse or justification for noncompliance with the established standard.

It is not an adequate answer to say that the regulation formulating the standard was contained or provided for in the permit issued by the Road Commissioner. Authority to prescribe the regulation was appropriately vested in the Road Commissioner by the ordinance. Standards resulting from the valid acts of legally constituted public officers or bodies have been recognized by the courts. Griswold v. Sharpe, 2 Cal. 17; Lemasters v. Southern Pacific Co., 131 Cal. 105, 63 P. 128; Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 82 P. 53; Pruitt v. San Pedro, etc., Co., 161 Cal. 29, 118 P. 223, 36 L.R.A.,N.S., 331; Morris v. Sierra, etc., Power Co., 57 Cal. App. 281, 207 P. 262; Clark v. Pacific Gas & Elec. Co., 118 Cal.App. 344, 5 P.2d 58, 6 P.2d 297.

[2] Nor is it a sufficient answer to say that the court read to the jury section 83 of the ordinance which specified the safeguards to be furnished in the absence of a designation thereof in the permit; that the jury was correctly instructed on the issue of contributory negligence; and that the implied finding on the latter issue would therefore have brought about the same verdict. By its instruction in regard to section 83 the court adopted a standard of conduct directed solely to compliance with the safety provisions of that section. But the jury, having also before it the safeguard required by the permit, was entitled to consider whether the defendant's failure to cover the ditch at night was the proximate cause of the plaintiff's injuries. It cannot be said as a matter of law that the plaintiff was guilty of contributory negligence. It was for the jury to determine whether he had had sufficient knowledge or notice of the existence of the ditch or of the barricades and warnings to put him on guard. The refusal to submit to the jury the regulatory standard and the affirmative instruction that there was no regulatory standard therefore constituted prejudicial error.

[3] The court also erred in receiving evidence that on occasions holes had been cut into pigeon coops maintained by Mr. Berry along his fence line on 101st street and that the holes were large enough to admit the torso of a child probably intent on stealing pigeons, as tending to show that the lights on the barricade and along the ditch might have been snuffed out by children on the night of November 13th prior to the accident. There was no evidence that holes were cut or pigeons stolen on that night. The evidence received was so conjectural that it could not be said to have sufficient relevancy or weight in determining what actually happened on the night preceding the accident to account for the fact that lanterns were unlighted. In the event of another trial it is assumed that this error will no be repeated.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

EDMONDS, Justice.

I concur in the reversal of the judgment upon the ground that the court erroneously instructed the jury "that there was no county ordinance or law or regulation at the time of this accident prohibiting the ditch in question from being left open at night, or in other words, requiring the ditch to be covered at night." In view of the fact that the application and the permit specified that "no excavation authorized by this permit shall be left open between sunset and sunrise without first securing written permission from the Road Commissioner," that instruction was contrary to the evidence. However, for the reasons stated in the dissenting opinions in Polk v. City of Los Angeles, 26 Cal.2d 519, 543, 159 P.2d 931, and Clinkscales v. Carver, 22 Cal.2d 72, 76, 136 P.2d 777, I do not agree with the majority that the jury should have been instructed that if the defendant violated the provision of the application or permit requiring the excavation to be covered at night, he was negligent as a matter of law. At most, the jury might have considered the existence of that requirement in determining the question of defendant's negligence.

27 Cal.2d 443

PEOPLE v. MING.

Cr. 4653.

Supreme Court of California, in Bank.

Dec. 21, 1945.

1. **Criminal law** ⚷1035(6)

Defendant could not complain on appeal on ground that he was deprived of right of trial by jury selected in accordance with law because of participation in trial of prosecuting attorney who was not representing the people at time jurors were examined in regard to their acquaintance with counsel, where defendant's objection concerning counsel's appearance was not made immediately after counsel commenced to participate in trial but some time later, and after overruling of objection defendant did not request examination of jurors concerning any acquaintance with counsel.

2. **Constitutional law** ⚷257
Criminal law ⚷286

Penal Code sections specifying the procedure to be followed when a defendant enters a plea of not guilty by reason of insanity is not unconstitutional on ground of depriving defendant of due process of law. Pen. Code, §§ 1016, 1017, 1020, 1026.

3. **Homicide** ⚷237

Evidence supported conviction of murder in the first degree as against plea of insanity.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Robert Lee Ming was convicted of murder in the first degree and he appeals automatically.

Affirmed.

Dorris & Fleharty, of Bakersfield, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

EDMONDS, Justice.

After a jury found Robert Lee Ming guilty of murder in the first degree without recommendation as to the punishment which he should suffer therefor, he was tried upon his plea of not guilty by reason of insanity and found to be sane. As grounds for the reversal of the judgment which imposed the death penalty, Ming challenges the constitutionality of the procedure concerning trial of the issue of insanity and also asserts that the district attorney deprived him of rights relating to the examination of jurors.

The record shows that Ming shot and killed his wife and James Graham, a soldier who was her companion at the time of the tragedy. The shooting occurred at the doorway of a hotel in Bakersfield where she was living and each of the victims died almost instantly. Jealousy of his wife, from whom he was separated, was the motive for the homicides. It appears that she had secured an interlocutory decree of divorce, but Ming was insistent that she live with him again. Upon several occasions he had threatened to kill her and, at one time, he said that he would not let any other man have her.

Mrs. Ming and Graham were shot shortly after midnight. Twelve hours before, Ming had attempted unsuccessfully to borrow a .38 revolver from a service station operator. Later he obtained a thirty-thirty carbine and shells from his brother-in-law. About 11 o'clock in the evening he was seen carrying the gun wrapped in a gunny sack. Upon being asked by Alvin Walters, a friend, as to why he was carrying the weapon, Ming replied, "I am going lion hunting tonight. * * * A whole gang of us are going." Walters told Ming that he was carrying a concealed weapon and unloaded the gun. Ming placed the shells in his pocket and rewrapped the weapon in a white apron.

Walters then took Ming in an automobile to several places where Ming was supposed to meet the hunting party. Walters noticed that Ming was looking into automobiles which they passed. When they reached a tavern known as the Apex, Ming said, "Yes, here is where they are." It was about midnight. Ming got out of the car and Walters went home.

After having a drink at the Apex, Ming registered at a hotel under the assumed name of Doctor Prumel. He was still carrying the thirty-thirty with the white cloth around it. Leaving the gun in his room, Ming went to a restaurant. While Ming was there his wife and Graham were sitting in a booth opposite the cash register. After Ming had finished eating, he stood around the cash register for about five minutes conversing with the waitress. When he left he told her: "You remember what date it is, don't forget it."

From the restaurant Ming went by taxicab to the hotel. He was excited and said that because some people for whom he had been looking had arrived before he expected them, he might not come back. He went up to his room, obtained the gun, and returned to the taxicab which had waited for him. He then ordered the driver to take him up and down the streets of Bakersfield. Finally Ming directed the driver to park the cab in back of a Plymouth coupe parked in front of the Senate Hotel. Ming unwrapped the gun. He informed the driver that the party in the car directly in front of them was his wife, that she had caused him enough trouble and was stepping out with other men. The driver suggested they go for a ride and talk the matter over. He reached for the ignition switch, but Ming told him to leave it alone, adding: "I know what I am doing."

In about five minutes Mrs. Ming left the coupe. Ming got out of the taxicab and walked to a point midway between the coupe and the door of the hotel, shooting her just as she reached the entrance. She fell and he shot her twice more. Meanwhile, Graham had left the coupe and was crouched down behind it on the street side. Ming turned and fired a shot into the coupe. Graham fell and Ming walked over closer and fired a shot into his head. Throwing the gun to the sidewalk Ming said, "I guess I will hang for this."

Ming then walked to an automobile that had just pulled up to the curb and said to the occupants of the car, "Take me to jail, I shot two people." They started for the county jail, but Ming reminded them that, as the shooting occurred in the city, they should take him to the city jail. When one of the occupants of the automobile remarked that he noticed a soldier lying in the street, Ming replied that he was dead.

Entering the police station Ming told the desk sergeant that he "just came up to talk to him about radios and he would be up later to see him." Without mentioning the shooting, he left the officer and went to his home, where he was arrested a short time later. At that time Ming asked a police officer if his wife and Graham were dead. He told the officer that he had borrowed the gun from his brother-in-law, and when he saw his wife with the soldier "it just made him mad and he blew up."

The facts regarding the shooting stand undisputed. As a witness in his own behalf, Ming identified letters from his wife dated less than a month before the homicides which tend to show that cordial relations then existed between them. He also said that he had arranged to buy his wife a fur coat selected by her.

In regard to the gun, Ming admitted that he had obtained the weapon from his brother-in-law and remembered talking with Walters about it. He also recalled his remarks about lion hunting and the discussion as to whether the gun was a concealed weapon. Many other events of the fateful evening were also clear in his mind. Concerning his story about lion hunting, he told the jury that no arrangements had been made for such a party nor had he selected a place for the hunt. His justification for this statement was that he had planned to call some persons by telephone and ask them to go with him.

He remembered seeing the waitress at Tiny's, but he denied that he saw his wife and Graham there. His intention after leaving the restaurant, he said, was to pick up the gun and go home. He insisted that he did not remember anything from the time he picked up the gun at the hotel until he was standing in front of the desk sergeant at the police station. But in his testimony he recalled that, after reaching home, he had told his mother and father he thought he had killed his wife.

At the trial upon the issue of insanity, three physicians appointed by the court testified that, in their opinion, at the time of the commission of the crime, Ming was sane. Two other doctors also testified to the same effect.

Ming was then 27 years of age. There appears to be nothing unusual about his family history. He left school at the age of 15, upon completion of the ninth grade. He worked on his grandfather's farm while attending school, later in a radio shop, in a CCC camp and at many other places.

Within a month after this country entered the war, Ming enlisted in the army. As a signal man in charge of communications, his principal duty was to control the fire of the gun batteries. He told the jury that, while wearing earphones, he received a shock caused by the firing of the guns while the amplifier was on. It made him dizzy but he felt no pain at first, just a ringing. Later he was troubled with vomiting after his meals. While in the army, he had four operations, one for appendicitis, and three for radical mastoids. Shortly after one of his operations at San Francisco, he said, he procured a two-hour pass. The next thing he remembered he found himself on Main Street in Los Angeles. He reported immediately to the Military Police. He was taken to the hospital and later sent to San Francisco.

In January, 1942, Ming was honorably discharged from the army because of medical disability. After that he worked for a time as a radio repairman, then for a taxi company, and for different oil companies. While working for the taxi company he met Charlotte Kerr, whom he married.

Ming's father testified that after his son's discharge from the army, he told him that Charlotte had died as the result of eating poisoned fish. Ming complained that his head was killing him. He also said that he was afraid that he was going to kill some one. He was taken to a veteran's hospital where he stayed for three or four weeks.

Ming's mother corroborated her husband in regard to their son's statement concerning the poisoned fish. She said that the son was easily irritated and pounded holes in the wall with his fist. Another witness declared that at one time Ming came home crying; Charlotte had been poisoned, he insisted. According to this witness, even when Ming saw his wife he refused to believe that she was alive.

[1] While the jury was being selected the People were represented in the courtroom by Deputies District Attorney Scott and Wooldridge. During the trial on the insanity issue, over the objection of counsel for Ming, Deputy District Attorney Maas took an active part in the presentation of the People's case. The appellant contends that the participation in the trial of an attorney who was not representing the People at the time the jurors were examined in regard to their acquaintance with counsel, deprived the accused of the right of trial by a jury selected in accordance with law and justice. A second ground relied upon for a reversal of the judgment is that sections 1016, 1017, 1020 and 1026 of the Penal Code, which provide that the issues presented by a defendant's plea of not guilty by reason of insanity must be tried separately from those arising upon the plea of not guilty, deprives the accused of due process of law.

Although Deputy District Attorney Maas participated in the examination of witnesses from the commencement of the trial upon the issue of insanity, no question was immediately raised concerning his appearance on behalf of the People. However, some time later, Ming's attorney objected to his association as counsel upon the ground that he did not take part in the trial at the time of the selection of the jury. When the trial judge, in effect, overruled the objection, no request was made to examine the jurors concerning any acquaintance with Mr. Maas, nor did counsel for Ming suggest that there was any reason for such interrogation. Under these circumstances no error is shown by any member of the prosecutor's staff.

[2] As to the second contention of the appellant, it is enough to say that the constitutionality of the Penal Code sections specifying the procedure to be followed when a defendant enters a plea of not guilty by reason of insanity has been upheld by this court in a line of unvarying decisions. People v. Coleman, 20 Cal.2d 399, 405, 406, 126 P.2d 349, and cases cited therein; People v. Crowder, 69 Cal.App.2d 304, 309, 158 P.2d 988.

[3] The evidence overwhelmingly shows that Ming is guilty of the unprovoked murder of two persons. Upon a number of occasions he had threatened to kill his wife. For several hours, carrying the gun which he later used, he searched for her and her companion. Although, upon the trial, he denied that he saw his wife and Graham in the restaurant, the surrounding circumstances make his denial unbelievable. He waited around the cash register, which was only a few feet from where the couple were sitting, telling the waitress to remember the date. He then went to the hotel and obtained the gun which he had left there. Finding his wife and Graham, he deliberately fired three times at her, twice

after she had fallen, and then twice shot Graham. Five physicians, three of whom were appointed by the court, testified that he was legally sane. Certainly this constitutes conclusive evidence that Ming is guilty of two crimes of first degree murder and the verdicts as to his sanity find ample support in the record.

The judgment and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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27 Cal.2d 437

COLONIAL INS. CO. v. INDUSTRIAL ACC. COMMISSION et al.

L. A. 19455.

Supreme Court of California, in Bank.

Dec. 21, 1945.

1. **Workmen's compensation 🔑1199**

The provisions of the Workmen's Compensation Law dealing with limitation of time within which proceedings for compensation may be commenced, are to be liberally construed. St.1937, p. 295, § 5404.

2. **Workmen's compensation 🔑52**

Where provisions of Workmen's Compensation Law are susceptible of an interpretation either beneficial or detrimental to an injured employee, they must be construed favorably to the employee. St.1937, pp. 265, 295, 296, 299, §§ 3202, 5404, 5405 (a), 5409, 5705.

3. **Workmen's compensation 🔑1203**

The provision of the Workmen's Compensation Law dealing with limitation of time within which proceedings for compensation may be commenced provides a defense which may be waived. St.1937, p. 295, § 5404.

4. **Workmen's compensation 🔑1380**

The burden of proving that claim for workmen's compensation is barred rests on parties who seek to defeat the claim on ground that proceedings were not commenced within time required by statute. St.1937, p. 295, § 5404.

5. **Workmen's compensation 🔑1380**

Where Workmen's Compensation Law has exemptions, exceptions, or matters which will avoid bar of statute because of failure to commence proceedings for compensation within statutory time, the burden is on claimant to show that he falls within that category. St.1937, p. 295, § 5404.

6. **Workmen's compensation 🔑1209**

Under provision of Workmen's Compensation Law that proceedings for compensation may be commenced within six months from date of injury or from date of last payment of compensation or agreement therefor, the phrasing is permissive and affirmative, which indicates that the claimant has whichever period is the longer, that is, the time commences from whichever point will extend to claimant the longest period. St.1937, p. 295, § 5404.

7. **Workmen's compensation 🔑1209**

In Workmen's Compensation Law providing that proceedings for compensation may be commenced within six months from date of injury or from date of last payment of compensation or agreement therefor, the word "or" conveys the thought of alternatives, not exceptions, or methods of avoiding the statute. St.1937, p. 295, § 5405.

See Words and Phrases, Permanent Edition, for all other definitions of "Or".

8. **Workmen's compensation 🔑1380**

Under Workmen's Compensation Law providing that proceedings for compensation may be commenced within six months from date of injury or from date of last payment of any compensation or agreement therefor, party seeking to defeat claim must prove that the time has elapsed, starting from any and all three of the points designated. St.1937, p. 295, § 5404.

9. **Workmen's compensation 🔑1380**

Provision of Workmen's Compensation Law that when employee is incompetent or a minor, the time for filing claim shall not run against him provides an exception and the burden is on employee to show that he falls within it. St.1937, p. 296, § 5408.

10. Workmen's compensation ⚟1380

Under provision of Workmen's Compensation Law that proceedings may be commenced within six months from date of injury or from date of last payment of any compensation or agreement therefor, party seeking to defeat claim has burden of proving that no compensation was paid and no agreement was made therefor within six months prior to filing of claim. St. 1937, p. 295, § 5404.

11. Workmen's compensation ⚟1682

Under provision of Workmen's Compensation Act that proceedings may be commenced within six months from date of injury or from date of last payment of any compensation or agreement therefor, where there was no evidence that an agreement for compensation was not made, and reports of doctors tended to establish that medical attention was given within six months prior to filing of claim more than six months after injury, employer's insurance carrier did not sustain burden of proving that claim was not timely filed, and award of compensation must be affirmed. St.1937, p. 295, § 5404.

◆

Proceeding by the Colonial Insurance Company against the Industrial Accident Commission and Miles E. Nickles to review an order of the Commission awarding compensation to Miles E. Nickles for an industrial injury.

Award affirmed.

Prior opinion, 159 P.2d 54.

Garratt B. Sargent and Syril S. Tipton, both of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

CARTER, Justice.

Petitioner, insurance carrier for the employer, was unsuccessful in its attempt to have respondent, Industrial Accident Commission sustain its defense of the statute of limitation to a claim for workmen's compensation filed by respondent, Miles E. Nickles.

Nickles suffered a right inguinal hernia in the course of his employment on January 3, 1944. He filed his application for compensation on August 31, 1944. According to applicant's testimony, he consulted Dr. Hull on January 5, 1944, and was advised that he had the hernia. The following day at the suggestion of Dr. Hull he consulted Dr. Gamble, a doctor for petitioner carrier. The latter examined him. Later on he was examined by Drs. Gillis, (and Dr. Gillis' brother) Townsend, and Watson. In the medical report of Dr. Gamble it is stated that Nickles first consulted him on January 6, 1944, and "Injection treatment versus surgery was discussed. This case to me seemed to be an injectable type *so the patient was ordered to purchase a truss and return later for injections.* However the insurance carrier intervened and withdrew the patient from my professional care." (Emphasis added.) Dr. Gillis' report, dated January 20, 1944, referred to an examination on January 18, 1944, and remarks: "He (Nickles) reported to Dr. Gamble on January 6th. who told him he had a rupture and advised a truss which the injured procured and which he has worn since." Dr. Gillis' second report dated April 19, 1944, referring to a consultation of April 18, 1944, states: "You will note from my report to you of January 20, 1944 that this man presented a right, indirect, inguinal, reducible hernia which I believed should be repaired surgically. Authority was granted by your office to proceed with the surgery but the injured has decided not to have it done. Instead he procured a truss which he has been wearing continuously. He has been able to continue with his work. He has *reported in here periodically* for observation only.

"I examined him last on April 18, 1944, at which time I noted that there was no clinical evidence of any right-sided hernia now, but this would be expected in view of the fact that he has been wearing the truss continuously. I believe that if he took the truss off and allowed it to remain off for a few hours the right inguinal hernia would again be present.

"This man still states that he is not going to accept surgery, at least not temporarily, and is going to continue wearing the truss and continue working. Under the circumstances I have no further recommendations to make." (Emphasis added.) It will be noted that that report covers the period including, and for some time prior to April 18, 1944. Six months prior to August 31, 1944, the date the application was filed would be March 1, 1944, a date before the last consultation and within six months after the injury was received.

[1-3] At the outset it must be remembered that the provisions of the workmen's compensation law dealing with the limitation of time within which proceedings for compensation may be commenced, like other parts of that law, are to be liberally construed to the end that the beneficent features thereof shall not be lost to employees, and where provisions are susceptible of an interpretation either beneficial or detrimental to an injured employee, they must be construed favorably to the employee. State Comp. Ins. Fund v. Industrial Acc. Comm., 26 Cal.2d 278, 158 P.2d 195; Bianco v. Industrial Acc. Comm., 24 Cal.2d 584, 150 P.2d 806; Ocean A. & G. Corp., Ltd., v. Industrial Acc. Comm., 90 Cal.App. 725, 266 P. 556; Harris v. Industrial Acc. Comm., 204 Cal. 432, 268 P. 902; Liptak v. Industrial Acc. Comm., 200 Cal. 39, 251 P. 635; Department of Motor Vehicles v. Industrial Acc. Comm., 14 Cal.2d 189, 93 P.2d 131; Labor Code, § 3202, St.1937, p. 265. And as said in Morrison v. Industrial Acc. Comm., 29 Cal.App.2d 528, 536, 85 P.2d 186, 191: "Compensation is an obligation created by law in accordance with justice. The statute of limitations is a mere rule which limits the time within which a claim must be presented. It is adopted for the purpose of encouraging diligence and preventing injustice. It is a mere defense which may be waived, and should not become a trap to defeat just claims."

The statutory declarations on limitations read:

"Unless compensation is paid or an agreement for its payment made within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred." Labor Code, § 5404, St.1937, p. 295 et seq.

"The periods within which *may be commenced* proceedings for the collection of medical, disability or other benefits * * * are, except as otherwise provided in this division, as follows: (Emphasis added.)

"(a) *Six months from the date of injury, or* from the date of the last payment of any compensation, *or* agreement therefor, or the expiration of any period covered by such payment." (Emphasis added.) Labor Code, § 5405. In connection with those sections, consideration must be given to the burden of proof with regard to whether or not a claim for compensation is barred.

[4-8] "The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not to extinguish the right of the employee." Labor Code, § 5409. By making the statute of limitation an affirmative defense the burden of proving that the action is barred rests upon the defendant.

"The burden of proof rests upon the party holding the affirmative of the issue." Labor Code, § 5705. In Morrison v. Industrial Acc. Comm., supra, 29 Cal.App.2d 535, 85 P.2d 191, it is said:

"The statute of limitations is a defense personal to the debtor, which will be waived if not pleaded. 16 Cal.Jur. 396, sec. 6. The burden of proving that the claim for compensation was barred by the statute of limitations in the present case was upon the respondents who seek to defeat that claim on the ground that it was not presented within six months of the time of the injury complained of." See, also, Argonaut Min. Co., Ltd., v. Industrial Acc. Comm., 21 Cal.App.2d 492, 497, 70 P.2d 216. However, in explanation of that rule it has been declared that where the statute has exemptions, exceptions or matters which will avoid the statute the burden is on the claimant to show that he falls within that category. New Amsterdam C. Co. v. Industrial Acc. Comm., 66 Cal.App. 86, 225 P. 459; Rose v. Petaluma & Santa Rosa R. Co., 64 Cal.App. 213, 221 P. 406; MacDonald v. Industrial Acc. Comm., 211 Cal. 118, 294 P. 389; 34 Am. Jur., Limitation of Actions, §§ 450-451; 130 A.L.R. 440, 471, 482. In the instant case the payment of compensation or agreement therefor are not, however, exceptions or exemptions, or matters in avoidance of the statute. Section 5405 of the Labor Code, supra, states that the action may be commenced within six months from certain events. The phrasing is permissive and affirmative, which indicates that the applicant has whichever period is the longer, that is, the time commences from whichever point will extend to him the longest period. See Bianco v. Industrial Acc. Comm., 24 Cal.2d 584, 150 P.2d 806. The three points of time at which the statute may start its course are in the alternative. The proceeding may be commenced within six months from "the date of injury, *or* from the date of the last payment of any compensation, *or* agreement therefor, * * *." The use of the word "or" conveys the thought of alternatives, not exceptions, or methods of avoiding the statute. Those alternatives are equal. It cannot be said that the basic point of commencement of the time is the date of the injury any more than the payment of compensation or an agreement to pay it. We held in Bianco v. Industrial Acc. Comm., supra, that where two points of commencement were connected by "and," the applicant could avail himself of the longer period. Here the use of "or" makes the case even stronger. Bianco v. Industrial Acc. Comm., supra, 24 Cal.2d 587, 150 P.2d 806. It follows that defendant must prove that the time has elapsed, starting from any and all three of the points designated.

[9, 10] A further factor pointing to the foregoing interpretation appears from the statute. It will be noted that section 5405 states "except as otherwise provided in this division" the periods are as those given. There we have a clear reference to exceptions and must turn to other provisions of the law to find them. For illustration, section 5408 provides that where the employee is incompetent or a minor, the time shall not run against him. This is an exception and the burden is on the employee to show that he falls within it. That was the situation under the wording of the statute involved in MacDonald v. Industrial Acc. Comm., supra; New Amsterdam C. Co. v. Industrial Acc. Comm., supra; and Rose v. Petaluma & Santa Rosa R. Co., supra. For example, in the MacDonald case the statute provided that the period was six months from the date of the injury "except as otherwise provided in this act," and "*provided, further,* that the provisions of this section shall not apply to an employee who is totally disabled and bedridden as a result of his injury, during the continuance of such condition or until the expiration of six months thereafter." (Emphasis added.) 1923 Deering's Gen.Laws, Act 4749, § 11(b) (1), (c); Stats.1917, p. 831, § 11(b) (1), (c). The distinction between the various situations with reference to the burden of proof is not without reason. The condition of being bedridden, incompetent, or under age is peculiarly within the ability of the employee to prove, while payment or agreement to pay compensation are matters of which the defendant certainly has knowledge. Interpreting the statute in light of the rule that a construction favorable to the employee should be followed in preference to an unfavorable one, the result must be that the defendant has the burden of proving that no compensation was paid and no agreement was made therefor.

[11] In the instant case there is no evidence that an agreement for compensation was not made. As indicated by the reports of the doctors the evidence tends to establish the fact that medical treatment was given, rather than that it was not given within six months prior to the filing of the claim. Hence, petitioner not having sustained its burden, the award must be affirmed. It is so ordered.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

As the record affirmatively shows that within six months prior to the filing of his claim, the insurance carrier furnished the applicant with medical care, I concur in the judgment affirming the award of compensation. Such care constitutes "payment of any compensation, or agreement therefor" within the meaning of section 5405 of the Labor Code. United States F. & G. Co. v. Industrial Acc. Comm., 195 Cal. 577, 234 P. 369; Colonial Ins. Co. v. Industrial Acc. Comm., 60 Cal.App.2d 9, 140 P.2d 442; Bige v. Industrial Acc. Comm., 105 Cal.App. 210, 287 P. 577.

27 Cal.2d 389

ZIEGLER v. REUZE.

S. F. 17186.

Supreme Court of California, in Bank.

Dec. 14, 1945.

Rehearing Denied Jan. 10, 1946.

1. Trial 🔑98

In action for malicious prosecution based on charge of disturbing peace, wherein court interrupted witness for defendant who testified that she found three dead rats in front of her doorway, to ask whether witness saw plaintiff or her husband put them there, to which witness replied "no, but that no one else would do so", court's statement that he would accept motion to strike was proper.

2. Malicious prosecution 🔑59(5)

In action for malicious prosecution based on charge of disturbing peace, evidence of relations between plaintiff and her neighbors was relevant to throw light on relationship of parties to each other, or to their neighbors who were witnesses, and related generally to subject matter concerning which plaintiff had testified as being pertinent to issue of malice, where action involved had grown out of a neighborhood quarrel of a continuing character.

3. Malicious prosecution 🔑60(1)

The plaintiff in a malicious prosecution action is given a wide range in proving facts tending to show malice, and defendant to disprove them.

4. Appeal and error 🔑204(1), 231(3), 241

Where substantially all of testimony of defendant and her witnesses in malicious prosecution action based on charge of disturbing the peace concerning specific incidents was received without prior specific objection by plaintiff's counsel who merely stated his views as to general scope evidence should take without objecting to individual questions and motions to strike which were made were so general and inclusive as to require denial, appellate court would not consider objections on appeal.

5. Trial 🔑367

Where motion to strike hearsay testimony was properly granted, it was trial judge's duty to completely disregard it.

6. Appeal and error 🔑1046(5)

In action for malicious prosecution based on charge of disturbing peace on specified date, trial court's statement, on correctly granting plaintiff's motion to strike out certain testimony as hearsay, that he would but that such testimony still produced a certain amount of effect on his mind, did not require reversal because plaintiff was not prejudiced under circumstances. Code Civ.Proc. § 475; Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action for malicious prosecution by Louise Ziegler against Juliette Reuze. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, App., 157 P.2d 396.

Samuel D. Hamburg, of San Francisco, for appellant.

J. B. Zimdars, of San Francisco, for respondent.

SCHAUER, Justice.

In this malicious prosecution action, plaintiff appeals from a judgment rendered by the court, without a jury, by which it is decreed that plaintiff recover nothing. The trial court, on sufficient evidence, found in favor of defendant an all contested issues. Plaintiff's chief contention on appeal is that the court received and considered certain evidence which was not properly admissible. We have concluded, however, that such evidence as may not have been properly before the court was not, in the light of all the evidence and the findings, materially prejudicial to plaintiff's case and that the judgment must be affirmed.

As disclosed by the record, the facts which gave rise to the controversy are substantially as follows: On September 26, 1942, defendant Juliette Reuze swore to a complaint charging that on or about September 16, 1942, plaintiff Louise Ziegler committed the misdemeanor of disturbing the peace. On October 2, 1942, the complaint was dismissed by a judge of the municipal court and on October 17, 1942, this action was filed.

The "international character" of the controversy was stressed in the trial court. Plaintiff and her husband, Christopher Ziegler, of Austrian extraction, and defendant, who is a Frenchwoman, and her husband, Peter M. Reuze, also French, had since 1937 resided as neighbors in the vicinity of Golding Alley and Corbett Avenue in the city of San Francisco. Also resident in the neighborhood, in a house on a lot which adjoined on one side a lot owned by the Reuzes and on the other side a lot owned by the Zieglers, were the Ruffonis, apparently of Italian descent, and the Kellys, who, it seems to have been inferred, are Irish. The home occupied by the Reuzes adjoined the west side of a vacant corner lot owned by the Zieglers. The house in which the Zieglers resided was some 125 feet north of such vacant lot.

Plaintiff testified that between 6 and 7 o'clock in the evening of September 15, 1942, her husband went from their home to the vacant corner lot to secure some tools he had left there after working on the lot in the afternoon; that shortly thereafter plaintiff, who had remained at home, heard her husband calling her name; that she ran out to the sidewalk and from there saw her husband "coming around the corner. Mrs. Reuze, the defendant [whose measurements are not reflected in the record], was hanging on to my husband [who admitted 6'2" of stature] and pulling him back; and my husband tried to get away but she held him back; and there was an Arthur Kelly that had a big pot in his hand aiming for my husband's head"; that plaintiff "called to my husband to come in the house, and that Mrs. Reuze, the defendant, was still hanging; but my husband jerked loose and, at the same time, I saw Pete Reuze, her husband, flying around the corner and he had a gun—it looked like a machine gun—and he said, * * * 'I will blow your God damn head off, you dirty skunks. I am going to kill you both,' and he was aiming at me, and I was standing by my house, and I said nothing, I said. And she, the defendant, said, 'You dirty skunks, you dirty skunks, you dirty skunks, and I will kill you, you dirty sons of bitches,' and Mr. Kelly said, 'Who's a dirty skunk?' And he was the man with the pot"; that Mr. Ziegler then walked home, he and plaintiff went into their house and plaintiff called the police; that at no time was plaintiff closer than 75 feet to the group she claimed was pursuing her husband; that a few days after September 15 plaintiff and her husband "went to the District Attorney's office for a warrant [for Pete Reuze and his wife], and he talked us out of it"; that on September 26, 1942, pursuant to a citation she had received she went again to the district attorney's office where were already gathered (among other residents of the neighborhood) the Reuzes, the Kellys, and Mrs. Ruffoni, "those people that we reported for violating a City ordinance"; that the district attorney then "said that Mr. Ziegler couldn't be disturbing the peace because he is working, he is never home; and the defendant she said, 'Mrs. Ziegler is the one. She is disturbing the peace,' and * * * he said 'I will have to give a warrant against Mrs. Ziegler' so he did"; that plaintiff was thereupon booked at the City Prison and held in custody outside a cell until she furnished bail, a period of approximately one hour; that the police were "very courteous" to her.

Touching upon the subject of specific incidents with the neighbors, her relationship with them and theirs to her, plaintiff, in reply to the question "And you were friendly with all the other neighbors [other than the Reuzes]?" volunteered the statement that prior to the disturbance of September 15, 1942, she and her husband "had nothing to do with any" of their neighbors, but had for various reasons reported "seven or eight" of them to the Board of Public Works. She also testified that she had complained to the Board of Health concerning "the Tounseleys"; that Mr. Sheehy had "violated a city ordinance"; that she "never had nothing to do with Mrs. Sheehy"; that she [plaintiff] had written "the Board of Public Works if they would be kind enough to open up that public lane" across property owned, or claimed to be owned, and occupied by the Reuzes; and that she (plaintiff) and her husband by means of reports and representations made by them had "got [Arthur Kelly, "the man with the pot"] off Relief some years ago." She was asked, "How many neighbors were there that you had trouble with?" and answered, "It is all the people picking on us." Concerning the neighbors who were appearing as witnesses for the defendant, plaintiff stated, "She [defendant Mrs. Reuze] had those people along [at the conference at the district attorney's office] that she has today, that we reported for violating a City Ordinance, Arthur Kelly and Mrs. Kelly, and Mrs. Ruffoni—people making continuous trouble for us because we improved up there [among other things, it was testified by some of the witnesses, the "improvements" included a galvanized iron spite fence eight to twelve feet high and painted black] and they don't want improvements."

Some of the testimony above set forth was adduced on direct examination, some of it on cross-examination, and much of it was volunteered by the witness. Regardless of whose questioning was the basis for any particular statement no effort was made by or on behalf of plaintiff to exclude from the record *her* version of various incidents with the neighbors. It is, however, the testimony of the neighbors concerning these same or related matters, first alluded to by plaintiff herself, that plaintiff contends was improperly admitted.

Peter Reuze, defendant's husband, stated that on the evening in question, September 15, 1942, "After I got through working, the wife told me that those people were putting up stake posts to erect a fence; so I went down the lane and I saw a big railroad tie sticking up on the wall, and I didn't pay attention to it, and I was looking to see if it was on my ground, and I didn't see nothing; and I saw Mr. Ziegler come from behind and he grabbed me by the neck, and said, 'What in the hell are you looking at, you little son-of-a-bitch.' Anyway, he grabbed me by the neck and dragged me to the sidewalk, and I started to holler to have witnesses, and then the wife came, Mrs. Ruffoni came, and folks living up above, who was Mrs. Kelly, Mr. Kelly, and I don't know, possibly Mrs. Williams heard the commotion, and may have heard something; but anyway, I had those people there, and when they saw—Mrs. Kelly saw what was going on—I don't know how far away, but she called the Police and the Police came after it was all over, because those folks came, the wife, Mrs. Ruffoni, and Mr. Kelly, Mrs. Kelly were there, and when the wife saw he had me by the neck, she came to separate the two of us and then he got a hold of her, and pushed the two of us in the middle of the street, and here were machines coming around behind, and I was hollering, 'Here's a machine!' * * * And after that we managed to get loose, or, he released his grab on us, and the machines missed us by maybe three feet is about all I can see, and after that he was hollering for Louise—Mrs. Ziegler; and she came down, and she said, 'Christopher, come on home, and leave those two sons-of-bitches alone,' and she didn't pay no more attention; and here comes a police wagon, a sedan, and the officer said, 'Oh, well, we know those people. We had trouble before. Nobody got hurt. Forget about it. We came over because we were sent over,' and he said 'That's why we came here,' and that was that particular case.

"Your Honor, may I say something else? I have been pestered by those people all along. They said I am the 'machine gunner' and they have sent the FBI up. I have no objection for anybody to investigate me on my actions, but it seems on different occasions that those people have persecuted me on having machine guns. * * * I don't even own an air rifle. * * * I have no weapon"; that prior to September 15, 1942, Mr. Ziegler had not annoyed the witness, "but he said to us, 'If you keep'—they had trouble with somebody else before—with Mrs. Ruffoni at that time—and they were talking to us—we didn't take sides, we tried to keep neutral on what may arise, and they said 'If you keep on talking to the Ruffonis we are going to make it mean for you.' * * * and we kept on talking to Mrs. Ruffoni, because we have known her a good many years, she is a good neighbor, and those people, we were friends with them when they first came * * * and we didn't have a word with them until they started complaining about Mrs. Ruffoni. * * * That's quite a while before this when they started to have trouble with Mrs. Ruffoni. Every time they would see her they would say, 'How is Lena,' they said, 'the wop, the son-of-a-bitch.' * * * [O]n one * * * afternoon I was cutting some rose bushes in the yard, and the wife was going to see Mrs. Ruffoni, and Mrs. Ziegler was at that time in her lot, and she started to call my wife, call her names—she called her a dirty French whore, and that's exactly the words she used. * * * And I was so upset that I went back alongside, and I called to her and I said, 'Mrs. Ziegler,' I said, 'what did you call my wife?' She said, 'You son of a bitch, you come over here and I'll fix you,' and she was brandishing a hammer, and I said, 'I will give you the first crack at me, if you feel that way about it, you and your hammer,' I was upset and she cooled off and went back to her work, and I forgot about the darned thing. And I always said to the wife, 'There is only one way to keep those people quiet, and that is to go to court'. Nobody wanted to go to court, so I advised the wife to put those people under a peace bond, and that is why she went to court, to put those people—with all the neighbors present, and some are missing now—under a peace bond at the bond office."

Defendant's story of the events of September 15, 1942, is as follows: "On the 15th of September 1942, Mr. Ziegler put up posts on the ground [of the vacant lot adjoining the Reuze home] and when my husband come home at night, I told him about it, and my husband went down and Mr. Ziegler grabbed him by the neck and started to fight, and I hear him hollering, 'Help, help,' Mrs. Ruffoni come down. She was in the house and she come down and we went to see what happened. Then Mr. Ziegler grabbed—he had my husband by the neck—and I went after Mr. Ziegler to grab him and Mr. Ziegler had both of us, and he tried to put us on the street. A machine was coming, and all our neighbors, Mrs. Kelly, Mr. Kelly was there, and Mrs. Ruffoni, and Mrs. Williams—she was above us—come down and try to help us. They were putting us in the street, and Mr. Ziegler wanted, I think, both of us to be killed. Then Mr. Ziegler let us go—he grabbed both of us—and he was going for his wife, by the name of Louise, and when she come out she used language that was something fierce. * * * She said, 'You God damned dirty French whore. You old soak.' And I was never once intoxicated in my life. And I went home"; *that one of the neighbors then called the police, who advised that the Zieglers be put under a peace bond;* that thereupon she, defendant, consulted the district attorney in his office and at his request returned to his office on September 26, 1942, accompanied by several of the neighbors; that when they arrived at his office "Mr. and Mrs. Ziegler was there. He asked me again my case, and I started to say what he [Ziegler] did to my husband, and what she [Mrs. Ziegler] called me, and the District Attorney asked to say what those people did, and they started in to say, but she [Mrs. Ziegler] was so mean, she don't want us to say to the District Attorney * * * Then he [the District Attorney] * * * said [to Mrs. Ziegler], 'You shut up, you are just looking to fight,' and he said, 'Who are those people?' And I said 'The people who come and testify' and when we started to talk, she don't give us a chance to talk, and she [the plaintiff, Mrs. Ziegler] said, 'I want everybody to be arrested in this room.' Then the District Attorney just * * * said, 'There will be only one, and it will be you.' Then he passed me a sheet of paper and wanted me to sign, and I said 'Why?' And he said, 'She's a nuisance. She ought to be arrested' and I said, 'What we want, those people—we all come together and we want those people to be under a peace bond. We want to be left alone, like we were before. If we talk in the street, we don't want them to call us names.'"

Julia Sheehy, Elinor V. Knuth, Mabel Kelly, and Leone Saran, all of them neighbors of the parties, were also present in the district attorney's office when, at his direction, defendant signed the complaint against Mrs. Ziegler, and corroborated defendant's story of the events which occurred there. Mrs. Saran testified in particular that on "the date that this complaint was sworn out, I came down with Mrs. Reuze and we were talking to the District Attorney about the complaint, and Mr. and Mrs. Ziegler butted in so many times trying to tell their side of the story, that the District Atttorney got sick and disgusted and he said, 'I am sick of you, with your water pistols and popguns. I will swear a complaint on general principles, because you are both a nuisance.' * * * He said, 'I am sick and tired of your popguns and complaints for the different tenants that live on Corbett Avenue.' Q. And he advised Mrs. Reuze to sign this complaint that is the subject of this action? A. Yes. Q. And she did it after a full statement of all the trouble by you people and by the Zieglers made to the District Attorney at the Hall of Justice? A. Yes."

[1] These four neighbors also testified to various specific instances and manners in which plaintiff and her husband had interfered with and attempted to supervise the lives and living conditions of the witnesses (while they resided in the neighborhood) by complaints to the Board of Health and the city building inspectors and in the case of the Kellys by taking steps to secure the discharge of Mr. Kelly from his WPA employment. Further testimony to the same general effect was given by defendant's husband. It is to be noted that such testimony by three of the four neighbors and by Mr. Reuze concerned matters which had already been covered generally by the plaintiff in her own testimony. The testimony of Mrs. Saran, the fourth of her neighbors above mentioned, was received out of order, prior to plaintiff's cross-examination, but after plaintiff had testified concerning the action she had taken to procure the discharge of Mr. Kelly. The nearest approach to an objection to the testimony of this witness (other than an objection to a conclusion, which was sustained) is found in a remark of plaintiff's

attorney (interrupting an answer of the witness) that "We are only concerned with the trouble set forth in the complaint, September 15, 1942." And, likewise, the closest approach to a ruling on the subject, as to this witness' testimony, is the reply of the trial judge that "Malice is involved in this case—I don't know what the lady is going to say, naturally, but I think that the attitude and relations that existed between the plaintiff here and all her neighbors has more or less to do with this case." The judge's statement was not challenged and no objection was interposed to the succeeding questions. However, at a later stage of her examination, after she had stated, "and I found three dead rats in front of my doorway," the court interrupted her and the record thereon is as follows: "The Court: Q. You didn't see them [the Zieglers] put them there? A. No, but no one else would throw any rats. The Court: I will accept a motion to strike that. Mr. Penaat [plaintiff's attorney]: Yes. As a matter of fact, I think all of her testimony is irrelevant. The Court: There are parts of it that have some relevancy to the nature of this case." The ruling, if we may call it such, was correct.

[2, 3] Plaintiff argues, however, that the judgment must be reversed by reason of the admission and consideration by the court of the above mentioned testimony concerning specific instances of interference by plaintiff and her husband with the neighbors, and in this connection urges that although in an action for malicious prosecution proof of bad reputation of plaintiff for peace and quiet is admissible on various theories, such proof must consist of evidence of general reputation rather than of specific acts of plaintiff. But here the admissibility of the evidence in question is not governed by the rules pertaining to the proof of bad reputation. Such evidence was admissible because it tended to throw light on the relationship of the parties to each other or to their neighbors who were witnesses. It related generally to subject matter concerning which plaintiff had testified and was pertinent to the issue of malice. The action before the court obviously grew out of a neighborhood quarrel, apparently a more or less continuing quarrel, and the joint effort of a substantial number of the neighborhood residents to have the plaintiff and her husband placed under a peace bond. Mrs. Saran testified, "That wasn't the only day we had trouble. Every day something happened there." The specific acts testified to were not wholly disconnected incidents with strangers but rather a part of the background of the very controversy at issue. If plaintiff's testimony concerning the specific acts of herself and her husband in relation to their neighbors was admissible as a part of the surrounding circumstances, so also was that of the neighbors. "The plaintiff is given a very wide range in proving facts and circumstances tending to prove malice, and the defendant, to disprove it." (16 Cal.Jur. 748, § 15.) The effect of such evidence—whether, in the light of the other evidence, it tended to establish or to negate malice on the part of the defendant—was for the trial court. Under the circumstances there was no error in receiving it.

[4] We have discussed the merits of the question on the admissibility of the above mentioned evidence because the briefs seem to assume that such question is properly before the court, but it should also be mentioned, as a further and in itself sufficient answer to plaintiff's contention on this point, that the record discloses that substantially all of the questioned evidence (the testimony of Mr. Reuze and of the three other neighbors, as well as that of Mrs. Saran, previously discussed) concerning specific incidents was received without prior specific objection having been interposed (counsel for plaintiff stated his views as to the general scope the evidence should take but did not object to individual questions) and that such motions to strike as were made were so general and inclusive as to require denial even if plaintiff's theory of admissibility had been correct. Furthermore, it should be noted that the subject of proving bad general reputation for peace and quiet was not mentioned until late in the trial, when it was suggested by the learned trial judge, and that when counsel for defendant acted upon the court's suggestion the objection of counsel for plaintiff to the questions asked was based upon the contention that the questions should call for general reputation for "truth and honesty" rather than for "peace and quiet." In his brief counsel for plaintiff now admits, in effect, that the questions severally objected to were in proper form but contends that testimony of specific acts, given in response to other questions not specifically objected to, was improperly admitted because it tended to prove bad repu-

tation. As hereinabove shown such evidence was properly admitted as touching upon the issue of malice.

[5] In addition to his story as quoted hereinabove Mr. Reuze stated that "They [the Zieglers] went to my employer where I was working and said that I was not fit to be an American Citizen, and then they sent the Immigration Department to investigate me. I have no objection, because I was not afraid to be investigated by anyone; and after that they went where I am working now at the present time; they went there and told the chief of the guards that I am a thief, that I stole some tools from Bethlehem Steel Company * * *. And that I threatened [Mrs. Ziegler] * * * with a machine gun. Q. And they tried to get you discharged? A. Yes, that was the idea when they came there, to have me discharged. * * * Q. How do you know that all these annoyances resulted from the activities of these people? * * * A. Because the chief of the guards * * * told me about it himself." Counsel for plaintiff asked that "this latter testimony" be stricken as hearsay, to which the trial judge replied, "Yes, but it still produces a certain amount of effect in my mind." Assuming that the motion is sufficiently certain in its specification of testimony to be understandable alike by counsel, the trial court, and this court, the ruling striking the hearsay was correct and, being stricken, it was the duty of the trial judge to completely disregard it. We are satisfied, however, for reasons hereinafter delineated, that a reversal cannot be predicated on the remark "but it still produces a certain amount of effect in my mind."

Apparently before the defendants had rested, but without objection from either party, the judge brought the trial to a conclusion by announcing his decision as follows: "I will decide this case without further testimony. I have heard plenty. *The testimony of the plaintiff herself and her husband is sufficient* to indicate to me that there is no basis for the prosecution of this action for damages for false arrest. *The testimony of all the witnesses* shows that the condition of strife and neighborhood quarrelsomeness existing up there on the hill is created by the fact that the plaintiff and her husband seem to figure that they had control of the destinies of everybody in that neighborhood up there. * * * They have this WPA worker taken off his job, and they make half a dozen or more complaints against the maintenance of conditions that are in various homes up there. * * * *But, anyway, this lady didn't seek a warrant for the arrest of the plaintiff. There was a general conference* * * * *at the Bond and Warrant office as between the plaintiff and all these other neighbors* * * *." (Italics added.) The trial court specifically found, among other things, "That defendant, in or by the obtaining of said warrant [of September 26, 1942, against plaintiff], did not act maliciously or without probable cause, but did so on the advice of a deputy district attorney of said City and County [of San Francisco] after having stated to him the facts of her complaint against plaintiff."

[6] Plaintiff argues vigorously that the statement by the trial judge upon striking the hearsay testimony of defendant's husband, quoted hereinabove, that such testimony "still produces a certain amount of effect in my mind," demonstrates that the judge was allowing himself to be influenced by inadmissible evidence. Giving consideration to the entire record, as we are required to do by the provisions of section 4½ of article VI of the California Constitution, we are satisfied that the hearsay statement, even if it had not been stricken out, could not in reason be regarded as of sufficient moment to have any substantial effect upon the trial court's findings. The evidence taken as a whole leads overwhelmingly to the conclusion that there has been no miscarriage of justice by the entry of judgment in defendant's favor. As testified by plaintiff, herself, as well as by defendant, her husband, and the neighbors, the issuance of the complaint against plaintiff came as the culmination of a conference between the deputy district attorney and the neighborhood residents, including the plaintiff and her husband as well as the defendant. The defendant was not learned in court procedures; prior to her appearance on the charge against plaintiff she had never been in court. The trial judge evidently believed that the defendant and her neighbors sought to have the plaintiff and her husband placed under a peace bond, rather than prosecuted for disturbing the peace; and that there was reasonable and probable cause for their action. In any event, the evidence establishes without substantial contradiction that defendant

in good faith signed the complaint upon advice of the district attorney or one of his deputies after a full and fair disclosure of all the facts. The court specifically found, among other things, that defendant acted upon such advice and, as previously mentioned, that she acted without malice and upon probable cause. Several complete defenses to this malicious prosecution action are thus made out by defendant. Regardless of the other issues, the finding as to defendant's receipt of and reliance upon the advice of counsel (see 16 Cal.Jur. 741 § 11; Richter v. Neilson, (1936), 11 Cal. App.2d 503, 508, 54 P.2d 54; Sebastian v. Crowley (1940), 38 Cal.App.2d 194, 203, 101 P.2d 120) could not well have been affected adversely to plaintiff by the stricken hearsay testimony. Under the circumstances the erroneous consideration by the trial court of the stricken testimony, assuming that such testimony was considered, must be held not to have resulted in a miscarriage of justice. (See Cal.Const., art. VI, § 4½; Code Civ.Proc. § 475.) And under the same rule, even if it could be held that the evidence (hereinabove discussed) concerning the specific acts of plaintiff and her husband was improperly considered for any purpose, the judgment could not be disturbed.

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

72 Cal.App.2d 270

GARDNER v. GARDNER.

Civ. 15014.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1945.

1. Appeal and error 🔑935(2)

Where affidavits on motion to open default judgment are conflicting, those in favor of prevailing party must be taken as true on appeal.

2. Courts 🔑90(1)

General principles do not necessarily determine right of one to prevail merely by virtue of their pronouncement, but merits of any justiciable controversy must be adjudicated on all facts presented to the court, and if facts found suggest no exception to general principles, the latter may prevail and decision result accordingly.

3. Courts 🔑90(1)

If conduct of a party invokes application of an exception to a pertinent general principle, the decision may stem from the application of such exception to the facts found.

4. Divorce 🔑161

Where wife after being served in North Dakota by sheriff with process in husband's California divorce suit consented to entry of divorce decree and made no demands on husband except that he provide for his children, denial of wife's motion to vacate interlocutory divorce decree and preceding order for default 5 months and 29 days after the decree was not abuse of discretion. Code Civ.Proc. § 473a; Civ. Code, §§ 138, 198, 207.

5. Divorce 🔑161

Under Civil Code provision, defendant in California divorce suit served by sheriff in North Dakota nearly six months prior to entry of interlocutory decree of divorce based on default was not entitled to have decree set aside as matter of right, within one year from its entry, on theory that she had not been personally served, but lower court had discretion to deny motion. Code Civ.Proc. § 473a.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action for divorce by Murray Gardner against Mary Elizabeth Gardner. From an order denying defendant's motion to vacate an interlocutory decree of divorce and the preceding order for default, defendant appeals.

Affirmed.

William C. Rau, of Los Angeles, for appellant.

Robert E. Krause and John A. Paap, both of Long Beach, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the trial court abused its discretion in denying defendant's motion to vacate an interlocutory decree of divorce and the preceding order for default, where service of summons was made in a sister state 5 months and 29 days prior to the decree and the motion was filed more than 2 months thereafter.

Basing his action upon extreme cruelty, plaintiff filed his complaint on June 5, 1944. It was served by the sheriff at Jamestown, N. D., 14 days later. Defendant promptly consulted an attorney in the Dakota city and on June 22 forwarded a letter to plaintiff's counsel, attorney Paap, to the effect that she had been advised that "it may become necessary for me to return to California in order to protect my children until they become self supporting." In her reply to Mr. Paap's request that she sign an appearance she wrote that she had no objection to her husband's being divorced so long as the children suffered no detriment by reason thereof, and volunteered to execute the appearance. On June 14, 1944, Mr. Paap wrote that plaintiff would continue to support the children. On September 25, 1944, defendant's default was entered. Subsequent to the entry of default defendant wrote Mr. Paap as follows: "If he will pay me $10,000, I will let him have his divorce and never cross his path again"; and 15 days later she wrote plaintiff that it would be all right for him to proceed with the divorce so long as he would send her the money. Having made no reply to her letters, plaintiff obtained his interlocutory decree on November 15, 1944.

[1] Thus it appears that not only was defendant in fact served with process and actually informed of the several events in the series of occurrences which preceded the decree but also she had the benefit of the advice of counsel and in turn gave plaintiff express consent that he might proceed to the final act in the drama by obtaining a decree of divorce. These facts recited in the supporting affidavits of respondent are deemed to be true. Doak v. Bruson, 152 Cal. 17, 91 P. 1001.

[2, 3] Defendant contends that especially in divorce actions the law favors trials on the merits; that it regards with disfavor attempts to take advantage of mistake, surprise or excusable neglect, and that section 473a of the Code of Civil Procedure evidences a legislative intent to provide simple means for gaining relief from technical defaults. General principles do not necessarily determine the right of one to prevail merely by virtue of their pronouncement. The merits of any justiciable controversy must be adjudicated upon all of the facts presented to the court. If the facts found suggest no exception to general principles, the latter may prevail and decision result accordingly. But if the conduct of a party invokes the application of an exception to a pertinent general principle the decision may stem from the application of such exception to the facts found.

[4] It is not shown that plaintiff took advantage of any mistake or excusable neglect on the part of defendant. She was agreeable to the decree for over 5 months before its entry. During that period she made no demands upon plaintiff except that he provide for his children. Such demand was meaningless in view of the law that plaintiff could not have been relieved of that obligation even though defendant had consented thereto. Civil Code, §§ 138, 198, 207. It is argued that she acted promptly after entry of the decree. Such diligence did not meet the requirements of her situation nor does it offset her supine attitude during the gestation of the divorce decree. She knew the purpose of the action from its incipiency and that it would terminate in a divorce decree if not answered as required by the summons. Her repeated acrimonious consent to the decree prior to its entry requires no comment as to its probative value in showing her silent if not eager acquiescence in the divorce proceeding and its ensuing decree.

[5] Not only do the facts disclose that the court was not unreasonable in the exercise of its discretion in denying defendant's motion but the order is supported by a fair interpretation of section 473a, Code Civil Procedure, and by numerous authorities. Section 473a[1] was formerly a part of section 473, but in 1933 it was made a separate statute as though to emphasize the purpose of the rule that in the case of one served by publication the defendant has an advantage in his attempt to vacate a judgment by default, whereas under section 473

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[1] "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

the burden is strictly upon the defendant to show that he has suffered mistake, surprise, inadvertence or excusable neglect. To such as are served without the state, in the absence of facts showing laches, the court may within one year instead of six months after judgment grant relief therefrom. Appellant conceives that because she was served in North Dakota she was not personally served when the sheriff at Jamestown delivered to her a copy of the summons and complaint, and that she was therefore entitled to have the judgment vacated as a matter of right upon her motion within one year from its entry. Such construction of the statute is not justified. The significance of personal service out of the state following an order for publication of summons is that the defendant thereby gains actual notice of the nature of the action and of the demands upon him, whereas a party who has been served by mere publication of the summons may never have heard of the lawsuit prior to his receipt of notice of entry of the judgment. If the defendant receives the complaint in a foreign jurisdiction he may there consult counsel, and if he desires to resist the demands of his adversary he may in propria persona forward the appropriate pleading to avoid a default or take such steps as he may deem protective of his rights.

Defendant's situation is analogous to if not identical with those of others who have sought the same sort of relief. In Boland v. All Persons, 160 Cal. 486, 117 P. 547, 548, Mrs. de Morgan was defendant in an action to quiet title. She was confined to her bed from the time of the filing of the action until her death. She received no personal service but was informed of the contents of the summons and complaint which were posted on the door of her home which was the subject of the action. She was capable of transacting business but ignored the Boland lawsuit. She deceased on May 10, 1907, and judgment was entered against her on May 27. The effort of her administratrix to obtain relief from the judgment was unavailing. The Supreme Court held that while one who has not been personally served may for that reason be granted relief within a year, yet if it be shown "that the applicant had actual notice of the action in time to have entered an appearance * * *, and that the failure to do so was owing to his neglect or to his consent to the judgment," a case arises for the exercise of the discretion of the court. In such event the court must determine whether or not the applicant's laches warrants relief. The case of Hiltbrand v. Hiltbrand, 218 Cal. 321, 23 P.2d 277, was a divorce action. The wife was residing in Switzerland when sued and she there received a copy of the summons and complaint. She promptly wrote to her husband's counsel protesting the action, but her default was entered. Two days thereafter she wrote her attorney at Los Angeles requesting him to represent her. He delayed until six months more had elapsed, when he filed notice of motion to vacate the default. The question posed by the Supreme Court was whether under the circumstances there was any room for operation of the discretion of the trial court in deciding the motion. While acknowledging the continuity of the rule (Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990) that under ordinary circumstances a defendant served by publication has the right at any time during the year following the entry of judgment based upon published summons to be relieved therefrom, yet the court held that such relief will not be granted where there is an affirmative showing of laches or of inexcusable neglect of sufficient strength to create an estoppel, citing Palmer v. Lantz, 215 Cal. 320, 9 P.2d 821, and In re Mercereau, 126 Cal.App. 590, 14 P.2d 1019. The very case which prescribes the rule in ordinary cases (Gray v. Lawlor, supra) declares that section 473 was not designed for litigants who with full knowledge of constructive service upon them remain inactive.

Defendant having delayed for practically five months after receipt of summons and plaintiff having adjusted himself to the new life in reliance upon her inaction in the litigation and upon her express consent to his divorce, the trial court had an abundance of material for the exercise or discretion and its conclusion will therefore not be disturbed.

Order affirmed.

McCOMB and WILSON, JJ., concur.

72 Cal.App.2d 238

PEOPLE v. ARECHIGA.

Cr. 3903.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1945.

1. Criminal law 🔑1144(13)

On defendant's appeal from conviction after trial before jury, evidence was viewed in light most favorable to people.

2. Kidnapping 🔑5

Evidence that defendant forced complaining witness into his automobile and took her to another part of the county was sufficient to sustain conviction of kidnapping. Pen.Code, § 207.

3. Rape 🔑51(4)

Testimony of 17 year old complaining witness that defendant by threats and contrary to her will forced her to have sexual intercourse with him when she was not his wife, sustained conviction of forcible rape. Pen.Code, § 261.

4. Criminal law 🔑1159(3)

Conflicts in evidence must be disregarded by appellate court since such evidence is for consideration of trier of facts.

5. Criminal law 🔑1159(2)

The finding of trier of facts sustained by substantial evidence will not be disturbed by appellate court.

6. Rape 🔑51(3), 57(1)

That physician who examined complaining witness shortly after she had been attacked testified that she was virgin, did not establish that defendant was not guilty of rape where same doctor also testified that hymen of complaining witness was not intact and that from condition in which he found her private parts, penetration could have taken place, but effect of testimony was for the jury. Pen.Code, § 261.

7. Criminal law 🔑1172(1)

Where in prosecution for kidnapping and forcible rape on 17 year old girl, court properly instructed that it was duty of jury to examine with caution testimony of prosecuting witness because such charges can be easily made and are difficult to disprove, further instruction that fact that charge was made should not deter jury from rendering verdict of guilty if convinced by evidence beyond reasonable doubt that defendant was guilty as charged, was not prejudicially erroneous as destroying value of cautionary instructions. Pen.Code, §§ 207, 261.

8. Criminal law 🔑782(1), 789(4)

In prosecution for kidnapping and rape of 17 year old girl, court properly instructed that jury should not be moved by passion, sympathy or prejudice to find verdict of guilty on any counts and should find defendant not guilty unless convinced beyond reasonable doubt from evidence that he was guilty as charged. Pen.Code, §§ 207, 261.

9. Criminal law 🔑958(3)

Where there was no showing in affidavit supporting accused's motion for new trial that alleged newly discovered evidence could not have been produced at trial, appellate court could not disturb ruling denying such motion.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

John C. Arechiga was convicted of kidnapping and rape, and he appeals.

Affirmed.

Rosalind Goodrich Bates, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy, and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy, both of Los Angeles, for respondent.

McCOMB, Justice.

From verdicts of guilty of (1) kidnapping and (2) rape, after trial before a jury, defendant appeals. There is also an appeal from an order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App. 2d 265, 269, 108 P.2d 732, the essential facts are:

At about 8:30 p. m., on March 18, 1944, Mary Fernandez, age 17, while on Ord Street between Broadway and Castelar streets in Los Angeles, California, was struck by defendant, pushed into his car, threatened that if she made any outcry he would strike her again, driven to the hills and there thrown to the ground. Defendant then had an act of sexual intercourse with her against her will.

[2] Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *There is not any substantial evidence to sustain the judgments of guilty.*

This proposition is untenable.

a) Section 207 of the Penal Code so far as applicable here reads as follows:

"Every person who forcibly steals, takes, or arrests any person in this state, and carries him * * * into another part of the same county * * * is guilty of kidnaping."

Clearly the testimony of the complaining witness shows that defendant was guilty of kidnapping in violation of the provisions of the foregoing section when he forced Miss Fernandez to get into his automobile and took her to another part of Los Angeles county.

b) So far as applicable here, section 261 of the Penal Code reads thus:

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: * * *

"3. Where she resists, but her resistance is overcome by force or violence;

"4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, * * *."

[3-5] Complaining witness testified that defendant had an act of sexual intercourse with her when she was not his wife, contrary to her will, her resistance being overcome by force and threats of great and immediate bodily harm. Clearly such evidence which was believed by the trial jury was substantial evidence of forcible rape as defined by section 261 of the Penal Code, supra. Conflicting evidence must be disregarded by this court since such evidence was for the consideration of the trier of fact; and where as in the instant case there is substantial evidence to sustain the finding of the trier of fact an appellate court will not disturb such finding. See People v. Pianezzi, supra.

[6] There is no merit in defendant's contention that he was not guilty of rape because the doctor at the Receiving Hospital who examined Miss Fernandez shortly after she had been attacked testified that she was a virgin. Since the same doctor also testified that Miss Fernandez's hymen was not intact and that from the condition in which he found her private parts, penetration could have taken place. The effect to be given to this testimony was for the jury whose determination is binding upon this court.

[7] Second: *The trial court committed prejudicial error in instructing the jury as follows:*

a) *"By reason of the fact that charges of the nature involved in this case can easily be made and are often difficult to disprove I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness. The fact that the charge here made, however, is one difficult to disprove should not deter you from rendering a verdict of guilty in the event you are convinced by the evidence beyond a reasonable doubt that defendant is guilty as charged."*

The foregoing instruction was correct and there is no merit in defendant's contention that the court destroyed the value of the cautionary instruction by coupling with it an instruction that although the charge was one difficult to disprove, that fact should not deter the jury from rendering a verdict of guilty in the event they were convinced beyond a reasonable doubt of defendant's guilt. The first sentence of the instruction correctly states the law as set forth in People v. Putnam, 20 Cal.2d 885, 889, 129 P.2d 367, and People v. Williams, 55 Cal.App.2d 696, 670, 131 P.2d 851. There is no doubt the second sentence is also an accurate statement of the law of this state on the subject.

[8] b) *"You are not to be moved by passion, sympathy or prejudice to find a verdict of guilty on any counts of the information and unless you are convinced beyond a reasonable doubt from the evidence that the defendant is guilty as charged on one or any of the counts of the information you should find the defendant not guilty."*

The foregoing instruction was a correct statement of the principles of law involved therein and was properly given. People v. Bojorquez, 35 Cal.App. 350, 353, 169 P. 922; People v. Woodcock, 52 Cal.App. 412, 437 [6], 199 P. 565; People v. Zari, 54 Cal.App. 133, 135, 201 P. 345.

[9] Third: *The trial court erred in denying defendant's motion for a new trial*

on the ground of newly discovered evidence.

This proposition is untenable. There is not any showing in the affidavits filed in support of the motion for a new trial that the alleged newly discovered evidence could not have been produced at the time of the trial. Therefore we may not disturb the ruling of the trial court in denying such motion. People v. Urquidas, 96 Cal. 239, 241 et seq., 31 P. 52.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

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72 Cal.App.2d 241

PEOPLE v. HERMAN.

Cr. 3938.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1945.

Hearing Denied Jan. 17, 1946.

1. Automobiles 🔑355(10)

Evidence sustained conviction for taking an automobile without the owner's consent. Vehicle Code, § 503, St.1939, p. 1481.

2. Criminal law 🔑863(2)

Court's statement to jury, in response to request for further instructions during deliberations, that jury should not concern themselves with any deleted matter and that such matter was argumentative and was not an instruction as to the law, was not erroneous.

3. Criminal law 🔑823(4)

In prosecution for taking an automobile without owner's consent, instruction defining "willfully" was not misleading, in view of other instructions and evidence clearly revealing defendant's intent in taking the automobile. Vehicle Code, § 503, St.1939, p. 1481.

4. Automobiles 🔑357

In prosecution for taking an automobile without owner's consent, evidence was insufficient to warrant giving of defendant's requested instruction on theory of cancellation of sale of automobile by defendant. Vehicle Code, § 503, St.1939, p. 1481.

5. Criminal law 🔑770(1)

A defendant in a criminal case is entitled to instructions fairly covering his theory of the action, but in order to have a theory there must be evidence on which it may be based.

6. Criminal law 🔑419(11)

In prosecution for taking an automobile without owner's consent, where police officer called at defendant's place of business and had conversation with defendant's wife and son after automobile had been reported as stolen, but there was no evidence that officer was representing or was authorized to represent owner, exclusion of evidence regarding the conversation was not error. Vehicle Code, § 503, St.1939, p. 1481.

7. Criminal law 🔑1086(14)

Error could not be predicated upon remarks of district attorney where record did not contain any objection or exception to the remarks.

8. Criminal law 🔑865(1)

Where jury during deliberations, requested further instructions and court reread general instructions regarding duties of jurors, record did not show that trial judge coerced the jury or in any manner influenced them to return a verdict.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Bernard L. Herman was convicted of taking an automobile without the owner's consent, and he appeals.

Affirmed.

A. J. O'Connor and George J. Hider, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with violation of section 503 of the Vehicle Code, St.1939, p. 1481, taking an automobile without the owner's consent, upon which he was found guilty by the jury. His motion for a new trial was denied, and he appealed from the judgment of conviction and from the order denying said motion.

[1] 1. *Sufficiency of the evidence to sustain judgment of conviction.* Viewing the evidence most favorable to the judgment, the material facts shown thereby are as follows: Appellant purchased a Cadillac automobile from one Brightman, at which time the car bore a Hawaiian ownership or registration certificate and Hawaiian license plates. Brightman signed the registration certificate as registered owner and as legal owner and delivered the same to appellant. Appellant paid part of the purchase price in cash and he and Brightman went to a bank where he obtained a loan in an amount sufficient to pay the full sum. Appellant gave the bank his personal note and a chattel mortgage on the car to secure the loan, delivering to the bank the registration certificate with Brightman's signatures thereon.

Appellant advertised the automobile for sale and in response to the advertisement Wade E. Miller called at appellant's place of business. Miller purchased the car, giving two personal checks amounting to $4,000, and the car was delivered to him. Two days later Miller and appellant went to the bank which held the chattel mortgage, where Miller handed appellant two cashier's checks in exchange for his personal checks previously given. Appellant paid his indebtedness to the bank and received his chattel mortgage and the Hawaiian registration certificate. Miller requested appellant to sign a bill of sale but he refused to do so. He did trace Brightman's signature on a bill of sale and handed it to Miller with the Hawaiian registration certificate which Brightman had endorsed. Miller took the certificate to the Motor Vehicle Department and had a California registration certificate issued in his own name and received California license plates for the car. Appellant did not sign the certificate as first buyer in the blank provided for such signature. However, the signatures of Brightman as both legal and registered owner and possession of the certificate by Miller indicated the latter to be the first buyer.

There is a conflict as to the price which appellant was to receive for the automobile. Miller claims that the sum of $4,000 paid by him was in full payment, and appellant asserts that the price was $5,200 and that Miller owed him $1,200. In finding appellant guilty of taking Miller's car as charged the jury resolved the conflict against appellant.

Appellant made several unsuccessful attempts to see Miller in his effort to collect the balance which he claimed to be unpaid. Appellant testified that he finally told one Craig, an associate of Miller, that if Miller did not pay the alleged balance he, appellant, would return the $4,000 and cancel the deal, to which Craig, according to appellant, agreed. Craig's authority to bind Miller is not shown. Appellant made threats to Miller's secretary that he would take the car if the additional sum was not paid, to which she replied that he would be stealing the car if he took it without Miller's consent. Miller's attorney warned appellant to use legal means to recover the car. Appellant, as his counsel state in their brief, "decided to take the law into his own hands." He gave the Los Angeles Cadillac agency the motor number of the car and obtained a duplicate set of keys. He then went to Miller's place of business, took the car and drove it to a ranch several miles distant, where it remained for about two weeks. He removed the license plates which Miller had obtained and installed old Ford plates on the car.

While driving the automobile he was arrested for violating the speed law. It required a shot from the officer's revolver to bring appellant to a halt after a chase of two and a half miles during which a speed of 90 miles per hour had been reached. It was then discovered that the automobile was the one which Miller had reported to have been stolen. Alighting from the car, appellant approached the officer with a bottle in his upraised hand, the officer drew his gun, and appellant lowered his arm, after which he was placed under arrest and taken to the police station.

The automobile having been delivered to Miller by appellant, together with the Hawaiian registration certificate endorsed by Brightman as both registered and legal owner, Miller then had actual possession and legal title and was entitled to have the car registered in his own name. If appellant had not received the amount which he claimed to have been due him, remedies were available to him in the civil courts. Appellant's deliberate intent to deprive Miller of the automobile in violation of section 503 of the Vehicle Code is shown by his having procured keys for the car, his taking it from private property in the absence and without the consent of Miller, his concealing it for two weeks at a distant point, his changing the license plates, and his effort to avoid arrest. It devolved upon the jury to decide the question of intent and to determine any conflicts in the evidence. The verdict speaks for itself.

[2] 2. *Alleged errors in the instructions to the jury.* While the jury was deliberating they came into court for further instructions. In response to an inquiry by a juror why some portions of the instructions had been stricken out, the court replied that they should not concern themselves with any deleted matter and that such matter was argumentative and was not an instruction as to the law. There was no error in such statement.

[3] Appellant asserts error in the giving of an instruction reading: "The word 'willfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another, or to acquire any advantage." In People v. Gibson, 107 Cal. App. 76, 82, 289 P. 937, the court said that standing alone the instruction as to the meaning of "willfully" was proper (citing Penal Code, sec. 7, subd. 1) but that when giving this instruction the court should make certain that the jury understood that the definition of "willfully" applied only to the "general intent" and not to "specific intent." In the instant case the court instructed the jurors in the language of section 503 of the Vehicle Code, instructed them as to the burden of proof and reasonable doubt, in the language of the statute, and informed them that they were to be governed solely by the evidence. We fail to see how the jury could have been confused or misled by the instruction, especially in view of the fact that appellant's intent in taking the automobile was so clearly revealed by the evidence.

[4, 5] Complaint is made that the court erred in refusing to instruct the jury on the theory of cancellation and rescission as requested by appellant. The evidence did not warrant the giving of such instructions. Appellant talked about canceling the transaction but he never did so. He did not rescind or offer to rescind the sale, and did not tender to Miller the consideration which appellant had received. He testified that he told Miller's secretary that "he was ready to cancel the deal and return the money" and that later he returned to Miller's place of business with $4,000 at which time Miller's secretary said he was absent. Thereafter appellant took the car into his possession in the manner heretofore related. A defendant in a criminal case is entitled to instructions fairly covering his theory of the action, but in order to have a theory there must be evidence upon which it may be based. The instructions on cancellation and rescission were not warranted by the evidence.

[6] 3. *Alleged errors in the exclusion of evidence.* After the automobile had been reported as stolen a police officer called at appellant's place of business and had a conversation with appellant's wife and son, the substance of which appellant attempted to prove. The objection to the offer of proof was properly sustained. The officer adopted the device of representing himself as an attorney and apparently was making an investigation of the alleged theft of the car in his official capacity. Since there was no evidence that he was representing or was authorized to represent Miller the latter would not have been bound by any statements made by the officer. The objections were properly sustained.

[7] 4. *Alleged misconduct of district attorney.* It is contended that the district attorney stated to the jury that appellant had defrauded the state of California out of the fee for transferring into his own name the Hawaiian certificate that he had received from Brightman, and attempted to defraud Brightman by forging the latter's name on the registration slip. The record does not contain any objection or exception to these remarks and error cannot be predicated thereon.

Questions relating to the tire rationing were not prejudicial. They referred to the rationing certificates and prices of the new tires placed on the car before the sale to Miller. They appear to have been proper subjects of inquiry and even if not, they were not prejudicial.

[8] 5. *The alleged coercion of the jury.* The charge that the trial judge coerced the jury or in any manner influenced them to return a verdict has no foundation in the record. During the colloquy between the jurors and the court to which we referred, when they asked for further

instructions, the court re-read the general instructions as to the duties of the jurors. There was not a word of coercion or even a suggestion or intimation that it was their duty to agree upon a verdict.

The judgment and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

72 Cal.App.2d 283

INGLE v. BAY CITIES TRANSIT CO. et al.

Civ. 14965.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1945.

Hearing Denied Feb. 21, 1946.

1. Master and servant 🔑301(5)

The fact that employee appeared for work in an intoxicated condition did not terminate relationship of employer and employee.

2. Automobiles 🔑193(14)

Fact that bus driver appeared for work in an intoxicated condition and took a bus out contrary to express directions of one described as night foreman with resulting accident, did not make it any the less an act within the scope of employment for the consequences whereof the master and principal is responsible to third persons. St.1937, p. 261, § 3000; Civ.Code, §§ 2295, 2338.

3. Automobiles 🔑244(26)

Finding that bus company was not operating bus colliding with automobile of plaintiff, and that bus was not being driven by employee of defendant bus company, was not supported by evidence showing that bus driver reported for work in an intoxicated condition and contrary to express orders of one described as night foreman took out a bus in attempt to make one of his regular scheduled trips. St.1937, p. 261, § 3000; Civ.Code, §§ 2295, 2338.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Charles Edward Ingle against Bay Cities Transit Company and another for damages for personal injuries and property damage caused by collision between plaintiff's automobile and a bus belonging to defendant named. Judgment for defendant named and plaintiff appeals.

Reversed.

Paul R. Smith, of Santa Monica, for appellant.

Tripp, Callaway, Sampson & Dryden and DeWitt Morgan Manning, all of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages for personal injuries and property damage caused by a collision between plaintiff's automobile and a bus belonging to defendant transportation company. A trial by the court resulted in a judgment for defendant from which plaintiff appeals.

The record reveals that defendant, as a common carrier, operated passenger busses in the City of Santa Monica. On September 4, 1943, the date of the accident, Joe Holmberg was, and had been since June 3, 1943, employed by defendant as a bus driver. On the day of the accident Holmberg, who operated a bus on regular schedules to the Douglas Aircraft Company, had completed the usual trips at 9:30 p. m., but was scheduled to make one more trip over the same route at about 11:30 p. m. Richard Tidwell was employed by defendant at the garage or base where the busses were kept and prepared for use. Quoting from respondent's brief, the sequence of events leading up to the accident occurred as follows:

"Holmberg came into Tidwell's office and inquired 'if he could take his run out'. He was drunk at that time. Tidwell told him he was in no shape to take the run out. Holmberg went and got into the bus which had been put out by Tidwell for the run and Tidwell pulled him out, told him to get out, and took the bus and backed it up and parked it against the fence about 25 feet or 30 feet away. Another bus undergoing repairs was parked nearby and Holmberg took that bus and drove out into the street before Tidwell got back. The bus taken was not the one assigned to the Douglas run. There was nothing to indicate to Tidwell, at the time he took the bus from Holmberg and told him not to drive, that Holmberg conceivably might take any other bus although not so authorized. The accident occurred just outside the lot adjacent to the defendant bus company's garage on 4th Street in Santa Monica."

The findings recite "That it is not true that the defendant Bay Cities Transit Company was driving or operating said passenger bus, which collided with said plaintiff; and that it is not true that said passenger bus was being driven by any agent, servant or employee of said defendant Bay Cities Transit Company while acting within the scope or course of such agent's, servant's or employee's authority; and that it is not true that the defendant Bay Cities Transit Company was reckless, careless or negligent in the premises." Appellant contends in effect that said finding was error as a matter of law and that the evidence fails to support such finding. In that connection it is argued that Tidwell was without authority to "destroy" the relation of employer and employee and that, at the time of the accident, Holmberg was an employee of defendant, "acting within the scope of his employment."

Respondent, on the contrary, argues that "the court's implied finding that Tidwell, respondent's night foreman, had authority to forbid the use of a bus by Holmberg is fully supported in the evidence, and the fact that different conclusions might be drawn from the evidence makes the question of the scope of Tidwell's authority one of fact which the trier of the facts resolved against appellant and which therefore cannot be disturbed on appeal".

Actually there was no conflict in the evidence. As to the issue here considered, the witnesses consisted of Jess Anderson, the president of defendant company, Charles Clark, supervisor for defendant company, both of whom testified that Tidwell was the "night foreman", and Tidwell, who testified that "my duties was night foreman and second class mechanic". Referring to Holmberg's conduct on the night in question, Tidwell testified in part that "he (Holmberg) was drunk at the time"; "too drunk to take out a bus". "We always have the bus ready for that run, and he went and got in his bus and I told him he could not take it out, and I pulled him out and told him to get out and I taken the bus and backed it up and parked it up against the fence", "when I came back from parking the bus I taken away from him, he done got in another bus and ran into the car". It appears that included among Tidwell's duties was the preparation of busses for use and the designation of such busses for the drivers to use.

It is argued by respondent "that Tidwell was in charge of the busses, that he told the drivers what busses to take and without his designation of the bus the driver had no authority to take a bus". And further that, "In the instant case, defendant employer is not basing its freedom from liability on the ground that Holmberg was told not to get drunk or not to be negligent, but squarely on the ground that Holmberg was forbidden to operate at all any bus whatsoever of the defendant respondent on the night in question".

The record falls far short of supporting respondent's argument, in substance or effect. The record is destitute of evidence that Tidwell had any authority over Holmberg. Although the president of the Company, the supervisor and Tidwell testified that Tidwell was "foreman", the company pay-roll classified Tidwell merely as a shop employee. Moreover, the extent of Tidwell's authority was not shown by the evidence. To the question, "What were your duties on the night of the accident", Tidwell replied, "My duties was night foreman and second class mechanic". The use of the word "foreman" by the above witness was evidence of nothing, so far as the relationship of employer and employe is concerned as between the defendant company and Holmberg. Nor did the use of the word "foreman" in the circumstances justify any inference that Tidwell had the power and authority to terminate that relationship. In the light of the record, Tidwell's position and conduct were not determinative of the question as to whether Holmberg was "acting within the scope of his employment" when the accident occurred. There is no evidence that Tidwell had any authority over Holmberg; nor is there any evidence that Holmberg was not an employee of defendant corporation at the time the accident occurred.

[1, 2] It is a logical inference from the evidence that, as a matter of law, Holmberg was both a servant and an agent of defendant corporation as those terms are defined by section 3000 of the Labor Code, St.1937, p. 261, and section 2295 of the Civil Code, respectively. And the question of liability must be determined accordingly. Section 2338 of the Civil Code provides that, "Unless required by or under the authority of law to employ that particular agent, a prin-

cipal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." The fact that Holmberg appeared for work in an intoxicated condition manifestly did not terminate the relationship. And the likelihood of such a contingency was something which the innocent victim of the consequences could not be expected to guard against. The operation of a bus for the "run" to the Douglas plant was a "service" and a "transaction" which Holmberg was employed to do and perform. The fact that it was attempted in the manner herein described did not make it any the less "an act within the scope of employment". For the "consequences" thereof, the master and principal is "responsible to third persons".

[3] The evidence does not support the findings as recited above, for which reason the judgment is reversed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

72 Cal.App.2d 423

PEOPLE v. DUNCAN et al.

Cr. 2353.

District Court of Appeal, First District, Division 2, California.

Dec. 31, 1945.

1. Indictment and information 🔑191(9)

Under statute authorizing defendant to be found guilty of any offense the commission of which is necessarily included in the offense charged, defendant charged with assault with intent to commit robbery could be found guilty of assault with deadly weapon. Pen.Code, §§ 220, 1159.

2. Indictment and information 🔑191(9)

A defendant charged with robbery is entitled to instruction that he may be found guilty, if the evidence warrants, of either of the lesser offenses of simple assault or assault with a deadly weapon. Pen.Code §§ 220, 1159.

3. Criminal law 🔑1159(3)

An appellate court cannot question determination of trial court resolving conflicting evidence.

4. Assault and battery 🔑92

Evidence that defendant accused of assault wtih deadly weapon drew gun and demanded prosecuting witnesses' money, was sufficient to show an intent to use weapon if prosecuting witnesses failed to comply and to sustain conviction.

5. Weapons 🔑8

A black-jack is a "deadly weapon" within statute specifying minimum sentences for persons who commit offenses armed with deadly weapons.

See Words and Phrases, Permanent Edition, for all other definitions of "Deadly Weapon".

6. Assault and battery 🔑92

Evidence that motorist covered hitchhikers whom he had picked up, with a gun, ordered them out of automobile, and demanded their money, warranted motorist's conviction for assault with deadly weapon, notwithstanding that police officer's subsequent search of automobile and motorist did not disclose a gun.

7. Assault and battery 🔑92

Evidence that passenger struck hitchhiker who had got out of automobile, with a black-jack, and knocked hitchhiker to the pavement, warranted conviction of passenger for assault with deadly weapon, notwithstanding that police officer's subsequent search of automobile and passenger did not disclose a black-jack.

◆

Appeal from Superior Court, San Francisco County; William F. Traverso, Judge.

James Duncan and Barrett Corbett were convicted of an assault with a deadly weapon, and they appeal.

Affirmed.

Edward Dienstag, of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

The appellant Barrett Corbett was accused by information of assault with intent to commit robbery upon the person of George E. Turner.

The appellant James Duncan was accused by information of assault with a deadly weapon upon the person of Henry M. Solum.

Both defendants pleaded not guilty. By stipulation the cases were consolidated and trial by jury was waived. The court found each of the defendants guilty of an assault with a deadly weapon, denied them probation, and sentenced each to serve 9 months in the county jail.

The testimony of the two prosecuting witnesses and that on the side of the appellants presents a wide conflict as to the character of the altercation out of which this prosecution arose.

The following testimony appears without contradiction: On Friday, January 22, 1944, close to 12 midnight, the appellant Duncan was driving his Chrysler sedan easterly on Haight street in San Francisco. Seated on his right was his wife, and on her right sat the appellant Corbett. On the curb on the south side of Haight street stood Turner and Solum, looking for transportation down town where they lived. Duncan pulled up and they got into the rear seat. Whether they got in at Fillmore or at Buchanan street or at some street between is not clearly shown, but it is not material. After they had gone 2 or 3 blocks the altercation started. After it was over and the car containing its original occupants had left, a bystander gave the license number to Turner and Solum, who gave it to the police when they made their complaint; the police communicated with the motor vehicle department and got the address to which the license had issued, and when, around 2 a. m. of the 23d, the Chrysler drove up to that place two police officers were waiting there and arrested both appellants.

The two versions split on what happened after Turner and Solum got into the car. They testified that after they had reached about Octavia and Haight streets Corbett, identified by them as "the big fellow", covered them with a gun and told them to "get out"; that one of the appellants, apparently Corbett, then began "feeling around" (presumably searching) and went through Turner's billfold but found no money in it; that nothing was taken from his person, but a gun was kept pointed at him while this was going on. Meanwhile Duncan was hitting Solum over the head with some kind of an instrument which appeared to be a black-jack or a piece of pipe; every time Solum would get up from the ground he would be again knocked to the pavement by Duncan, and when it was over Solum was pretty bloody. Turner testified that he was hit on the back of the head with some kind of a weapon which raised a bump on his head. He could not say just what the weapon was.

The testimony of the appellants was that the two men were invited into the car because Duncan thought they were service men; and that when it was found that they were not he, Duncan, asked them why they were not in the service and Solum answered that it was "none of their damn business"; that when they were asked where they were going they answered to Fourth and Howard streets, and when told that the Chrysler party was going only to Haight and Market streets, Solum, with profanity, told them to take him and Turner down to their destination anyway; whereupon Duncan said they didn't have to take that, and ordered them out of the car. When they got to the sidewalk they had further words and Duncan and Solum got into a fight. Corbett testified that he remained seated in the car with Mrs. Duncan until he saw Turner go over toward the other two, whereupon he went over to Turner, grabbed him by the arm, violently spun him around, headed him down the hill, and told him not to come back. Both appellants denied the possession or use of a gun or any other weapon, and a search of them and of the car by the officers disclosed no gun, black-jack, pipe, or other weapon. Both appellants testified to the same effect, and it was stipulated that Mrs. Duncan if called would do likewise. Both appellants and both prosecuting witnesses admitted that before they had met they had done considerable drinking. Duncan on cross examination admitted that he had once been convicted of burglary. The broad question presented to the trial court was whether this affray was an assault and battery with a deadly weapon or weapons, or just another brawl or fist fight.

[1,2] The appellant Corbett's contention that it was error for the trial court to find him guilty of assault with a deadly weapon when the information charged

him with assault with intent to commit robbery is without merit. The Penal Code, § 1159 specifically provides that the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged. Thus when the evidence warrants, a defendant charged with robbery may be found guilty either of simple assault or assault with a deadly weapon. A defendant on trial for robbery is entitled to have the jury instructed that it may find him guilty of either of these lesser offenses which may be included within the charge of robbery. People v. Foss, 85 Cal.App. 269, 259 P. 123; People v. Driscoll, 53 Cal.App.2d 590, 128 P.2d 380, and cases cited. As the offense of assault with a deadly weapon may be included in the offense of robbery, so may it also be included in the offense of assault with intent to commit robbery. A defendant charged with assault with intent to commit robbery under Penal Code, § 220 may properly be found guilty of assault with a deadly weapon, as was Corbett here, so long as the evidence supports his conviction. 3 Cal.Jur. 224, 225.

[3] Both appellants, however, ask that this court set aside the judgments of the lower court on the ground of insufficient evidence to support the charges against them. It is true that the evidence presented to the trial court was conflicting in many respects, both as to the character of the altercation and as to the parties involved in the respective disputes. It was the function of the trial court to resolve these conflicts. No authority need be cited on the point that an appellate court may not question the determination of the trial court which resolved such conflicts against the defendants herein.

[4-8] The prosecuting witnesses are agreed that appellant Corbett covered both of them with a gun and ordered them out of the automobile, stating that appellants wanted money. Whether Corbett subsequently engaged in an altercation with Solum rather than with Turner, as he urges on appeal, is not material. His conduct prior thereto was sufficient to establish the offense of assault with a deadly weapon. From the fact that he drew a gun, coupled with his demand, the court could properly imply that he had the requisite intent to use the weapon if the prosecuting witnesses failed to comply. People v. McMakin, 8 Cal. 547; People v. McCoy, 25 Cal.2d 177, 153 P.2d 315.

So far as appellant Duncan is concerned, it appears that after the parties stepped out of the automobile he struck complainant Solum several times with an instrument which Solum identified as a black-jack, knocking him to the pavement several times. Duncan admits an altercation with Solum. There can be no quarrel with the conclusion that a black-jack is a deadly weapon. Penal Code, § 3024.

The facts affirmatively established were sufficient to warrant the conclusion of the court that in each instance, as to each appellant, there was an assault with a deadly weapon. They were not negatived by the fact that the subsequent search of the automobile and of the appellants themselves by police officers failed to disclose a gun, black-jack, pipe, or other weapon.

The judgments are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

72 Cal.App.2d 445

GOODWIN v. BOARD OF TRUSTEES OF FIREMEN'S RELIEF AND PENSION FUND OF CITY OF OAKLAND et al.

Civ. 12932.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1946.

1. Municipal corporations 🔑200

Under plan of city of Oakland for payment of sums deducted from city firemen's salaries into firemen's relief and pension fund and city's contribution of balance necessary to maintain fund, a fireman's retirement allowance is not limited to fund, but payment of such allowance is general obligation of city. St.1933, p. 3192, § 97.

2. Municipal corporations 🔑200

Under Oakland city charter provisions for payment of sums deducted from city firemen's salaries into firemen's relief and pension fund for payment of retirement allowances to disabled firemen, as well as those attaining prescribed age and serving required number of years, and pensions to families of firemen killed in service, such deductions are in nature of premiums for annuities and accident insurance, and no express or implied legal or equitable obligation is imposed on city to refund deducted sums to firemen voluntarily resigning before reaching retirement age, in absence of charter provision for such refunds. St. 1933, p. 3192, § 97.

3. Municipal corporations ⟹176(3)

The Oakland city charter amendment, providing for refund of sums contributed by city fireman, resigning before reaching retirement age, to firemen's relief and pension fund, pursuant to section providing for deductions from firemen's salaries, as fixed by previous section increasing such salaries, for payment into fund, operates prospectively not retroactively, and hence authorizes refund only of sums deducted after date of amendment. St.1943, pp. 3323, 3325, 3327, §§ 97, 97b, 101½.

◆

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding by Bernard C. Goodwin against the Board of Trustees of the Firemen's Relief and Pension Fund of the City of Oakland, the members of such board, and the city for a writ of mandate to compel, and a declaration of plaintiff's right to, refund of sums deducted from his salary as a city fireman and paid into the city firemen's relief and pension fund. Judgment for defendants, and plaintiff appeals.

Affirmed.

Markell C. Baer and Aiken, Kramer, Aiken & Baer, all of Oakland, for appellant.

F. B. Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiff, Bernard C. Goodwin, instituted this proceeding for a writ of mandate and declaratory relief, contending that under the proper interpretation of certain provisions of the charter of Oakland, upon his voluntary resignation as a fireman, he was entitled to be repaid certain sums which had been deducted from his salary and paid into a relief and pension fund, which sums the city has retained and refused to pay to him. The trial court held that plaintiff was not entitled to the claimed refund and entered its judgment accordingly. From this judgment Goodwin appeals.

The facts are not in dispute and are as follows: Appellant became a member of the Oakland Fire Department on June 5, 1933, at which time he was appointed a hoseman. He voluntarily resigned on May 31, 1943. At the time he entered the city service the charter did not provide for the deduction of any portion of the salary of firemen to be contributed to a pension fund, but it did provide for the allowance by the city of $2 per man per month, which sum was paid from the treasury in addition to salaries and deposited in a pension or retirement fund. The city made up the balance. Stats. of 1919, p. 1364, at p. 1366, § 97 et seq. of the city charter. Goodwin expressly renounces any claim to a refund of any part of the amount so paid into the fund.

On July 19, 1933, § 97 of the charter was amended to reduce salaries not to exceed ten per cent and to eliminate the $2 monthly allowances theretofore allowed for retirement purposes, and to provide in lieu thereof a monthly deduction from each fireman's salary of five per cent, to be withheld by the city and to be deposited in the pension fund. Section 97 as then amended (Stats. of 1933, p. 3189, at p. 3192) read in part as follows (p. 3194): "There shall be deducted from each monthly installment of salary due pursuant to the provisions of this section, a sum equal to five per cent of such monthly installment, which sum so deducted shall be retained by the treasurer of the city and forthwith paid by him into the firemen's relief and pension fund. The city shall contribute the balance necessary to maintain said fund pursuant to the provisions of this charter." Under the retirement system set up by the charter firemen are permitted to retire voluntarily after twenty years of service and upon reaching the age of 55, and, since, 1941, are compelled to retire upon reaching the age of 70. In addition, regardless of years of service, they can, and in some cases must, retire if disabled in the course of their duties. In each event they receive one-half of their salaries for life. If the fireman is killed in service his widow or children, or other named relatives receive a pension.

There was no provision in the 1933 amendments or in any provision of the charter prior thereto for the refund of such deductions or contributions in the event the fireman resigned from service before the happening of the specified contingencies for the payment of retirement, death, or permanent disability allowances.

In 1943, § 97 was amended in several respects not here important and, in addition, the old section was broken up and renumbered §§ 97, 97a, 97b, 97c and 97d, with the former paragraphs and provisions substantially carried forward under the new numerical designations. Section 97, as thus changed, continued the old schedule of minimum salaries, with a provision, however, for a fifteen per cent increase of salaries under certain conditions, while the above-quoted provision of old § 97 which provided for the five per cent deduction from salaries for the pension fund, was renumbered § 97b. Its language was almost identical with the above-quoted provision from old § 97. As then adopted it reads as follows, Stats. of 1943, p. 3316, at p. 3325: "Sec. 97b. There shall be deducted from each monthly installment of salary due pursuant to the provisions of Section 97, a sum equal to five per cent of such monthly installment, which sum so deducted shall be retained by the Treasurer of the City and forthwith paid by him into the Firemen's Relief and Pension Fund. The City shall contribute the balance necessary to maintain said fund pursuant to the provisions of this Charter * * *."

The same session of the Legislature approved another amendment to the Oakland charter, both it and the amendments to § 97 becoming effective May 4, 1943. This other amendment consisted of adding to the charter a new section, numbered § 101½. It reads as follows (Stats. of 1943, p. 3316, at p. 3327): "Sec. 101½. Any member of the Department who resigns or is discharged from the service previous to retirement, shall have all such sums as have been deducted from his pay and contributed to the Firemen's Relief and Pension Fund pursuant to the provisions of Section 97b, refunded to him plus simple interest at the rate fixed by the Board of Trustees." Twenty-seven days after this amendment became effective appellant voluntarily resigned.

The respondents' position, and the basis of the judgment in their favor, is that appellant upon his resignation was entitled to receive back only such salary deductions as were taken out of his salary subsequent to the adoption of this section on May 4, 1943.

Appellant's position is that upon his resignation he was entitled to a refund of all deductions made from his salary and retained by the city since the amendment to § 97 in 1933. In support of this position he urges that the charter sections expressly grant the petitioner a refund of all salary deductions; that under § 101½ it is not the salary deductions under "Section 97b" as such that shall be refunded, but the salary deductions under "the provisions" of the section, and these "provisions" are the identical "provisions" which continuously existed in the charter since 1933. It is argued that the only change in the language of § 97b from the language of the former § 97 was that it referred to deductions from the salaries paid under the provisions of § 97b, instead of the deductions made under the provisions of "this section," and that the legislative intent of the framers of the charter was clearly to keep the old provisions continuous, which they attempted to do by splitting the section into several sections numbered 97, 97a, 97b, 97c and 97d, and carrying through into the renumbered sections practically the identical provisions of the former section, which had become quite lengthy and cumbersome. In such a case, it is argued, the numerical designations of the charter are to be disregarded and such a change constitutes but a continuation of the old statute, there being no break in the continuous operation of the old statute. Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868. Thus, appellant argues, § 101½ is to be construed and understood as if it referred to the old § 97 as well as to "the provisions of Section 97b."

Appellant also argues that the charter amendment so construed expresses a reasonable purpose; that the money deducted from the salary for retirement purposes was in a proper sense withheld by the city in trust for retirement purposes, and that when the trust fails, as it does upon the resignation of the employee, the employee is entitled to the refund of his contributions. Appellant points out that under numerous other retirement systems express provision is made for the refund of moneys contributed to the retirement fund or withheld from the salaries when the employee voluntarily resigns before reaching retirement age. Appellant adds in this regard that, as is true of all pension provisions and statutes of such type, the provisions must be liberally construed to effect the spirit and purpose of the act, and he urges that that purpose can only be served here by granting to petitioner the full refund of all of his salary contributions since the time they were first taken from him in 1933 and to the date of his resignation.

He contends that the construction contended for is not unconstitutional. He urges that the giving of the amendment a retroactive application does not involve a gift of public funds, because public funds are not here involved, but moneys belonging to the petitioner; further, that it has been held that giving a pension statute a retroactive effect does not involve a gift of public moneys where the employee served in contemplation of the ultimate granting of a pension (Murphy v. City of Piedmont, 17 Cal.App.2d 569, 62 P.2d 614, 64 P.2d 399); also it has been held that where a retroactive construction was given to a pension statute which granted the employee benefits based in part upon services rendered prior to the enactment of the statute, no gift of public moneys was involved, but it was in the nature of additional salary to be paid for services rendered after the enactment of the provision in question. Whitehead v. Davie, 189 Cal. 715, 209 P. 1008.

Based on these cases, he argues that his right to a refund is predicated upon contract; that after 1933, when the city began to deduct and hold back portions of his salary, he had a right to contemplate that upon his resignation he would be entitled to receive the balance of his salary payments under general principles of law and equity, but that when the charter was amended to expressly state such an obligation upon the city's part, he had a right to rely upon the contractual rights thus established, and to take advantage of its provisions and to resign under its scope and effect.

Nor does § 101½, if construed in accordance with appellant's contention, he argues, create an indebtedness on the part of the city for past years when no liability existed, because before its enactment the city was under an equitable obligation to refund the contributions in such a case, and appellant having resigned after the enactment of the statute, and in reliance thereon, the city was then liable under its contract to refund the money.

[1, 2] The correct answer to all of these contentions depends upon the rights of appellant between 1933 and May 4, 1943. During that period there was deducted certain sums from each fireman's salary, which sums were paid into the fund. The city made up the balance. There was no provision for a refund of the deducted amounts upon resignation before reaching retirement age. It seems to be appellant's position that nevertheless there was an implied obligation on the part of the city to return these moneys if the employee resigned. This thought seems to be predicated on the concept that during those ten years the employee received nothing for these deductions, and that they were simply retained by the city as trust funds to be ultimately repaid as part of the retirement allowance if the employee ever retired. This is not a correct analysis of the legal rights of the parties. This retirement system, unlike some such systems, was not based on the theory that contributions paid by each employee were to be paid into a separate individual fund or account for him, and upon reaching retirement age, matched by the governmental body involved, and that fund then used to pay that retirement allowance. Here the contributions of the firemen were paid into a fund designated as the Firemen's Relief and Pension Fund. The city expressly assumed the liability to keep such fund solvent. Such a plan does not limit the retirement allowance to the fund, but the obligation to pay the retirement allowance, once it vests, becomes a general obligation of the governmental agency involved. England v. City of Long Beach, Cal., 163 P.2d 865. Nor is it correct to say that during the period 1933–1943 the firemen received nothing for their deductions unless they retired. The plan set up by the charter did not only provide for retirement based upon age and years of service. In addition it provided for retirement, regardless of age and years of service, for a fireman disabled in the course of his employment. It also called for pensions for the families of firemen if the firemen were killed in the service. To this extent the plan called for a limited type of protection in the nature of accident insurance. The deductions made each month were paid, therefore, not only towards an ultimate annuity to be paid upon reaching the age of retirement, but also for this accident insurance. As long as there was no provision in the charter for a refund of these funds in the event of voluntary resignation before reaching retirement age, it must be held that under the type of plan here involved the deductions were in the nature

of premiums for the types of protection above outlined. This being so there was no legal or equitable, express or implied, obligation until May 4, 1943, on the part of the city to refund these sums if the employee voluntarily resigned. No other conclusion is permissible. The moneys paid into the fund were not trust funds belonging to the firemen, but public moneys of the city. It should be here noted that the five per cent deduction made from a fireman's salary was obviously insufficient alone to support the pension plan. Under the plan a fireman could retire at 55 after twenty years of service. During that period he would pay into the fund the equivalent of one year's salary. This would pay him half salary for but two years. Obviously, at 55, his life expectancy is much longer. Thus it is clear that, as accident insurance plus the possibility of a future annuity, firemen received a quid pro quo for their deductions.

[3] Once it is determined that no obligation existed between 1933 and May 4, 1943, to make a refund in the case of voluntary resignation before reaching retirement age, the problem involved becomes relatively simple. As a matter of interpretation, §§ 97, 97a, 97b, 97c, 97d and 101½ as amended or added in 1943, by their very terms, are prospective in their operation. Section 97, as amended in 1943, provided for a fifteen per cent raise in salary. The section numbered § 97b in 1943 provided for a five per cent deduction from the salaries as fixed by the amended § 97, not as they were fixed in the old § 97. Section 101½, added in 1943, provided for a refund, in case of resignation or discharge from service prior to retirement, of all sums contributed by the firemen "pursuant to the provisions of Section 97b." Obviously, since § 97b did not exist until May 4, 1943, the only sums paid pursuant thereto were those paid after that date. Both amended § 97 and its subdivisions, and new § 101½ by their very terms are prospective and not retroactive in their operation.

The conclusion that § 101½ was intended to act only prospectively is strengthened if not compelled by the fact that if held to be retroactive it would be unconstitutional. If no obligation existed between 1933–1943 to make such refunds, and it has already been so held, it is too clear to require further comment that for the city to assume an obligation to pay for services after they are rendered when no obligation existed at the time of rendition, would be to violate the provision of the Constitution prohibiting gifts of public funds.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

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SLOAN et al. v. COURT HOTEL et al.
(CLARK, Intervener).
Civ. 12956.

District Court of Appeal, First District, Division 2, California.

Dec. 27, 1945.

Rehearing Denied Jan. 26, 1946.

Hearing Denied Feb. 21, 1946.

1. Venue 🔑22(1)

Plaintiff's right to trial of action in another county than that of defendant's residence is exceptional, and plaintiff claiming such right must bring himself within terms of exception.

2. Venue 🔑72

The transitory or local character of cause of action must be determined from allegations of complaint at time of defendant's motion for change of venue and from nature of judgment which may be rendered on such complaint, assuming truth of its allegations.

3. Pleading 🔑111

A plaintiff, claiming right to trial of action in another county than that of defendant's residence, must frame complaint to show clearly right to retain trial in county wherein action was commenced, and any ambiguities must be resolved against plaintiff and in favor of defendant's right to trial in county of his residence.

4. Venue 🔑68

Plaintiffs' self-serving statement in affidavit, filed after defendant filed notice of motion for change of venue, that purpose of action was to establish plaintiffs' estates or interests in realty, did not convert action, shown by complaint to be only for injunction against plaintiffs' dispossession, into local action.

5. Venue ⇨72

The right to change of venue must be determined by condition of things when parties claiming such right first appeared in action.

6. Innkeepers ⇨8

A mere "lodger", as distinguished from "tenant", is one who occupies a room or portion of a tenement under control or in occupancy of another and has no interest in realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Lodger" and "Tenant".

7. Innkeepers ⇨8

One renting a room in house under direct control and supervision of owners, who furnish and attend to rooms and retain keys thereto, personally or by their servants, is a "lodger", not a "tenant."

8. Innkeepers ⇨9

Guests in hotel, boarders in boarding house, and roomers or lodgers are generally mere "licensees", not "tenants", have only personal contracts, and acquire no interests in realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee" and "Tenant".

9. Innkeepers ⇨9

Persons merely occupying ordinary hotel rooms, with regular hotel service supplied by proprietor, cannot sue to establish estate or interest in realty and enjoin termination of their occupancies by proprietor.

10. Pleading ⇨8(11)

In suit to enjoin termination of plaintiffs' occupancies of hotel rooms, allegation of complaint that plaintiffs attorned to one of defendants as his tenants from month to month after conveyance of hotel and sale of leasehold interest therein to such defendant was unfounded legal conclusion, as hotel lodgers are not tenants.

11. Innkeepers ⇨9

A hotel owner's acceptance of room rents for month during which lodgers remained after receiving notices to vacate on first of following month did not constitute waiver of such notices.

12. Innkeepers ⇨9

In suit to enjoin termination of plaintiffs' occupancies of hotel rooms, allegations of complaint were insufficient to support inference of contracts between plaintiffs and defendant hotel owner for any period beyond month prior to date fixed for vacation of rooms in notices served on plaintiffs. Code Civ.Proc. § 395.

13. Venue ⇨46

A suit to enjoin hotel proprietor and lessee from removing plaintiffs from their hotel rooms, contrary to Emergency Price Control Act and rent regulations, was not an action to enforce, or prevent breach of, contract, nor concerned with title to or estate in realty, but was purely an equity suit in personam to enforce such regulations and prevent interference with plaintiffs' possession, and hence was a transitory action, wherein defendants were entitled to change of venue to county of defendant proprietor's residence. Code Civ.Proc. § 395; Emergency Price Control Act of 1942, as amended, 50 U.S.C.A.Appendix § 901 et seq.

14. Appeal and error ⇨1180(1)

On reversal of judgment or order, proceeding is left where it stood before judgment or order, and parties stand in same position as if no judgment or order had been rendered or made and have same rights which they originally had.

15. Venue ⇨41

Where defendants are entitled to granting of their motion for change of venue, they are entitled to hearing of every motion or proceeding in case before superior court of county of their residence.

16. Appeal and error ⇨1176(2)

Appellate court's jurisdiction of appeal from order denying motion for change of venue includes full power to make all orders or judgments necessary to render effectual its judgment reversing such order and directing court below to enter order transferring cause for trial to another county.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Suit by James K. Sloan and others against the Court Hotel, Joseph W. Harris, and H. Bolzendahl for an injunction against termination of plaintiffs' occupancies of hotel rooms, in which Marion Clark intervened. From orders denying individual defendants' motion for change of place of trial and granting a preliminary injunction, defendants appeal.

Reversed.

Nathan G. Gray, of Berkeley, for defendants and appellants.

Jerome Politzer, Joseph A. Pritchard, and Maurice J. Hyman, all of San Francisco, for respondents.

GOODELL, Justice.

This suit was commenced by 24 guests of the Court Hotel to prevent by injunction the termination of their occupancies. The defendant Harris, a resident of Alameda county, moved for a change of place of trial to that county on the ground of residence, and the defendant Bolzendahl, a resident of San Mateo county, joined therein. The motion was denied. After hearing, a preliminary injunction was issued. The defendants appeal from both orders.

The Court Hotel, a 6-story building of 133 rooms, is located on Bush street in downtown San Francisco. On March 15, 1943, George F. Bigley, then its owner, leased the hotel to Elsie Schell for a 10 year term. On August 6, 1943, she assigned the lease to Adell B. Whittaker and appellant Bolzendahl. On March 9, 1944, Bigley deeded the property to appellant Harris. On June 5, 1944, Adell B. Whittaker assigned her half interest in the lease to her co-lessee, Bolzendahl. On January 30, 1945, Bolzendahl by a written instrument sold to Harris his leasehold interest, the good will and all furniture and furnishings in the hotel, for which Harris paid Bolzendahl a substantial money consideration. By a contemporaneous writing Bolzendahl agreed to remain in possession and continue to operate the hotel for the account of Harris until March 1, 1945 and that during that intervening month he would assist Harris in obtaining the possession of all the rooms by March 1. It was also agreed that Bolzendahl would accept no rentals for any period subsequent to March 1.

Appellant Harris had been negotiating for the leasing to The Pacific Telephone & Telegraph Co. of the hotel premises *as a unit* for use as a dormitory for its telephone operators needed in San Francisco because of the war. On September 28, 1944, Harris wrote to the Office of Price Administration at San Francisco asking its advice as to his "position as an owner of this building under the rules and regulations" and on October 9, 1944, its district rent attorney answered that "assuming that the tenant is an utter stranger to the transaction between you and the Telephone Company the sub-tenants are not protected by the eviction section of the Rent Regulations for Hotels. You would, therefore, be at liberty under the Rent Regulations to pursue your remedies according to California Law."

On January 31, 1945, Harris caused to be served on all occupants of the hotel a "notice to vacate," addressed to each of them by name and room number, signed "Joseph W. Harris owner," reading as follows:

"You are hereby notified that the tenancy of H. Bolzendahl, operating lessee of the above mentioned Hotel, has terminated, and the undersigned demands that you vavate the room you now occupy on or before March 1, 1945, at 12:00 noon o'clock.

"The undersigned owner and landlord seeks in good faith to recover possession of the room you now occupy for the immediate purpose of substantially altering or remodeling it in a manner which cannot practicably be done with you in occupancy, and the plans for such alteration or remodeling have been approved by the proper authorities.

"As to the undersigned you are a subtenant, and this notice is not to be construed as changing that relationship in any manner whatsoever."

The notices were put into their respective mail boxes. These notices, admittedly received by the occupants, precipitated the filing of this suit on February 27, 1945. An order to show cause restrained the defendants from interfering with the plaintiffs' possession pending a hearing. After hearing, a preliminary injunction was issued restraining the defendants from removing the plaintiffs by action or otherwise, contrary to the provisions of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq., and the rent regulations thereunder, as long as they paid their rent. A $3,000 bond was required and furnished.

[1] The first question presented for decision is whether the court should have granted the motion for change of venue. "The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is sup-

ported by a long line of judicial decisions. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.'" Brown v. Happy Valley, etc., 206 Cal. 515, 521, 274 P. 977, 979, citing Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209.

[2] Neet v. Holmes, 19 Cal.2d 605, 607, 122 P.2d 557, 558, holds that: "The question of the transitory or local character of the causes of action must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations." See also Weygandt v. Larson, 130 Cal.App. 304, 19 P.2d 852, and cases cited.

That being so, an inquiry into the allegations of the complaint is in order. They are to the effect that on January 30, 1945 appellant Harris took over the management, ownership and operation of the hotel; that the plaintiffs occupy rooms therein as tenants from month to month; that in February 1945, they attorned to the owner as his tenants occupying said rooms, and paid the February rent. They allege the shortage of housing due to the war, recognized by the federal government in designating San Francisco as a defense rental area; that each of the plaintiffs has a valuable possessory and property right in said housing accommodations in the hotel and it will be impossible for them to obtain other accommodations, and if evicted they will suffer irreparable injury not to be measured in monetary damages. They allege the service of the notice to vacate and that it does not conform to state law; that defendants have refused to accept the March rent and threaten to evict the plaintiffs; that the defendants have not obtained the permission or consent of the Office of Price Administration; that they are seeking in re-renting the building to circumvent the law and the O.P.A. regulations and to profiteer. The prayer is that the defendants be prevented by injunction from removing the plaintiffs or interfering with their possession.

[3] Neet v. Holmes, supra, holds also that: "The pleader is required to frame his complaint to show clearly that he is entitled to retain the trial of the action in the county in which it was commenced." Sheeley v. Jones, 192 Cal. 256, 219 P. 744, holds the same, and, further, that if there are any ambiguities they must be resolved against the pleader and in favor of the defendant's right to have the case tried in the county of his residence. Citing Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381.

After the notice of motion for change of venue had been filed and apparently with a view to giving the complaint a quiet title complexion, the plaintiffs filed an affidavit in which they stated in conclusional language the purpose of this suit as follows: "That the above entitled action was commenced for the purpose of establishing and determining an estate or interest of plaintiffs and each of them in the real property * * * to-wit in the respective tenancies of plaintiffs in said Court Hotel * * * and to determine the right or interest of plaintiffs and each of them in and to the respective portions of said real property as mentioned and set forth in said complaint and under which they hold as tenants thereof and to determine their right to hold possession of said respective portions of said premises and also for the determination of the right of the defendants to reenter the same and/or to evict plaintiffs therefrom."

[4, 5] The complaint does not purport to state a case to quiet title. The prayer seeks only an injunction preventing the dispossession of the plaintiffs, and if there had been no appearance and a default had been entered such preventive injunction would have been the full measure of plaintiffs' relief. In Eckstrand v. Wilshusen, 217 Cal. 380, 381, 18 P.2d 931, 932, it is said that: "In order to determine whether the action is local or transitory, it is necessary to ascertain the true character of the action as disclosed by the complaint, and the character of the judgment which might be rendered upon a default thereto." Citing Grocers, etc., Union v. Kern, etc., 150 Cal. 466, 89 P. 120; McFarland v. Martin, 144 Cal. 771, 78 P. 239, and 25 Cal.Jur. p. 855. The plaintiffs' self-serving statement in the affidavit that the purpose of the action was to establish the "estate or interest of plaintiffs and each of them in the real property" cannot convert this into a *local* action, when the complaint itself does not show it to be such. In Ah Fong v. Sternes, 79 Cal. 30, 33, 21 P. 381, 382, it is said that: "He [the plaintiff] cannot deprive the defendant of his right to a change of venue by the addition of something to

the complaint. If this were not the rule, it would be very easy for a plaintiff to defeat the defendant's right in the matter. All that plaintiff would have to do would be to add another cause of action to his complaint. * * * And the 'right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action' [Remington S.] M. Co. v. Cole, 62 Cal. [311], 318; Buell v. Dodge, 57 Cal. 645." To the same effect is Brady v. Times-Mirror Co., supra. If such reinforcement cannot be accomplished by an amendment to the complaint, it certainly cannot be accomplished by statements by the plaintiffs in an affidavit of their purposes.

[6-9] Under the authorities the plaintiffs were not *tenants* at all. They were *lodgers* and "A mere lodger is one who occupies a room or portion of a tenement, which is under the control or in the occupancy of another, and who has no interest in real estate." McDowell v. Hyman, 117 Cal. 67, 71, 48 P. 984, 986. In Fox v. Windemere Hotel Apartment Co., 30 Cal.App. 162, 164, 157 P. 820, 821, it is said: "Where * * * the testimony shows that the house was under the direct control and supervision of the owners, that the rooms were furnished and attended to by them, and that they or their servants retained the keys thereto, a person renting such a room makes himself a lodger and not a tenant" (citing cases). In Edwards v. Los Angeles, 48 Cal.App.2d 62, 67, 119 P.2d 370, 373, the court quotes from 1 McAdam on Landlord and Tenant, 5th Ed., p. 239, as follows: "Guests in a hotel, boarders in a boarding house, and roomers or lodgers, so called, are generally mere licensees and not tenants. They have only a personal contract, and acquire no interest in the realty." In Roberts v. Casey, 36 Cal.App.2d Supp. 767, 771-773, 93 P.2d 654, the cases are reviewed and discussed. See also People v. Vaughan, 65 Cal.App.2d Supp. 844, 852, 150 P.2d 964. The affidavits filed by the defendants (which are not contradicted) show the plaintiffs' occupancy to be simply that of the ordinary furnished hotel room with regular hotel service supplied by the proprietor. It cannot be the law that persons occupying such a status can sue to establish their "estate or interest" in real property.

[10-12] By the same affidavit the plaintiffs seek to give the case a contractual complexion so as to bring the case within sec. 395, Code Civ.Proc., for therein they state "that the respective contracts of tenancy wherein the respective plaintiffs hold possession and occupy the respective portions" of the hotel "were in fact entered into and made with the defendants" in San Francisco and "that the defendants in said contracts agreed to perform the obligations thereof, to-wit: to place said plaintiffs in possession and occupancy * * * and to collect the rentals thereof." Further it is stated *that defendants placed them in possession and collected the rentals.* No breach is alleged. The record shows that some of the plaintiffs had lived in the Court Hotel for as long as ten years which means that they had been there long before the Bigley-Schell lease was made in 1943. There had been a succession of lessees, and these plaintiffs had rented their rooms under various lessees and had stayed there after the intervening lessees had departed. Harris had never been in contractual relations with any of the roomers, and the only allegation of the complaint which even hints at a contract between plaintiffs and Harris is contained in paragraph VI:

"That on or about February, 1945, the said plaintiffs and each of them, individually attorned to the defendant, Joseph W. Harris, as his tenants from month to month occupying said rooms in said premises, and plaintiffs and each of them have paid over to said defendant through his duly authorized and ostensible agents their rent for the said housing accommodations and said rent was accepted by said defendants as aforesaid through said agents, as rental for said hotel accommodations for February, 1945."

Since there is no legal relation of tenancy in the case of lodgers in a hotel, the allegation of attornment is the unfounded legal conclusion of the pleader. Conceding that in some circumstances a contract for an indefinite occupancy from month to month might be implied from the acceptance of rent by Harris for the month of February, other allegations of the complaint effectively negative the existence of any such implied contract in this case. Paragraph VIII of the complaint sets out in hæc verba the notice to vacate quoted above and alleges that it was placed in plaintiffs' boxes on or about January 31, 1945. Acceptance of February rent after plaintiffs had been given notice to vacate on March 1 would only support the inference of an implied contract to accept the plaintiffs as roomers for the month of February. If the plaintiffs chose to remain during February in the face of the notice to vacate on March 1 Harris was entitled to the February rent and his acceptance of it would not constitute a waiver of the notice to vacate. Conner v. Jones, 28 Cal. 59; Byrne v. Morrison, 25 App.D.C. 72. The allegations of the complaint read together will not support the inference of any contract between plaintiffs and Harris covering any period beyond the month of February and the rights, if any, of plaintiffs to continue in occupancy beyond that date cannot be contractual, but must rest strictly upon the O.P.A. regulations adopted pursuant to Act of Congress, i. e. must be statutory.

[13] The plaintiffs' assertion in their affidavit that this "is not an action to enforce the O.P.A. Regulations" is best answered by the language of the injunction itself. It restrains the defendants from "directly or indirectly removing or attempting to remove or threaten to remove plaintiffs herein as such tenants and occupants of said Court Hotel from any hotel room occupied by them *contrary to the provisions of said Emergency Price Control Act of 1942, as amended, and said Rent Regulations for hotels and rooming houses, issued in pursuance thereof, by the U. S. Office of Price Administration* and from interfering with plaintiffs and each of said plaintiffs' possession and enjoyment of said hotel accommodations occupied by them in said Court Hotel or from locking plaintiffs or any of them out of said accommodations or from instituting any action at law or at equity to remove or interfere with such occupancy *contrary to said United States Price Control Act and the Rent Regulations for hotels issued in pursuance thereof,* as long as plaintiffs pay the rent for said rooms and accommodations and are not in default * * *." (Emphasis added.)

It is purely and simply a suit in equity, in personam, to prevent the defendants from interfering with plaintiffs' possession. It is not an action to enforce a contract or to prevent a breach thereof, and it is not concerned with the title to, or any estate in, real property. In our opinion it is clearly a transitory action and the motion for change of venue should have been granted.

[14] The authorities hold that on a reversal "The proceeding is left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever been rendered or made. They have the same rights which they originally had * * *." 2 Cal.Jur. p. 996, sec. 590; see, also, 25 Cal.Jur. p. 918, sec. 50.

[15] Restitution will be ordered in proper cases. See Ashton v. Heydenfeldt, 124 Cal. 14, 56 P. 624. See Cowdery v. London, etc., Bank, 139 Cal. 298, at pages 304, 305, 73 P. 196, 96 Am.St.Rep. 115, for a review of the cases. Without attempting to lay down any general rule, it would seem that in this particular case the order granting the preliminary injunction should be reversed. It has been well said with respect to a motion for change of venue that "If the defendants are entitled to have their motion granted, they are entitled to have every motion or proceeding in the case heard before the superior court of the county of their residence." Brady v. Times-Mirror Co., 106 Cal. 56, 61, 39 P. 209, 211, followed in Nolan v. McDuffie, 125 Cal. 334, 337, 58 P. 4. Such reversal will restore the parties to their status quo ante, as, under the authorities, they should be restored.

[16] In Howell v. Thompson, 70 Cal. 635, 11 P. 789, 790, it appears that after the trial court had denied a change of venue and an appeal had been taken, it proceeded to try the case on the merits. The supreme court said: "This court has jurisdiction of an appeal from an order denying a motion to change the place of trial; and there can be no doubt that when this court reverses such an order, and directs that the court below shall make and enter an order transferring a cause for trial to another county, its jurisdiction includes full power and authority to make all orders or judgments necessary to render effectual its judgment on appeal from the order denying the change of the place of trial. Unless the judgment can be set aside by this or the superior court, 'the party appealing,' as was said in Pierson v. McCahill [supra, 23 Cal. 249], 'might be forced to a trial in the wrong county, before the appeal was determined, and thus he would lose all benefit from his appeal in case the order should be reversed.'" The court concluded as follows: "If the fact that a final judgment had been entered by the superior court had been made to appear to this court when the appeal from the order refusing a change of the place of trial was heard, this court

could have provided, in its judgment reversing the order, for setting aside the judgment of the court below. This, without inquiring whether any error occurred at the trial of the cause below, but simply because the order of this court would be of no avail if the judgment below was allowed to stand." In speaking of the reversal of an order granting a change of venue, the court said in Christin v. Superior Court, 9 Cal.2d 526, 532, 71 P.2d 205, 208, 112 A.L.R. 1153: "The effect of the reversal would be to nullify the trial in San Francisco and any judgment or rights obtained as a result thereof, restoring all parties to their positions prior to the rendition of the void judgment, i. e., to a position where the cause might be brought to trial in Los Angeles. Howell v. Thompson, 70 Cal. 635, 11 P. 789." See also Pacific Construction Finance Co. v. Kramer, 41 Cal.App.2d 461, 462, 106 P.2d 634.

The order refusing to change the place of trial is reversed, and the order granting the preliminary injunction is reversed.

NOURSE, P. J., and DOOLING, J., concur.

SEVERANCE v. KNIGHT-COUNIHAN CO.*

Civ. 12786.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1945.

Rehearing Denied Jan. 26, 1946.

Hearing Granted Feb. 21, 1946.

1. Appeal and error 🔑989

Where a judgment is attacked as being unsupported by the evidence, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trial court or jury.

2. Appeal and error 🔑996

When two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court or jury.

3. Evidence 🔑444(2)

Parol evidence is admissible to show conditions precedent, which relate to delivery or taking effect of instrument, as that it shall only become effective on certain conditions or contingencies, for such evidence does not contradict or vary the written instrument but tends to show that no valid and effective contract ever existed.

4. Evidence 🔑444(2)

Parol evidence that agreement between employer and employee, which contained provision giving employee option to purchase personal property of the employer, was entered into for the purpose of defrauding employer's creditors and was to take effect only in event creditors brought proceedings against employer, did not violate parol evidence rule, but tended to show conditions on which the agreement was to take effect and to show that no valid agreement existed.

5. Fraudulent conveyances 🔑176(1)

A party to an executory contract or conveyance which is fraudulent as to creditors cannot invoke the aid of a court to enforce its terms.

6. Fraudulent conveyances 🔑176(1)

Where agreement between employer and employee contained provision giving employee an option to purchase personal property of employer for a price at less than its actual value, and it was shown by substantial evidence that the agreement was made to defraud employer's creditors and was to become effective only in the event creditors brought proceedings against employer, both parties to the agreement were in pari delicto and employee was not entitled to recover possession of the property under the agreement.

7. Fraudulent conveyances 🔑310

A finding that contract between employer and employee was collusive and for purpose of defrauding the employer's creditors was a sufficient basis for a finding that the agreement was against public policy and void.

PETERS, P. J., dissenting.

* Subsequent opinion 177 P.2d 4.

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action by Alfred D. Severance against Knight-Counihan Company to recover possession of personal property to which plaintiff claimed to be entitled under a written agreement containing an option to purchase. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. W. Jackson, of San Francisco, for appellant.

Jackson Maddux, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Appellant brought an action against respondent printing company to recover possession of certain personal property to which he claimed to be entitled under a written agreement by the terms of which he was given an option to purchase said property under certain conditions, one of which was the termination of his employment. The trial court found that the agreement upon which appellant's claim of title was based "was collusive and was drawn and signed by plaintiff and defendant for the purpose and with the intent to defraud creditors of defendant; that said agreement provides for a wholly inadequate and unfair consideration to be paid by plaintiff for said property; that said agreement was and is contrary to good morals and public policy, illegal, void and unenforceable." Judgment was entered accordingly and this appeal is from said judgment.

Appellant makes a vigorous attack upon the judgment as being unsupported by the evidence, and before discussing the specific contentions of appellant hereinafter set forth, we shall summarize the factual situation as shown by the evidence.

The agreement around which the controversy centers reads as follows:

"Agreement

"Now This Agreement made and entered into this 16th day of February, 1938, by and between Alfred D. Severance, hereinafter called first party, and Knight-Counihan Company, a corporation, hereinafter called second party.

"Whereas, first party is now employed by second party, and desires to continue in the employ of second party.

"Whereas, second party is engaged in a general printing business and desires the services of first party.

"Now, therefore, in consideration of the aforesaid, and the mutual covenants and conditions to be performed by the parties hereto, they agree as follows:

"That as part of the consideration for the services rendered and to be rendered by first party to second party, and in addition to the salary received, and to be paid first party by second party, it is hereby understood and agreed that first party shall have the option and right to purchase, as hereinafter provided, all of the tariff pages set up and/or standing, whether completed or not, and used, or had been used, or to be used in connection with the business of second party.

"That said option and right to purchase shall, and may be exercised within thirty days after the termination of first party's employment with second party for any reason whatever, or said option and right to purchase shall, or may be exercised within thirty days after written notice by second party to first party that there has been a substantial change in the management of second party, or that the business of second party has been consolidated with, or sold or assigned to another person, firm, copartnership, or corporation, or second party has, or is about to liquidate its business, and first party's option and right to purchase may be exercised by him upon the happening of any of the events mentioned aforesaid, even though second party fails to give such written notice.

"First party shall at the time of the exercise of said option and right to purchase, give second party written notice thereof and shall have sixty days thereafter within which to pay second party as and for the full purchase price of said tariff pages, which shall be the then prevailing market price of all the metal contained in said tariff pages.

"That second party shall not have the right, and hereby agrees not to sell or assign in any manner whatever said tariff pages, or the use thereof to any person, firm, copartnership, or corporation without the written consent of first party during the term hereof.

"This agreement shall be binding upon the successors and assigns of second party and terminate at the death of the first party.

"In Witness Whereof, the parties hereto have set their hands the day and year first above written.

"A. D. Severance
First Party
"Knight-Counihan Company
"By Edward Counihan, President
"Frank Stender, Secretary
"(Corporate Seal)
"Attest:
"Wm. C. Maurer."

On January 21, 1943, appellant's employment was terminated by his resignation, and on January 29, 1943, he gave respondent company written notice of his election to exercise the option. The company refused to deliver the property and this action ensued.

The property involved consists of tariff plates, which are forms made up of type which has been cast and set, and they are kept standing in racks, each on an individual galley so as to be immediately available for printing tariff schedules as orders come in. Their value at the time plaintiff made his demand for them, as tariff pages—as standing and set up forms—was found to be $31,450; and the value of the metal contained in them, which by the terms of the agreement fixed the price plaintiff was to pay for them, was found to be $8,000.

At the trial only three witnesses testified: appellant on his own behalf; Edward Counihan, president and principal stockholder of the respondent company, who had signed the agreement for the company, and William C. Maurer, secretary of the company. Their versions of the circumstances surrounding the drawing and execution of the agreement, the discussions and conversations that led up to it and that were had on the occasion of its execution, and the purpose and intent that lay behind it, are in considerable conflict, as will be pointed out hereinafter; but there is no dispute as to the following facts.

Appellant had been in the printing business for over 20 years, first as a compositor and typesetter, and later in business for himself. He left his business on April 29, 1936, and went to work for respondent company about May 15, 1936, as a salesman. He was offered the employment by Counihan, the president and general manager of the company, and was to be paid $400 a month if he could bring in 1000 pages of tariff work a year. He did not have any tariff business or any orders therefor at the time he went to work for the company; but the first year he brought in some 1500 pages, and later was successful in developing tariff business, which increased until it reached a volume of about 5000 pages and close to $50,000 a year when appellant terminated his employment in 1943. About two years after entering respondent's employ, appellant became production manager and later vice president of the company, but he received no increase in his salary.

As to the circumstances under which the agreement was entered into, appellant testified that he had a conversation with Counihan two or three weeks before February 16, 1938, the date of the agreement, and the following took place: "* * * I went in to see Mr. Counihan, and I told him that I was concerned about my situation in the company; and he asked me why, and I told him that I knew that the sales were very badly down; I knew that the financial condition of the company was not sound, and also knew that there was considerable friction going on between the three principals, Mr. Counihan, Mr. Stender, and Mr. Knight, who at that time were the three stockholders, and I told him that I felt that I wanted some protection; that I did not feel that I wanted to continue in the employ of the company, and accumulate these pages of tariff and then if I was dismissed, or if I left the employ of the company, or if the company went into insolvency, or changed the management, or for any reason, that I would no longer be able to do that type of business, because the business is predicated upon standing pages, and whoever has the standing pages controls the sales volume. And I also told him I had the account for some fifteen to twenty years, and that I did not want to put my customer in the position of finding himself suddenly without all that standing type, which would put it to the expense of having to start it all anew, as well as the expense of having to read all of those pages over again, and that the most important part, the delivery, depends upon the standing pages, and if the printer had to set all of those pages anew it is almost impossible to make the delivery that is required of the correction pages."

The agreement was drawn up by appellant's attorney and signed by the parties, and appellant testified that he retained his copy three or four weeks, and that then Counihan said he was afraid if the Zellerbach interests (the principal creditors) found out about it he would be subject to severe criticism, and suggested that the copies of the agreement be left with Maurer, then secretary of the company, in a safe in the latter's office.

In contradiction of appellant's testimony, Counihan testified that *he* initiated the agreement; that he told appellant that "the creditors were hounding us, and I felt possibly that the creditors might take over the company, and figured that if they did, I would like to keep the company continuing, and possibly that we could save the tariff business by some method whereby I could let him have the tariff pages for the price of the metal, and continue the company in existence after the creditors foreclosed on us * * * we were attempting to save the tariff plates to continue the business; so the contract was for the price of the metal, rather than let the junk man have it; and continue the business and pay off the creditors with the same value in the metal as the junk man would have paid. The metal was not for him at all, it was for the little company to continue." He also testified that about the end of March or the first of April he called Maurer into his office and in the presence of appellant told Maurer that appellant and he had had some conversation, and had arrived at a method whereby in case the company was forced into liquidation by the creditors they would be able to start up again through the tariff plates; that the plan was to let appellant have the plates as metal, and they could start up again with the tariff business as a nucleus of the new business; and that he told Maurer that "these agreements were not in effect, and not to be effective unless the place was forced into liquidation and to take them and put them in the safe, a little private safe, that I used for my private papers, and in case the company was forced into liquidation, to give one to Mr. Severance and give one to me." Counihan further testified that about six months later, in August of 1938, he made new arrangements with the creditors, and the difficulties were overcome, so he took the copies of the agreement out of the safe; and when appellant asked for his copy of the agreement in January, 1943, he told appellant "there wasn't any agreement any more. The thing had passed for which the agreement was drawn up. The trouble was over. We were still running and were not liquidated, and that was all there was to it."

Maurer testified that he became secretary of the company on March 1, 1938; that late in March or early in April of 1938 he was called into Counihan's office—Severance also being present—and Counihan told him that "he and Mr. Severance had been having a discussion concerning type metal and the possibilities of continuing the business and using the type metal as a nucleus; and that an agreement had been arrived at between Mr. Severance and Mr. Counihan to carry out that idea. However, the time had not yet arrived for the accomplishment of that purpose and that the agreements that had been arrived at were not effective because the time had not arrived, and that it was their decision to place the documents in my hands, in my possession, until such time as they would become effective, or their purpose be necessary." He further testified that if the company was forced into liquidation one copy of the agreement was to be delivered to Severance and one to Counihan; that he did not "believe" anything was said by Counihan or Severance at the time the documents were delivered to him that Severance would be entitled to delivery of the document if he should leave the company. In 1941 he discovered that Counihan had taken the documents out of the safe without telling him, and when he asked Counihan why the documents had been taken out of his possession Counihan said that there was no reason for their existence any longer, "that the purpose of the document had not taken place."

Appellant's first contention is that "there was no evidence, or sufficient evidence, that said agreement was collusive and drawn for the purpose of defrauding creditors." Appellant contends that Counihan's testimony was not entitled to any weight; that it was impeached by the testimony of appellant and by Counihan's own written statements contained in the agreement. Appellant asserts that the terms of the agreement are plain and unambiguous and that the testimony of Counihan cannot vary those terms.

Respondent in reply contends that the trial court's finding that the agreement was collusive and drawn with intent to defraud creditors is amply sustained by the evidence; that the testimony of Counihan and Maurer shows that such was the purpose and intent of the agreement; that the evidence showed that such an agreement, if carried out, would work to the disadvantage of the creditors because, in the event of liquidation, instead of getting the plates themselves, which could be sold for more than the price of the metal ($8,000), or could be used by the creditors to operate such a business, or sold to other printing concerns for the operation of a tariff business (their value as standing plates being $31,450), the creditors would find only a sixty-day receivable for the value of the metal. Respondent argues that this evidence did not violate the parol evidence rule because it did not change the wording of the agreement or vary its terms, but it did establish that the agreement was unenforceable under the law.

Respondent argues further that the very circumstances under which the agreement was entered into, and its terms, earmark it as one to defraud creditors. It points out that Severance had been in respondent's employ less than two years; that he had brought no tariff business with him, nor any plates, yet he was given an option to buy the plates for the value of the metal alone and was to have the option for his lifetime, and was not obligated to remain in respondent's employ for a single day, but could have resigned the day after the agreement was signed, exercised his option and acquired the plates for the value of the metal in them, which was about one-quarter of their value as standing plates.

[1, 2] It is a rule too well established to require the citation of authorities that when a judgment is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court or jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court or jury. Bearing in mind this familiar rule, which, we are constrained to state, is too often disregarded by counsel in arguing conflicting evidence before an appellate court, we believe that the summary of the evidence hereinbefore set forth shows ample support for the trial court's finding that the agreement was collusive and was made in fraud of creditors.

[3, 4] As to the contention of appellant that the terms of the agreement are plain and unambiguous and could not be varied by the parol evidence of Counihan, we believe the true rule is expressed in 32 Corpus Juris Secundum, Evidence, § 935, page 857, as follows: "Hence, parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed."

In P. A. Smith Co. v. Muller, 201 Cal. 219, at page 222, 256 P. 411, at page 412, our Supreme Court said: "It is well settled by the decisions in many jurisdictions that evidence that parties never intended a writing to constitute a contract, but that in lieu thereof another contract was entered into between them, is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect. [Citing cases.]"

And in Texas Co. v. Berry Garage, 121 Cal.App. 455, at page 459, 9 P.2d 241, at page 242, the court said: "* * * oral evidence is competent to prove that a purported written contract was executed as a mere artifice to affect the relationship or conduct of third parties, and that it was mutually understood between the contracting parties that it was not intended to become binding upon them. Under such circumstances, the reception of oral evidence does not have the effect of varying the terms of the written instrument, but rather tends to prove the invalidity of the challenged document. [Citing P. A. Smith Co. v. Muller, supra.]"

Appellant also contends that even if the agreement was made for the purpose of defrauding creditors, as found by the court, he may nevertheless recover, because the action herein was not brought by the creditors but by one of the parties to the agreement. He cites, among other authorities, Darrah v. Lang, 119 Cal.App. 552, 554, 6 P.2d 989, at page 990, wherein the court quoted from Bump on Fraudulent

Conveyances, 4th Ed., 461, sec. 449, as follows: "The title of a fraudulent grantee is not only good against the debtor, but it is also good against all parties except creditors and their representatives. *It is voidable only at the suit of creditors,* and if no creditor interposes and complains, the transfer is as binding and effectual to pass the title as if made with the best intents and for the most innocent and commendable purposes." (Italics added.) Respondent points out that in this and the other cases cited by appellant the title had already passed to the grantee, and the court, in effect, left the parties where it found them; it did not give title to either party, but held that the transfer already made was binding on the parties.

[5] Whatever may be the rule in some jurisdictions, we are convinced that the rule established in California and in the great majority of jurisdictions is that a party to an executory contract or conveyance which is fraudulent as to creditors cannot invoke the aid of a court to enforce its terms.

In the early case of Ager v. Duncan, 50 Cal. 325, the court said, at page 327: "It does not appear that Quigley had any creditors to be defrauded. On the contrary, the inference from the seventh finding is that he had none. But if it be assumed that he had creditors, and that the note was given for the purpose of concealing from them the fact that he had an interest in the copartnership, the findings show that Quigley and the plaintiff were in pari delicto in the fraudulent intent. The contract is executory, and the action is to enforce payment of the note given with this fraudulent intent. In such cases it is immaterial by which of the parties the fraudulent nature of the contract is disclosed to the court. As soon as the fraud is made to appear by either of the parties, the court will refuse to interfere, and leave them as they were. In other words, it will not enforce a contract founded on the mutual turpitude of the parties to it. And for the same reason, if the contract has been executed, the court will not aid either party to escape its consequences."

The leading case in California upon this point is Hays v. Windsor, 130 Cal. 230, 62 P. 395, in which Ager v. Duncan, supra, is cited and approved. Hays v. Windsor is very closely in point with the instant case, and was an action to recover possession of a crop of grain sold under a bill of sale to plaintiff but possession being retained by defendants. Plaintiff testified that the transaction was in fraud of creditors, and defendants testified it was to protect the crop so the creditors could be paid after the crop was harvested. On appeal the judgment in favor of defendants was affirmed, the Supreme Court stating, at page 234, of 130 Cal., at page 396 of 62 P.: "No consideration was paid for the bill of sale, and if there was fraudulent intent in making it, shared in by all the parties thereto, they would be in pari delicto, and what was said in Ager v. Duncan, 50 Cal. 325, would apply: 'In such cases it is immaterial by which of the parties the fraudulent nature of the contract is disclosed to the court. As soon as the fraud is made to appear by either of the parties, the court will refuse to interfere, and leave them as they were. In other words, it will not enforce a contract founded on the mutual turpitude of the parties to it. And for the same reason, if the contract has been executed, the court will not aid either party to escape its consequences.' If the facts warrant the conclusion that defendants had no fraudulent intention of defeating payment to their creditors, but really intended by the transaction to make payment more certain, then the fraud and deception was on the part of plaintiff alone, and the rule laid down in Vitoreno v. Corea, 92 Cal. 69, 28 P. 95, would apply. It was there held that two persons may concur in an illegal act without being deemed in pari delicto. In the case cited the court said: 'In this case the defendant alone was guilty of the fraud. He cannot avail himself of his own fraud as a defense. "For no man shall set up his own iniquity as a defense, any more than as a cause of action."'—quoting Lord Mansfield in Montefiori v. Montefiori, 1 W.Blk. 364. Whether, therefore, plaintiff and defendants were equally guilty of fraudulent intent, or whether defendants were innocent of such intent and plaintiff alone was guilty, plaintiff cannot recover. See the subject discussed in Bump, Fraud. Conv., §§ 442–444, and cases there cited."

On page 440 of Bump on Fraudulent Conveyances it is said: "The same principles of policy which require that a fraudulent transfer shall be held valid as between the parties, also demand that no aid or relief shall be granted for the enforcement of any agreement arising out of a fraudulent transaction. The suppression of fraud is far more likely in general to be accomplished by leaving the parties without remedy against each other, and thus introducing a preventive check naturally connected with a want of confidence and a sole reliance upon personal honor. Any other doctrine would, moreover, destroy the rule itself, for parties could evade it by means of an agreement made at the time of the transfer." On page 447 it is said: "The principles upon which a specific performance of an agreement to reconvey is refused apply also to an action at law upon such an agreement, or upon a note given as the consideration for a fraudulent transfer. There is a marked and settled distinction between executory and executed contracts of a fraudulent character. Whatever the parties to an action have executed for fraudulent purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently contracted to execute, the law refuses to compel the contractor to execute or pay damages for not executing. In both cases it leaves the parties where it finds them." And on page 449 it is said: "The principles of the law which prohibit any action upon a fraudulent executory contract apply equally to the grantee."

In Moore on Fraudulent Conveyances, at page 638, it is said: "The law will not lend its aid to a party seeking to set aside his own fraudulent conveyance. Neither law nor equity will relieve either of the parties to a fraudulent transfer from the consequences of their own acts, as against the other, nor aid them against their own wrong, nor will the courts allow such a transfer to be attacked and impeached, or rescinded, at the instance of either of the parties, * * * whether the relief is sought as a direct cause of action or by way of defense, when none of the creditors seek the aid of the court." And at page 642: "It is not necessary that it should appear that some particular creditors were intended to be defrauded, and that some particular creditors, were in fact, defrauded, but if the intent of the parties was to defraud creditors, the court will not interfere to aid the parties to the fraudulent transaction."

In Colby v. Title Ins. & Trust Co., 160 Cal. 632, at page 640, 117 P. 913, at page 916, 35 L.R.A.,N.S., 813, Ann.Cas.1913A, 515, it is said: "It is true that, as a general rule, equity will not aid one party or another to an illegal transaction where they stand in pari delicto, but will leave them just where it finds them, to settle these questions without the aid of the court. This rule is universally recognized, and a few of the many authorities announcing it, are Pomeroy's Eq.Jur., (3d Ed.) pp. 659, 667, 1703; Atwood v. Fisk, 101 Mass. 363, 100 Am.Dec. 124; Ager v. Duncan, 50 Cal. 325; Hays v. Windsor, 130 Cal. 230, 62 P. 395; Chateau v. Singla, 114 Cal. 91, 45 P. 1015, 33 L.R.A. 750, 55 Am.St.Rep. 63, cited by respondent."

[6] It should be borne in mind that in the instant case, under the findings of the court, appellant and respondent were in pari delicto, and under the California cases hereinbefore cited, which have not been overruled or distinguished by any later cases, we believe that it must be held that upon the facts found by the trial court, and supported by the record, appellant is not entitled to recover possession of said personal property under said written agreement. Furthermore, we believe that the rule adopted in California is not only supported by the weight of authority but is supported also by considerations of sound public policy.

Appellant also contends that the trial court's finding that said agreement "provides for a wholly inadequate and unfair consideration" is unsupported by the evidence. However, in view of the fact that we have hereinbefore held that the finding of the trial court that the agreement was "collusive and for the purpose of defrauding creditors" was supported by the evidence, and that therefore appellant could not invoke the aid of the court to enforce its terms, we deem it unnecessary to discuss this contention.

[7] Appellant's final contention is that "There is no evidence that the agreement was contrary to law as to good morals, was against public policy, was illegal, was void or was unenforceable." This contention is really interwoven with the contention that there was no evidence that the agreement was collusive and drawn for the purpose of defrauding creditors, because the basis of the finding that the agreement was contrary to good morals and against public policy is that it was collusive and for the purpose of defrauding creditors. Therefore, what we have hereinbefore stated covers this final contention of appellant.

In view of the foregoing, our conclusion is that the findings of the trial court are supported by the evidence, and that upon such findings the court correctly held in favor of respondent.

The judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice.

I dissent.

The problem here involved is not complex. The proceeding is one at law to recover possession of certain personal property. The basis of the plaintiff's claim is a written contract, drafted by an attorney, under the terms of which it is not disputed that plaintiff is entitled to the property. The defendant comes into court, admits that through its president and secretary it executed the contract, does not claim that the plaintiff practiced any fraud or duress upon it, but says, in effect, that it wants to evade the transaction because it was a part of a crooked and fraudulent scheme conceived and initiated by its president to fraudulently defraud its creditors. The trial court has found that this is so. It has also found that plaintiff knew of this scheme and was a participant in it. The plaintiff denied this and told a simple straightforward and reasonable story as to the circumstances under which the contract was executed. Fraud must always be proved by clear and convincing evidence. While the evidence on behalf of defendant is not clear and convincing to me, and while, in fact, in my opinion, the evidence greatly preponderates in favor of plaintiff, the trial court has found in favor of defendant on this issue. While there is a difference of opinion in this state as to whether the trial or appellate court is to determine whether substantial evidence is clear or convincing (Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583), I approve and am bound by the majority rule announced in that case, that that question is for the trial and not for the appellate court. Therefore, in this case, as an appellate judge, I am bound by the finding that plaintiff knew of defendant's fraudulent scheme and was a knowing participant therein.

The majority opinion holds that, when a fraudulent and dishonest debtor enters into such an executory contract with a third person, the third person cannot enforce the contract in a law action against the fraudulent debtor. This holding is based on the theory that the parties are in pari delicto, in which event the courts will leave the contracting parties where it finds them.

There can be no doubt but that there is authority, and substantial authority, to support the holding in the majority opinion, but it is equally true that there is strong, and in my opinion much more convincing, authority that permits the third person to enforce such an executory contract against the fraudulent debtor. The two rules, amply supported by cases from various states, are stated as follows in 37 C.J.S., Fraudulent Conveyances, § 269, p. 1103:

"There is a lack of harmony in the decisions, even within the same jurisdiction, as to whether a party to an executory contract or conveyance which is fraudulent as to creditors can invoke the aid of the courts to enforce it. By some decisions a distinction is recognized between executed and executory contracts, and it is held that notwithstanding an executory contract is invalid as in fraud of creditors it is nevertheless enforceable by the parties thereto, and that too, although the party with whom the contract was made participated in the fraud. Some of these decisions make a distinction between an illegal contract in the strict sense of the term, and one which is fraudulent as respects creditors, the former being altogether void and the latter void only as against persons hindered, delayed, or defrauded.

"In direct conflict with the foregoing view, many decisions hold that the courts will not aid a party to an executory contract or conveyance in fraud of creditors to enforce it, but will leave the parties where it finds them, and that both parties being in pari delicto either party may set up the illegality of the contract as a defense even though it is the result of his own turpitude. * * *"

The problem is also discussed in 27 Cor. Jur. p. 659, § 431, where in fn. 62 some 31 cases from 15 different jurisdictions are cited in support of the rule that: "In quite a number of decisions a distinction is recognized between executed and executory contracts, and it is held that notwithstanding an executory contract is invalid as in fraud of creditors it is nevertheless enforceable by the parties thereto * * *."

Just what the rule is in California is a matter of dispute. The majority opinion cites Ager v. Duncan, 50 Cal. 325, and

Hays v. Windsor, 130 Cal. 230, 62 P. 395, in support of its holding that the doctrine of in pari delicto is applicable. The cited cases undoubtedly support this view, but what was said in the Ager case was clearly dicta and was adopted without noting that in two earlier California cases the contrary view was expressed, without adequate discussion, and without any recognition of the existence of the contrary view. The Hays case simply quoted the Ager case without question.

The earliest case that I have found where the point was discussed is Smith v. 49 & 56 Quartz Mining Co., 14 Cal. 242. In that case Smith sought to secure possession of certain stock in the possession of defendant. One of defendant's defenses was that the contract was in fraud of creditors. The court based its decision on several grounds. At page 247 of 14 Cal., it is stated: "The position taken by the Appellant, that the plaintiff here cannot recover in this action because the assignment or sale of stock was made to defraud the creditors of Smith, cannot be maintained. * * * But even if fraudulent as to the creditors of Smith, who do not seem to be complaining here, it was good between the parties—as a note given for the purchase money of land fraudulently conveyed * * *."

The same conclusion was arrived at in Davis v. Mitchell, 34 Cal. 81 (overruled on other grounds McBride v. Fallon, 65 Cal. 301, 4 P. 17). At page 89, of 34 Cal. it is stated: "If the transaction between him and Thomas, of which the note in suit was a part, was a fraudulent transaction as against the creditors of Thomas, he could neither aver nor prove the fraud in defence of the action. Mitchell could no more show the fraud in defence of an action upon the note than Thomas could show it in an action to recover back the property. To such an action and such a defence the Courts will not listen, but, in the language of Mr. Justice Baldwin, in Abbe v. Marr [14 Cal. 210], 'will shut their doors in the faces of the intruders.'"

Thus there are two Supreme Court cases supporting the majority opinion, and two supporting the views expressed in this dissent. Neither set of cases cites the contrary cases, nor is there an adequate discussion in any of them as to the basis of the rule adopted. The reasons I believe that compel an adherence to the enforceability doctrine were not at all referred to in the Ager or Hays cases. For this reason these two cases, particularly in view of the holdings in the Smith and Davis cases, cannot be considered binding authorities on this court. It is well settled that decisions that fail to consider a point cannot be considered an authority on that point. Oakland Pav. Co. v. Whittell Realty Co., 185 Cal. 113, 195 P. 1058. Thus, this court is free to adopt whichever view it may consider best.

There are several arguments that seem to me to be unanswerable that support the view that such contracts should be enforceable by the third person. In the first place the doctrine of in pari delicto presupposes, by very definition, that the parties are in equal fault. Here on one side we have a corporation that admittedly, by the testimony produced by it and relied upon by the majority to justify an affirmance, proved that its president conceived and initiated a plan to defraud the corporation's creditors. According to its president this contract was executed pursuant to that plan. On the other side we have the plaintiff, an employee, whose efforts admittedly built up and maintained this phase of the corporate business. He is induced by the president of defendant to enter into the contract in question. Are these two parties in equal fault? Can there be any doubt but that the party that conceives and initiates the plan to defraud his creditors is much more morally reprehensible than the third person who is induced by the fraudulent debtor to become a party to the contract? There can and should be but one answer to these questions—the parties are not equally at fault—the crooked and fraudulent debtor is much more at fault than the third person. This being so the parties are not in pari delicto. It is elementary law that the doctrine has no application unless the parties are equally at fault. See many cases collected and commented upon 6 Cal.Jur. p. 157, § 109.

There is another factor that compels the conclusion that such contracts should be enforceable by the third person. Public policy requires that contracts in fraud of creditors should be discouraged. The rule of the majority opinion encourages such contracts. Under that rule a fraudulent debtor can enter into a contract in fraud of his creditors knowing that the worse that can happen to him is, that if the creditors discover the fraud, they can reach the property—a right they would have had had the contract not been executed. Under the rule announced by the majority the third person cannot enforce that contract so that no penalty at all is exacted, no restraint at all is placed upon, the fraudulent debtor. But if such contracts could be enforced by the third person a real restraint against such contracts would exist. Any fraudulent debtor would hesitate before entering into such a contract if the third person could enforce it. It follows that, even if the parties were in pari delicto (which they are not), the public policy in favor of preventing such contracts being much stronger than the policy that the judicial hands should not be tainted by enforcing them, the first policy must prevail.

I believe that the judgment should be reversed.

Rehearing denied; PETERS, P. J., dissenting.

72 Cal.App.2d 402

SINGER v. EASTERN COLUMBIA, Inc., et al.

Civ. 14882.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Rehearing Denied Jan. 23, 1946.

Hearing Denied Feb. 25, 1946.

1. Landlord and tenant ⇨169(3)

Employee of tenant suffering injuries as result of breaking of plate glass window upon which she was resting her hand was required in order to recover against owner of building to plead and prove that owner owed her the duty of ordinary care to place and maintain the premises in a reasonably safe condition.

2. Landlord and tenant ⇨164(1)

In the absence of fraud, concealment or covenant in the lease, a landlord is not liable to a tenant for injuries due to defective condition or faulty construction of the demised premises. Civ.Code, § 1941.

3. Appeal and error ⇨927(3)

Reviewing court on appeal from judgment of nonsuit must assume that jury would have construed the evidence in the light most favorable to plaintiff.

4. Landlord and tenant ⇨169(11)

In action by employee of tenant to recover for injuries as result of breaking of plate glass window upon which she was resting her hand, evidence as to whether defendant's authorized agent agreed that defendants would make necessary repairs to window, presented a question for jury.

5. Landlord and tenant ⇨169(11)

Whether promise by agent of owner of building to repair plate glass window, the breaking of which resulted in injuries to employee of tenant, was supported by consideration and one of terms of rental agreement was for jury under evidence to effect that tenant relied upon promises to make repairs and was induced to continue his tenancy from month to month by reason thereof.

6. Landlord and tenant ⇨169(11)

Whether landlord's failure to repair plate glass window left the premises in defective and dangerous condition so as to create liability for injury to tenant's employee as result of window breaking was for jury under testimony to effect that windows were wobbly and loose and that putty which held the panes together had fallen out in places and that the panes were held by metal strips only at the top and bottom.

7. Landlord and tenant ⇨164(2, 7), 165(2), 167(8)

Landlord is under no liability for injuries to tenant or his invitee where burden of repair rests upon tenant unless landlord conceals or fails to disclose defective conditions and they are not known to the tenant.

8. Landlord and tenant ⇨164(2, 7)

Although the fact that tenant had knowledge of a defective condition relieves the landlord of liability where there is no agreement upon his part to repair it does not relieve him where there is such an agreement.

9. Landlord and tenant ⇨164(2)

Agreement of landlord to correct dangerous condition places him under duty which would not exist otherwise, and to relieve himself of responsibility he must correct condition as agreed, and not merely notify the tenant that it exists.

10. Landlord and tenant ⚷165(2), 167(8)

Where landlord has agreed to repair a specific condition which is known to be dangerous, he is liable for injury to tenant's invitee resulting from that condition just as tenant alone would be liable if the duty to repair rested upon him and he had knowledge of the condition, and in either case the invitee is chargeable with knowledge only of what he actually knows or in exercise of ordinary care would know of dangerous condition.

11. Landlord and tenant ⚷169(11)

Whether tenant's employee injured as result of breaking of plate glass window upon which she was resting her hand was negligent in failing to discover condition of window pane and to appreciate danger of that condition and whether she exercised ordinary care in pressing her hand against the pane was for jury under evidence.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Esther Singer against Eastern Columbia, Incorporated, the Estate of Adolph Sieroty, deceased, and others to recover for personal injuries subsequently dismissed as to defendant first named. Judgment of nonsuit, and plaintiff appeals.

Reversed.

Harold A. Fendler, of Los Angeles, for appellant.

Schell & Delamer, of Los Angeles, for respondents.

SHINN, Justice.

This is an appeal from a judgment of nonsuit in an action for personal injuries. Plaintiff was a sales girl employed by her brother, Louis Sabin, at a store in Hollywood where linens, baby wares and novelties were sold. She went into the display window space, bent over to remove a baby dress from a standard, rested her right hand upon a plate glass window and was removing the dress with her left hand when the window glass broke, inflicting severe injuries to her arm. The defendants are the owners of a leasehold of the premises; their lessee, Louis Sabin, was occupying them under a month to month tenancy. The land and building belonged to George and Emily Bennett; it was leased to one Len D. Owens, Jr., for a period of 99 years, one of the covenants of the lease being that the lessee was to keep the building and premises in "constant good condition and repair" for the duration of the lease. Owens transferred the lease to Adolph Sieroty, who accepted the same in writing and agreed to perform all the obligations, conditions and covenants thereof, including the one of repair and maintenance. Adolph Sieroty died, leaving as his surviving heirs at law, devisees and legatees, defendants Bertha M. Sieroty, Julian M. Sieroty, Jean Sieroty, and Perahta Sieroty, said Julian and Bertha being, respectively, executor and executrix of decedent's will. The complaint alleged that said defendants constitute a copartnership which maintained control of and operated the said premises; that between March 1, 1941, and March 1, 1942, one B. J. McElroy was the agent and employee of said partnership, duly authorized to sublease the said premises; that on or about March 1, 1941, defendants sublet the premises to Louis Sabin upon a month to month tenancy "and as a part of the consideration to said sublessee to sublet, rent, use and occupy said premises defendants and each of them orally agreed and covenanted to repair and keep said premises in good condition and repair and specifically covenanted and agreed to repair and keep in good repair and condition the display windows at and about the entrance to said premises, the whole of which premises were intended to be used by said sub-tenant, his employees and the general public as and for a retail store and place of business at the location aforesaid, and under and pursuant to said covenants and agreements aforesaid, said sub-tenant entered into the possession and occupancy of said store and remained in possession thereof as sub-tenant and lessee thereof to, until including and subsequent to the 16th day of January, 1942." Plaintiff's accident occurred January 16, 1942. She did not become of age until September 1, 1943, and she instituted this action March 24, 1944.

It was alleged that defendants negligently maintained the premises in a dangerous, unsafe and defective condition, with full knowledge of such conditions, and that they had repeatedly promised, covenanted and agreed to repair said premises and keep them in good condition. It was specifically alleged that the display windows at and surrounding the entrance were kept and maintained in a dangerous, unsafe and defective condition, and that as the proximate result thereof the window glass collapsed, thereby causing plaintiff disabling injuries. Defendant Eastern Columbia, Inc., was originally named as a defendant but the action was dismissed by plaintiff as to the corporation. Defendants, by their answer, admitted that by the terms of the original ground lease the lessee covenanted to keep the building and premises in constant good condition and repair, and they admitted that Adolph Sieroty accepted an assignment of the lease and agreed in writing to keep and perform all the terms, conditions and covenants thereof. They denied that they had sublet the premises to Sabin upon a month to month tenancy and denied that they had ever covenanted or agreed to repair or keep said premises in good condition, and in addition to the denials they pleaded the defense of contributory negligence and that plaintiff, with full knowledge of the condition of the premises, assumed the risk of using the same. The case went to trial; upon the conclusion of plaintiff's evidence, defendants moved for a nonsuit upon the grounds which are relied upon for an affirmance of the judgment. The motion was granted and a judgment of dismissal was entered.

[1] It was necessary for plaintiff to plead and prove that defendants owed her the duty of ordinary care to place and maintain the premises in a reasonably safe condition. Accordingly, plaintiff alleged that as a part of the consideration for the subletting, use and occupancy of the premises by Sabin, defendants orally agreed and covenanted to place and keep the premises in good condition and repair. Defendants do not seek to justify the judgment of nonsuit upon the ground that the complaint failed to state a cause of action. They contend (1) that the evidence failed to establish any negligence upon the part of defendants as the proximate cause of plaintiff's injury; (2) that there was no covenant to repair; (3) that if there had been such a covenant there would have been no liability because the tenant knew of the condition prior to the accident; and (4) that plaintiff knew of the dangerous condition, if it was indeed dangerous, assumed the risk, and was guilty of acts of negligence which proximately contributed to her injury.

[2-4] We will take up first the question of defendants' agreement to repair a specific condition. The following statement will be found in 15 Cal.Jur. § 114, p. 704: "In the absence of fraud, concealment, or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises. This is the rule at common law, and it has not been changed by section 1941 of the Civil Code." Plaintiff recognizes the rule and relies upon the alleged covenant of the defendants to repair. This agreement was claimed to have been made orally by defendants' agent McElroy. Louis Sabin testified to conversations with McElroy, which are relied upon as proof of the agreement. No objection was made to the testimony nor is it urged on the appeal that McElroy was not shown to have had authority to make the agreement. It appeared from Sabin's testimony that he and one Levi rented the store and after they moved in discussed making a lease for the term October, 1940, to and including February, 1941. One thousand dollars was paid as the first and last months' rent. In March 1941, Levi having been removed from the picture, Sabin arranged to continue in the premises himself. At that time there was a discussion of the condition of the show windows which furnishes the basis for the present action. The entrance door is deeply recessed, with show windows on each side. The panes extended from the floor to the top of the window space. The first pane of the west window, adjoining the sidewalk, was seven feet long. It extended southerly from the sidewalk a few degrees to the east of south, where it joined a pane three feet long which angled more sharply toward the southwest, where it joined a nine-foot pane extending due south, which in turn joined a six-foot pane extending sharply to the southeast to the entrance door. From the diagram which was used by the witnesses it appears that plaintiff rested her hand upon the first pane about midway between the point where it was attached at the sidewalk and the point where it joined the three-foot pane. It will be noted that at this latter point the panes angled outward from the show window; consequently, any pressure from inside the window would have had a tendency to separate them, whereas pressure from the opposite side would have had a tendency to force them closer together. One of plaintiff's witnesses was a window washer who had washed the windows for 14 months, commencing in January, 1941. He testified that when he commenced cleaning the win-

dows they were wobbly and loose and continued in that condition. He testified that there was only putty where the panes were joined together; that there was a metal strip at the top and the bottom, but that there was none in the center; that the putty was loose, had fallen out in places, and that when he washed the windows his brush and water went through the "split." This condition of the windows was the subject of discussions between Sabin and McElroy in January, 1941, and thereafter. According to Sabin, he told McElroy that he intended to take a lease on the store, that during the months of October, November and December rain water had come through the cracks and that termites had been eating his merchandise, and McElroy said: "We'll take care of that. * * * I'm not sure they will fix the window or the painting of the back of the windows, or like that, raising them. He wouldn't trouble with that; but as far as fixing the window he said he had a special man, a maintenance man who took care of those things." Sabin wanted the windows made smaller before he took a lease, a change which would give them a higher base. He testified that he explained about the cracks in the windows and that McElroy promised to take care of them, and that he made special trips down to pay his rent in order to urge McElroy "to fix this place up," that he showed McElroy where the putty was missing and the absence of metal clamps, but that McElroy never agreed to raise the window or paint the back of the show case and that no lease was signed. He also testified that had it not been for McElroy's promises he would not have remained in possession of the premises. Defendants' construction of this testimony is that McElroy's alleged promises related only to repairs that would be made in the event an agreement was reached as to the terms of a lease. If the evidence was open to that construction, it clearly was not the only one. Had the question been submitted to the jury, a reasonable construction of the evidence would have been that McElroy promised from time to time to repair the condition which existed where the panes joined. This would have been a reasonable conclusion even though the other alterations which were discussed were not to be made unless an agreement should be reached for Sabin to take a lease. Upon this appeal from a judgment of nonsuit we must assume that the jury would have construed the evidence in the light most favorable to the contention of plaintiff. In this view, the evidence would have supported a finding that at the time Levi left the picture and Sabin decided to stay on alone, and at divers later times, defendant's authorized agent agreed that defendants would make the necessary repairs where the panes joined.

[5, 6] Defendants say that if there was a promise that they would repair the condition of the windows, it was without consideration, but we think the jury could have determined otherwise, and that defendants' original promise to repair was one of the terms of the rental agreement. Also, according to the testimony of Sabin, he relied upon the several later promises to make repairs and was induced thereby to continue his tenancy from month to month. There was therefore evidence that defendants agreed to make the repairs and that the agreement was supported by a consideration.

The next question is whether defendants, having agreed to make the repair in question, owed any duty to plaintiff, Sabin's employee. This depends primarily upon whether the failure to make the repair left the premises in a defective and dangerous condition. The covenant to repair enters into the matter of liability only insofar as it placed defendants under a duty to eliminate the condition of the window if it was a defective and dangerous one. Defendants insist that there was no evidence that the window panes were maintained in an unsafe condition. There was testimony that the windows were "wobbly and loose" and that the putty which held the two panes together had fallen out in places. There was also evidence that the panes were held by metal strips only at the top and bottom. Defendants say: "There is not one iota of evidence of the entire record that the failure of the two plates of glass to be held together in any way rendered either more likely to break. For all that appears in the record, the fact that the plates of glass were not held rigidly on all four sides may have reduced the danger of breakage owing to the greater amount of give which they thereby possessed. * * * Where a plate of glass is free at one end, it is possible for it to bend with pressure rather than to break. Where, however, the plate is firmly held on all four sides, this possibility of bending greatly is reduced and necessarily the possibility of breaking is equally increased." This argument is not supported by any evidence and we think it expresses a conclusion of fact with which the jury might reasonably have disagreed. We think the jury might have concluded that the pane would not have broken if it had been more securely fastened. They may have understood from plaintiff's testimony that she placed her right hand upon the window in order to retain her balance as she lifted a dress from a standard with her left hand. It seems to us that the jury might have concluded, with reason, that the pane, being loose and wobbly as described, did not serve to aid plaintiff to maintain her balance as she expected, and that its recession caused her to place additional pressure upon it. Although she testified that her feet were placed firmly upon the floor, it is obvious that she expected to some extent to receive support from the window pane. Defendants also say: "There is not one iota of evidence in this case that the disrepair (the failure of the two plates to be physically joined together) created any risk to any person or that the joining of these plates together by means of putty or any other substance would have prevented any such risk." It may very well be that the joinder of the two panes with putty would not have enabled them to withstand any great pressure. But plaintiff's testimony was that she placed her hand lightly upon the pane, putting "hardly any" pressure upon it, and we cannot say as a matter of law that if the panes had been joined together firmly, one of them would have given way under light pressure. It appears from the evidence that the panes had not been held together at the edges by anything stronger than putty. If a renewal of the missing putty would not have given the joint sufficient strength to withstand slight pressure, it could have been determined by the jury, with reason, that a more efficient binder or joinder should have been used to render the premises reasonably safe. Giving full effect to plaintiff's testimony, as we must upon an appeal from a judgment of nonsuit, we are of the opinion that a determination by the jury that the condition was not a reasonably safe one and that its unsafety resulted from defendants' negligence would not have been unsupported by the evidence.

[7] A further contention is that even if there was a covenant to repair, there was no liability because the tenant had knowledge of the conditions. Defendants rely upon a statement in Runyon v. City of Los Angeles, 1919, 40 Cal.App. 383, 392, 180 P. 837, quoted in part in Shotwell v. Bloom, 1943, 60 Cal.App.2d 303, 311, 140 P.2d 728 and in Scholey v. Steele, 1943, 59 Cal.App.2d 402, 405, 138 P.2d 733, that "one who, upon the express or implied invitation of the tenant, enters or is proceeding to enter upon the leased premises, is an invitee, and as such stands in the shoes of the tenant" [40 Cal.App. 383, 180 P. 841] and may recover against the landlord only if the tenant could recover. The statement that the invitee may not recover if the tenant cannot recover is sought to be applied to a case in which the landlord has agreed to make repairs. But the quotations from the Runyon case are incomplete, the remainder of the sentence being, "and that the tenant may not recover if the burden of repairing rests upon him." In both the Runyon and Shotwell cases the duty to make repairs was upon the tenant. It is well settled that the landlord is under no liability in such a case for injuries to the tenant or his invitees unless he conceals or fails to disclose the defective conditions and they are not known to the tenant. Shotwell v. Bloom, supra; 15 Cal.Jur. p. 704, § 114; 7 Cal.Jur.Supp. p. 440; Restatement, Torts, § 358.

[8, 9] Scholey v. Steele, supra, was a case in which the court affirmed a judgment in favor of an invitee of the tenant for injuries sustained by reason of defective premises which the landlord had agreed to repair. The tenant had knowledge of the defective condition and requested the landlord to correct it and the landlord had promised to do so. Plaintiff, the tenant's invitee, had no knowledge of the condition. The court followed the Restatement, Torts, Vol. 2, § 357, reading as follows: "A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if (a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented. Comment: a. Nature of lessor's duty. The lessor's duty to

repair in so far as its breach subjects him to liability for bodily harm caused to the lessee and those upon the land in his right, is not contractual but is a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them." The rule, insofar as liability to an invitee is concerned, is not predicated upon the tenant's lack of knowledge of the defective condition, and this the court in the Scholey case no doubt had in mind when following the rule, since the tenant in that case had full knowledge of the condition. The fact that the tenant has knowledge of a defective condition, although it relieves the landlord of liability where there is no agreement upon his part to repair, does not relieve him where there is such an agreement. This is entirely reasonable, for when the duty rests upon the landlord the tenant will naturally depend upon him to make the repairs and allow conditions to exist which he would otherwise cause to be corrected. Under defendants' theory a landlord having contracted to keep premises in repair would be under no greater liability for injuries to his tenant, or the latter's invitees, than if there had been no such covenant. But the agreement of the landlord to correct a condition which is dangerous places him under a duty which would not exist otherwise, and in order to relieve himself of responsibility he must correct the condition as agreed, and not merely notify the tenant that it exists.

It is apparently argued by defendants, in reliance upon the general statement that the tenant's invitee may not recover unless the tenant can recover, that any negligence upon the part of the landlord should be imputed to his invitees. The same argument was made in the Scholey case and the court, citing authority, expressed doubt whether the rule of imputed negligence was applicable, and also said, 59 Cal.App.2d page 406, 138 P.2d at page 735: "Furthermore, even if the doctrine of imputed negligence is applicable, it would still present a question of fact for the trial court as to whether a person of ordinary prudence with the tenant's knowledge would continue to use the steps."

[10] We are aware of neither authority nor sound reason for applying the doctrine of imputed negligence to a case of injury to the tenant's invitee which has resulted from the landlord's breach of duty to make repairs. The rule applicable in such case is that if the landlord has agreed to repair a specific condition which is known to be dangerous, he is liable for injuries to the tenant's invitees resulting from that condition, just as the tenant alone would be liable if the duty to repair rested upon him and he had knowledge of the condition. In either case the invitee of the tenant is chargeable with knowledge only of what he actually knows or, in the exercise of ordinary care, would know of the dangerous condition.

[11] Defendants' final argument is that plaintiff must certainly have known of the condition of the window panes and that she assumed the risk involved and was guilty of contributory negligence. She testified that she had never been in the window before and had no knowledge whatever that the panes were not securely fastened. Louis Sabin testified that he had never told her of the condition of the panes. That was a condition which would not necessarily have been discovered in the exercise of ordinary care by one in plaintiff's situation. As before noted, plaintiff testified that she exerted scarcely any pressure against the window pane. Upon the motion for nonsuit it was the duty of the trial judge to give full effect to plaintiff's testimony. Therefore, the questions whether plaintiff was guilty of negligence in failing to discover the condition of the window panes and to appreciate the danger of that condition and whether she exercised ordinary care in pressing her hand against the pane were for the determination of the jury. These were questions upon which reasonable minds might differ, and the judgment of nonsuit cannot be sustained upon the ground that the evidence admitted only of the conclusion that plaintiff was guilty of contributory negligence.

The judgment is reversed.

DESMOND, P. J., and WOOD, J., concur.

In re BROOKS' ESTATE *
BROOKS v. BROOKS.

Civ. 15010.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1945.

Rehearing Denied Jan. 3, 1946.

Hearing Granted Feb. 14, 1946.

1. Divorce ⚿172

Where interlocutory divorce decree finding husband guilty of desertion had not been modified or vacated, contention that wife was party actually at fault could not be entertained in proceeding on wife's petition, as surviving widow, to have probate homestead set apart to her and for a widow's allowance. Probate Code, § 660 et seq.

2. Executors and administrators ⚿188
Homestead ⚿141(1)

Where, at time of husband's death, wife was living apart from husband under interlocutory decree of divorce granted because of husband's fault, the wife was entitled to a probate homestead set apart to her and a widow's allowance, even though she was not residing on property at time of husband's death. Probate Code, §§ 660 et seq., 661.

3. Executors and administrators ⚿194(5)
Homestead ⚿145

Evidence sustained finding that surviving widow had not relinquished or agreed to waive either right to a widow's allowance or to a probate homestead. Probate Code, §§ 660 et seq., 661.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceedings in the matter of the estate of James Robert Brooks, deceased, wherein Bessie M. Brooks filed a petition for a widow's allowance and for designation of a probate homestead, which petition was contested by Emma Brooks. From an order granting the petition, Emma Brooks appeals.

Affirmed.

Newby, Holder & Newby, of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting a widow's allowance and designating a probate homestead. The decedent, James Robert Brooks, died June 4, 1944, leaving an estate in excess of $24,000, which estate is not insolvent. The petitioner, Bessie M. Brooks, and decedent, as husband and wife, occupied as a home certain premises at 2243 Gatewood Street, in Los Angeles, from the time of their marriage, September 29, 1936, until their separation on June 28, 1940. On or about March 13, 1939, the wife designated and recorded a homestead on this, the separate property of the husband, which homestead was thereafter jointly abandoned at the time of divorce proceedings between the parties.

On July 22, 1940, within 24 days after the wife had left the family domicile, never to return thereto during the husband's lifetime, the husband filed action for divorce on the ground of cruelty to which the wife cross-complained also on the ground of cruelty. Upon the trial of this action an interlocutory decree of divorce was granted the husband on a supplementary amended complaint for desertion. Mrs. Brooks appealed and secured a reversal of that portion of the decree granting a divorce on the ground of desertion. Brooks v. Brooks, 53 Cal.App.2d 95, 127 P.2d 296. Other litigation between the parties included the husband's action to recover from the wife money which the husband had paid under an alleged void contract made in contemplation of marriage, which provided that the husband should pay the wife $80 per month for her services as nurse and housekeeper as had been done before their marriage. In Brooks v. Brooks, 63 Cal.App.2d 671, 147 P.2d 417, a judgment for the defendant wife in this latter action, was affirmed.

On or about July 24, 1942, the wife wrote to the husband a letter offering to return, to which the husband made no reply; thereafter the wife filed a divorce action in Alameda County and on October 11, 1943, was awarded an interlocutory decree of divorce on the ground of the husband's desertion. It is stated in appellant's brief that: "As a result of the negotiations between the attorneys * * * the defendant therein (the husband) agreed to waive his motion for a change of venue, would not contest the divorce action if an amended complaint were filed based exclusively upon desertion, and if the plaintiff would make no demands upon defendant *in said divorce action*, except the payment of the aggregate sum of $165.00 for attorney fees and costs, and also upon the condition that the plaintiff would join in the abandonment of the homestead theretofore declared by her on March 13, 1939" (italics added); that such conditions were fulfilled and the interlocutory decree entered pursuant thereto. The husband, James Robert Brooks, died testate on June 4, 1944. The premises located at 2243 Gatewood Street, in Los Angeles, upon which a probate homestead was ordered, constitute a part of the residue of the estate devised by the husband to Emma Brooks, a sister. The homestead above mentioned was set aside to the widow for a period of three years, and a widow's allowance of $50 per month for one year, was ordered paid to the respondent Bessie M. Brooks.

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* Subsequent opinion 171 P.2d 724.

In respect to the widow's allowance, appellant contends that: "Before a widow can claim a family allowance, she must be receiving or entitled to receive from the husband, at the time of his death, support and maintenance." This argument is based upon the Estate of Egeline, 53 Cal.App.2d 368, 370, 127 P.2d 948, 949 where the court said: "In the Ruiz case (Estate of Ruiz, 53 Cal.App.2d 363, 127 P.2d 945), wherein the Fulton case (Estate of Fulton, 15 Cal.App.2d 202, 59 P.2d 508) was followed, we held that where it had been judicially determined that the marriage should be dissolved under conditions rendering the husband no longer liable for the wife's support, the surviving wife—although technically within the letter of section 680, Probate Code,—was not entitled to a family allowance." An examination of the Egeline case, however, reveals that the wife had been served by publication and that the husband had been granted an interlocutory decree on the ground of the wife's cruelty, whereas in the present case, the interlocutory decree of October 11, 1943, was granted to the wife on the ground of the husband's desertion. Likewise in the Ruiz case, the husband was awarded the decree on the ground of the wife's cruelty; so also in the Fulton case, the interlocutory decree was granted on the ground of the wife's desertion. These cases are therefore no authority in support of the appellant's contention.

The recent case of Estate of Malouf, 67 Cal.App.2d 589, 155 P.2d 121, 122, cited by respondent, is directly in line with the facts of the present controversy. In that case the court held that the right of a widow to have the husband's estate not exceeding $2500, set aside to her under the provisions of Section 640 of the Probate Code, is not affected by the fact that, at the time of the husband's death, the wife was living apart from the husband under an interlocutory decree of divorce granted because of the husband's extreme cruelty. Holding that the Fulton and Ruiz cases, hereinbefore mentioned, were not in point, the court in the Malouf case said: "We have no such situation here. The interlocutory decree of divorce was granted to the wife because of the extreme cruelty of her husband. We must therefore assume that the separation was not caused by any voluntary act or the misconduct of the appellant but by mistreatment by her husband."

In this connection it may be noticed that Section 680 of the Probate Code, relating to family allowances, merely provides that: "The widow and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate * * *." In this case there is no contention that the allowance of $50 per month to the widow, was not reasonable.

Notwithstanding the interlocutory decree of October 11, 1943, granted to the wife "on the ground of defendant's (the husband's) wilful desertion and abandonment of plaintiff (the wife)," the appellant nevertheless insists that: "The petitioner, having voluntarily abandoned her husband on July 28th, 1940, under conditions rendering him no longer liable for her support, lost her statutory rights to a family allowance and probate homestead." In this connection appellant relies upon an earlier divorce action between the parties, hereinbefore referred to, in which on August 23, 1941, it was adjudged that the wife was not entitled to a divorce and that the husband should be granted a divorce on the ground of desertion, which judgment was reversed in Brooks v. Brooks, 53 Cal.App. 2d 95, 127 P.2d 296. Also relied upon is the testimony of Emma Brooks that the wife voluntarily left the home of the husband, who was a paralytic, on June 28, 1940, and never returned thereto.

[1] The decree of October 11, 1943, finding the husband guilty of desertion, has

never been modified or vacated. In view of this judicial determination, appellant's contention that the wife was the party actually at fault, cannot now be entertained. Whatever may have been the initial causes of the disruption of this marriage, and whatever steps may have been taken in previous litigation between these parties, these are not now proper matters for consideration. To hold otherwise would be tantamount to permitting a reopening of the divorce issues and a contradiction of the decree itself.

Appellant likewise contends that the widow is not entitled to a probate homestead for the reason that she was not residing on the property at the time of the husband's death, and had not resided there since June 28, 1940, when, as appellant insists, the wife abandoned the decedent. What has been said herein, as to the alleged fault of the wife, is equally applicable to the probate homestead. Moreover, the cases cited by appellant in support of the present proposition, namely, Estate of Carraghar, 181 Cal. 15, 183 P. 161, and Estate of Kachigan, 20 Cal.2d 787, 128 P.2d 865, are entirely inapplicable to the situation here presented. Nor does the case of Robson v. Meder, 66 Cal.App.2d 47, 151 P.2d 662, now published in 66 Cal.App.2d 47, 151. P.2d 662, support the appellant's contention. The Estate of Fulton, 15 Cal.App. 2d 202, 59 P.2d 508, previously commented on, was one in which the interlocutory decree had been granted to the husband because of the wife's desertion, whereas, as said in the respondent's brief, "In the case at bar, the position is exactly the reverse." In the Estate of Parkinson, 193 Cal. 354, 358, 224 P. 453, 455, the court held that a widow was not prevented from receiving a probate allowance "merely because she was, through no fault on her part, but wholly through fault on his part, separated from her husband * * *." The court then cited with approval Estate of Gould, 181 Cal. 11, 183 P. 146, holding that "the right of a widow to a reasonable provision for her support * * * was not conditioned upon her having lived in the family relation with the deceased at the time of his death."

[2] A perusal of the statute relating to probate homesteads, namely, Section 660 et seq. of the Probate Code, discloses no legislative intent to make residence by the widow, a prerequisite to such homestead. Section 661 provides without equivocation that if no homestead had previously been selected, etc, "the court, in the manner hereinafter provided, *must select,* designate and set apart and cause to be recorded *a homestead for the use of the surviving spouse* * * *." (Italics added.) The trial court correctly found that the petitioner, Bessie M. Brooks, was the surviving widow of James Robert Brooks, and that the petitioner and decedent "were living apart at the time of his death by the fault of decedent." The widow was therefore entitled to the probate homestead set apart to her, as well as the widow's allowance, unless it was made to appear that, in some manner, a waiver of those rights had taken place.

[3] It was further found in the court below, that the petitioner had never relinquished or agreed to waive either the right to a widow's allowance or to a probate homestead, and this finding is assailed by the appellant as not sustained by the evidence. The alleged waiver is predicated upon certain negotiations between attorneys for the respective parties which preceded the entry of the interlocutory decree of October 11, 1943. These negotiations, hereinbefore referred to, were, as found by the trial court, to the effect that the husband would waive the right to change the place of trial from Alameda County to Los Angeles County; that the husband would not defend a charge of desertion; that the wife would "make no demand upon decedent *in said divorce action,* except that he pay her attorney's fees and costs in the aggregate sum of $165.00, and further that petitioner should execute an abandonment of the homestead" (italics added), theretofore selected by her, which stipulations were duly complied with. The interlocutory decree as entered by the Alameda court, contains no statement concerning any waiver by the wife.

The evidence claimed by appellant to prove a waiver of the widow's probate rights, consists of certain correspondence between attorneys which however does not mention such rights; a written stipulation never signed either by the parties or their attorneys; and the testimony of Nathan Newby, appellant's attorney. The record does not support appellant's contention in this respect, but on the contrary discloses that the only financial stipulation actually entered into was that previously referred to concerning payment of attorney fees, etc., and the agreement that "in said divorce action" the wife would make no demand upon the husband. Indeed, the cross-examination of Attorney Nathan Newby seems to indicate quite clearly that the wife did not waive any rights in reference to the husband's estate:

"Q. By Mr. Backus: Do you have any writing at all from Mrs. Brooks wherein she waived any rights against her husband? A. We think we have the waiver through her attorney.

"Q. No writing at all where she waived any rights to an allowance from his estate? A. I have not.

"Q. That was not mentioned in your agreement with her attorney was it? A. No sir."

In the words of respondent's brief, "It would have been extremely simple for the respective attorneys for the parties, to have reduced the agreement waiving her widow's rights, to writing, and had the contract signed by both the parties," had such an agreement been contemplated. This was not done, and the record discloses no evidence that any agreement to that effect was entered into either in writing or otherwise.

In the Estate of Bidigare, 215 Cal. 28, 30, 8 P.2d 122, 123, the court said: "The sole question presented on the appeal is whether the petitioner waived her right to ask for a family allowance by reason of the above-quoted provision of the property settlement agreement. It is not disputed that the wife may, by her agreement, waive such right. It is well established, however, that in order to bar a family allowance the intention to waive the right must be clear and explicit, and that any uncertainty in the language of the agreement will be resolved in favor of the right. Estate of Whitney, 171 Cal. 750, 154 P. 855; Estate of Gould, 181 Cal. 11, 183 P. 146." This rule was followed in Estate of Andres, 126 Cal.App. 146, 14 P.2d 566, in which by written contract the wife had released to the husband, his heirs and assigns forever, all the right, title and interest which the wife "now has or may hereafter acquire, by operation of law or otherwise, in and to all other property, real, personal and mixed" which the husband "now owns or has acquired or which he may hereafter acquire or own, or which may now or hereafter stand in his name, whether the same be community property or otherwise." Citing the Bidigare case, the court said: "Our conclusion is that, under the contract relied upon by appellant herein, it does not appear that there was any express waiver of the wife's right to support or of her right to a family allowance. There is an absence of any clear and explicit intention of the wife to waive her rights in this respect." An application to have the cause heard in the Supreme Court, was denied. Appellant's brief states that "we do not deny" that such is the rule, but seeks to distinguish the above cases from the present controversy, maintaining that "Mr. Brooks was not liable for the support of his wife at the time of his death," and that therefore the order made in the present case was erroneous. The argument is not persuasive and the point taken must be resolved against the appellant.

No reversible error appears to have been committed by the trial court; the orders appealed from are reasonable and in compliance with the law as hereinbefore set forth, and are therefore affirmed.

YORK, P. J., and WHITE, J., concur.

72 Cal.App.2d 324

MOORE v. SPREMO et al.

Civ. 12965.

District Court of Appeal, First District,
Division 1, California.

Dec. 28, 1945.

1. Limitation of actions 🔑49(2)

Cause of action for continuous services rendered under circumstances indicating that they were not gratuitous, is deemed, for limitation purposes, to arise upon termination of services.

2. Appeal and error 🔑995

The Code sections, providing that oral admissions of a party should be viewed with caution, that weak evidence offered, when party has power to offer stronger evidence, should be viewed with distrust and stating presumption that willfully suppressed evidence, if produced, would be adverse, and presumption that higher evidence would be adverse if inferior evidence is produced, are ordinarily used as a guide for trier of facts and are not considered by appellate courts, except when there is no substantial evidence to support a judgment. Code Civ. Proc. § 1963, subd. 5, 6, § 2061, subd. 4, 7.

3. Evidence ⚷78

Where action against executors for rent and for services furnished decedent did not purport to be based upon a book account, executors were not entitled to presumption that contents of books of account, had books been produced, would have been adverse to plaintiff on theory that books of account were suppressed, since books are secondary evidence and plaintiff was disqualified as a witness to explain books, unless defendants interrogated her thereon and since record did not show that any books of account were kept other than those produced. Code Civ. Proc. § 1963, subd. 5, 6, § 2061, subd. 4, 7.

4. Appeal and error ⚷1008(1)

Whether services rendered by claimant to decedent during decedent's lifetime at decedent's special instance and request were of a gratuitous nature was for trier of facts.

5. Work and labor ⚷26

When services are rendered by one person, from which another derives a benefit, although there is no express agreement to pay for the services, there is a presumption which arises from proof of services rendered that person enjoying benefits thereof is bound to pay reasonable worth subject to rebuttal by proof of a special agreement to pay therefor a particular amount or in a particular manner or by proof that services were intended to be gratuitous or even by particular circumstances from which law would raise counter presumption that services were not intended to be a charge against party benefited.

6. Executors and administrators ⚷221(2)

Fact that one suing for services rendered a deceased, performed services as a member of household, does not destroy presumption that it was intended that deceased should pay therefor but only strengthens or diminishes an implication that services were acts of gratuitous kindness according to degree of relationship.

7. Executors and administrators ⚷221(5)

The intention to pay and expectation of compensation as between person rendering services in decedent's lifetime and decedent may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties.

8. Executors and administrators ⚷221(5)

Evidence sustained finding that claimant was entitled to compensation for reasonable value of roof furnished decedent in his lifetime and for reasonable value of personal services including cooking and nursing.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Nina Moore against Risto Spremo and Theodore Denda, as executors of the last will and testament of Rade Babich, deceased, to recover on a claim against decedent's estate for room rent and work and labor performed for decedent, which claim executors had rejected. From an adverse judgment, defendants appeal.

Affirmed.

Marion Vecki and Chalmer Munday, both of San Francisco, for appellants.

Fred A. Watkins and John D. Costello, both of San Francisco, for respondent.

WARD, Justice.

The defendants, as executors of the last will and testament of Rade Babich, deceased, appeal from a judgment in favor of plaintiff on claims against his estate for room rent and work and labor performed for the decedent.

The complaint was framed in four causes of action: (1) For room rent from January 15, 1930, to February 7, 1944, at the rate of $15 a month pursuant to an oral agreement; (2) for personal services, including cooking and nursing, at the instance and request of decedent, covering a period of four months at $150 a month; (3) for personal services of a similar but less onerous character covering a period of nine months at $75 a month; and (4) services for nursing, etc., from December 21, 1943, to the date of death of Rade Babich, February 7, 1944, in the sum of $300. The court found in accordance with the material allegations of the amended complaint in favor of the plaintiff on each cause of action.

The main question to decide is the sufficiency of the evidence to support the findings. Appellant presents the "Question Involved" as follows: "Whether, in the first place, there is any evidence at all in the record which will sustain the allegations of the amended complaint with reference to the first cause of action that the room in question was occupied by the decedent, Rade Babich, 'under and pursuant to an oral agreement with plaintiff made and entered into between said plaintiff and said deceased, on or about the said 15th day of January, 1930, by which said decedent agreed to compensate plaintiff at the rate of fifteen ($15.00) dollars a month for said room, at such time as decedent should cease to occupy said room', and the findings made in accordance with the said allegations; and in the second place, whether there is any evidence at all in the record which will sustain the allegations of the amended complaint with reference to the second, third and fourth causes of action and the findings made in accordance therewith, that the services therein mentioned were rendered under and pursuant to 'an oral promise by the decedent to pay plaintiff the reasonable value thereof when said services should have been completed', or that such services were rendered by plaintiff 'with the expectation and agreement that the same should be paid for by said decedent when terminated.' "

The evidence shows that Rade Babich came to live in the plaintiff's rooming house in 1928. In 1930, during the depression, she permitted him to stay on in his room without paying rent. In 1933 or 1934 he admitted to Harry G. Selig, one of his friends, that he owed Mrs. Moore, the plaintiff, a great deal of money; in 1937, the deceased stated to Selig that if she didn't get paid the amount she was owed, his will would take care of her, and finally, in the Fall of 1941 the deceased stated to Selig that when he settled up with Mrs. Moore, she would be able to buy two houses similar to Selig's house which was valued at about $7,500. As late as September, 1942, the decedent admitted to plaintiff's brother that he had not paid plaintiff what he owed her. In September, 1942, the decedent, having cancer of the rectum, entered a hospital to have a colostomy performed. When he returned to plaintiff's rooming house in November, 1942, he was very weak and sick and required her services day and night for four months. The decedent required constant care inasmuch as the excretory processes took place through his side with no muscular control. From this time on the decedent took all his meals at plaintiff's house and she cleaned his room and prepared special foods for him. He paid one-half of the food bills for the two of them, accurate books being kept. In discussing this financial arrangement with plaintiff's brother the decedent stated that it would not compensate plaintiff but was all he could do at that time. After the operation the decedent went again to the hospital for blood transfusions and remained there several days. Finally in December, 1943, the decedent became mortally ill; the plaintiff waited on him night and day. On January 4, 1944, he went again to the hospital where plaintiff continued to attend him, nurses being unobtainable. He died on February 7, 1944.

[1] Mrs. Maude Oser, a tenant of plaintiff's, testified as follows: "Well, I have seen her strip him and bathe him, clean him—get down on her hands and knees and scrub the floor where he had soiled it in his eruptions.

"Q. Eruptions from out of the side? A. Yes.

"Q. Was that on more than one occasion? A. Yes, it was several occasions that I saw that, and I have been there just after it had gone on many times.

"Q. You have been there at meal times? A. Oh yes, constantly.

"Q. Had you seen him eating? A. Yes.

"Q. Did he eat the same things the rest of the folks did when he returned from the hospital. A. Oh no, he was on a strict diet.

"Q. He had a special diet? A. Yes.

"Q. Who prepared the diet? A. Mrs. Moore."

Another tenant, a Mrs. Crittenden, and a visitor, Frank Wise, corroborated the testimony of Mrs. Oser. Just prior to his death decedent gave Mrs. Moore his automobile worth $1,000, and in his will he left her a mortgage valued at $750. There is evidence that decedent did not need a special diet and that he spent many week-ends alone, driving his car in the country. Taking the evidence favorable to the plaintiff, there is evidence that decedent agreed to compensate plaintiff at a specified monthly rate for the use of his room until he should cease to occupy it, evidence to support the findings that Babich was ill and confined to his room during the periods specified, and that at his special instance and request

Mrs. Moore prepared and served his meals and nursed him during the day, and for certain periods during the night. There is also evidence that Babich expected to pay and that Mrs. Moore anticipated receiving compensation for rent of the premises and for services rendered, and evidence from which a reasonable deduction may be drawn that payment of the reasonable value of such services had not been made when the services terminated. The complaint was filed within two years after the termination of the services, at which time the causes of action sued upon are deemed to have arisen. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Tabata v. Murane, 24 Cal.2d 221, 148 P.2d 605; Winder v. Winder, 18 Cal.2d 123, 114 P.2d 347, 144 A.L.R. 935; Lloyd v. Kleefisch, 48 Cal.App.2d 408, 120 P.2d 97; Beard v. Melvin, 60 Cal.App.2d 421, 140 P.2d 720.

[2, 3] In attacking the sufficiency of the evidence appellants stress the following Code section provisions: That evidence of the oral admissions of a party should be viewed with caution (Code Civ.Proc. § 2061, subd. 4); that willfully suppressed evidence, if produced, would be adverse (Code Civ.Proc. § 1963, subd. 5); "That higher evidence would be adverse from inferior being produced" (Code Civ.Proc. § 1963, subd. 6) and "That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust" (Code Civ.Proc. § 2061, subd. 7). The above statutory provisions are ordinarily used as a guide to the trier of the facts, and are not considered by appellate courts except when there is no substantial evidence to support a judgment. Specifically, it is appellants' theory that the books of account were suppressed, that therefore the previous sections noted are applicable, and that it must be presumed that, had they been produced, their contents would have been adverse to plaintiff. In this connection it appears that plaintiff kept an account of the amounts of money paid out for food for herself and decedent during part of the period of his illness and that decedent paid one-half of this amount, which arrangement had been agreed upon between plaintiff and decedent. The record does not disclose that any other book accounts were kept although plaintiff's brother referred to seeing some "books." The pleadings do not indicate that this action is based upon a book account. Moreover, books of account, like admissions, are classified as secondary evidence. Plaintiff was disqualified as a witness to testify to conversations with the decedent or to explain any books of account not in the decedent's handwriting or kept under his direction but entirely in her handwriting, unless defendants interrogated her upon those subjects. Roche v. Ware, 71 Cal. 375, 12 P. 284, 60 Am.Rep. 539; Lucy v. Lucy, 22 Cal.App.2d 629, 71 P.2d 949; Deacon v. Bryans, 88 Cal.App. 322, 263 P. 371. Plaintiff could have identified books of account (11A Cal.Jur. p. 905, § 642), but it is questionable whether any such books were ever in existence, and, if so, whether they could have been classified as "stronger and more satisfactory" evidence than the acknowledgment of the indebtedness to third parties.

[4] Appellants' contention that the evidence is insufficient is based upon its claimed unreliability above discussed, and the alleged facts that no agreement existed between plaintiff and decedent and that the use of the room and the services rendered were given gratuitously by plaintiff. Appellants cite in support of their position Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220; Broaddus v. James, 13 Cal.App. 464, 110 P. 158. Herbert v. Lankershim, supra, is a case in which there was no substantial evidence to support the trial court's findings and is clearly distinguishable not only on its facts but also in the issues involved. Broaddus v. James, supra, involves services rendered between relatives and the inferences concerning the gratuitous character of the services to be drawn therefrom. The determination of the question of the gratuitous nature of services is a factual one. Here it has been determined upon substantial evidence by the trial court contrary to appellants' theory.

[5, 6] The rules governing this type of case are aptly stated in Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 188 P. 1034. The factual background of that case is not identical but similar and the appellant's legal contention on the question of gratuity were there presented. In the Mayborne case, which is decisive in this case, the court said (46 Cal.App. at pages 181, 182, 183, 188 P. at page 1036):

"Appellant does not dispute the general rule, as stated in Moulin v. Columbet, 22

Cal. [508], 509, that, when services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a 'presumption of law which arises from the proof of services rendered that the person enjoying the benefit of the same is bound to pay what they are reasonably worth.'

"It is, though, justly contended that this is a mere presumption and 'liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counterpresumption that the services were not intended to be a charge against the party who was benefited thereby.' Appellant goes further in the claim that this case is an exception to the general rule in that plaintiff performed the services as a member of the household, and therefore could not claim the advantage of said presumption or implication of law. Decisions are cited to the effect that under such circumstances the presumption is, rather, that the services are gratuitous, and that the burden is upon the claimant to overcome this presumption. We need not review these various decisions, as we find a sufficient guide for our purpose in the declarations of the Supreme Court in Crane v. Derrick, 157 Cal. 667, 109 P. 31, as follows: 'It has been said many times that the question is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered or the support was furnished. See 21 Am. & Eng. Ency. of Law (2d Ed.) p. 1061; Murdock v. Murdock, 7 Cal. [511], 513; Friermuth v. Friermuth, 46 Cal. 42, 45. In the consideration of such circumstances, the degree of the relationship may strengthen or diminish the implication that the services are acts of gratuitous kindness and affection according to its proximity or remoteness. 1 Beach on Law of Contracts, § 653. Our own decisions support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made. Murdock v. Murdock, 7 Cal. 513; Friermuth v. Friermuth, 46 Cal. 42. And it is emphatically declared in Murdock v. Murdock that it is the expectations of the parties existing while the relation continued that is to control, and no circumstance occurring afterward can convert that into an implied contract, that was not so before.' Under this test the claimant is not required to prove any express contract, but it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties. * * * We are required, of course, to go no further than to say that such conclusion of the trial court is not unreasonable, although, we may believe that a finding the other way would be amply supported. Moreover, under the peculiar circumstances herein, although in a limited sense the parties lived together as a family, the industry, fidelity, and self-denial of plaintiff in the services she performed would indicate quite an unusual and extraordinary person if she had no expectation of such reward and reason to believe that it would be realized. The more rational inference would seem to be the other way, if we take into view the ordinary tests and motives of human conduct. Mr. Dutton's wants were thoughtfully supplied, he was carefully nursed in illness, and, as he grew old and feeble, he received increasing care and attention. Since there is no claim of any meretricious or improper relations between the parties, why should anyone suppose that she would so deport herself without expectation of substantial compensation?

"* * * The cases wherein such services are presumed to be gratuitous rest upon some natural or conventional obligation of mutual care and consideration, and the present instance hardly belongs to that class. Plaintiff was under no legal or moral duty to render services to Dutton. In contemplation of law they were strangers to each other, and as between such, the law says that beneficial services rendered and accepted must be paid for." See, also, Lloyd v. Kleefisch, supra; Long v. Rumsey, supra; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Lundberg v. Katz, 44 Cal.App.2d 38, 111 P.2d 917.

[7, 8] With specific reference to the elements necessary in proving a contract to pay in this type of case, the Supreme Court in Winder v. Winder, supra, 18 Cal. 2d at page 128, 114 P.2d at page 350, 144 A.L.R. 935, quotes with approval from

Wainwright Trust Co. v. Kinder, 69 Ind. App. 88, 120 N.E. 419, the following: "'The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties. * * * (The) expectation of compensation may co-exist with higher motives prompted by affection or the sense of duty, and * * * the existence of the latter does not necessarily exclude the idea of pecuniary compensation. * * * To warrant the finding of such contract, the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but such elements, like other ultimate facts, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.'" Applying these principles to the facts proven here, it must be determined that the evidence supports the trial court's finding that the decedent was bound to pay the reasonable value of the services rendered.

The judgment is affirmed.

PETERS, P. J., and ATTERIDGE, Justice pro tem., concur.

72 Cal.App.2d 465

HENDRICKS v. OSMAN et al.

3 Civ. 7172; Sac. 5724.

District Court of Appeal, Third District, California.

Jan. 3, 1946.

Hearing Denied Feb. 28, 1946.

1. Appeal and error 🔑854(3)
Pleading 🔑223

A party who declines to avail himself of leave to amend complaint after demurrer thereto has been sustained, which demurrer is both general and special, must stand upon his pleading as against both grounds of demurrer, and if the complaint is objectionable on any one ground, judgment of dismissal must be affirmed.

2. Trusts 🔑371(2)

A complaint which alleged that will gave realty to surviving husband with right to sell or encumber it, with provision that title thereto should vest in plaintiff in event husband still had title at time of his death, and that at time of husband's death title was still vested in him, but that defendant claimed some interest therein by reason of a contract of sale, was insufficient since if contract of sale was made by husband during his lifetime, it was valid, and plaintiff had no interest in the property.

Appeal from Superior Court, Mendocino County; Lilburn Gibson, Judge.

Action by C. L. Hendricks, also known as Leon Hendricks, against Augusta Osman, as executrix of the estate of Herman Traub, deceased, and others, to establish title in plaintiff to realty under the will of deceased. The trial court sustained a demurrer to the complaint and, upon plaintiff's refusal to amend, entered a judgment of dismissal, from which plaintiff appeals. Affirmed.

J. A. Ratchford, of Healdsburg, and Charles Kasch, of Ukiah, for appellant.

Hale McCowen, of Ukiah, for respondent.

PEEK, Justice.

This is an appeal from a judgment of dismissal entered after plaintiff declined to amend his complaint following the order of the trial court sustaining defendants' general and special demurrer thereto.

By his complaint plaintiff alleges that he is the nephew of Stella Traub, deceased; that by her will she devised certain real property to her husband, Herman Traub, which will provided in part (and it is to be noted that this is the only portion of the will set out in the pleading): "It is not my intention hereby to restrict my husband in any way concerning said ranch, but he shall have the right to sell, dispose of, or encumber the same, but if the title thereto is still vested in him at the time of his death, it shall go to my said nephew", plaintiff and appellant herein; that Herman Traub by the terms of said will was named executor of her estate; that in 1931 Stella Traub died, and thereafter her estate was administered by Herman Traub as executor; that he falsely and fraudulently alleged that he was the sole devisee under said will; that he gave no notice to plaintiff of the terms of the will or the death of Stella Traub or the pendency of the probate proceedings; that a decree of distribution was entered in said proceedings distributing the said real property absolutely to Herman Traub without mention of any interest plaintiff might have therein; that on August 14, 1944, Herman Traub died; that his estate is being administered by respondent Augusta Osman, the duly appointed and qualified executrix thereof; that at the time of the death of Herman Traub title to the ranch was still vested in him; and finally, that "defendants Reno Buchignani and Annie Buchignani claim some interest in said real property by reason of a purported contract of purchase and sale, and plaintiff herein alleges that said contract constitutes a cloud upon the real property, but that if the said claim be valid it be recognized and established by decree of Court." The complaint concludes with a prayer that defendants be adjudged to be holding the property in trust for plaintiff, that the trust be declared to be terminated, and that the rights of the Buchignanis be adjudged and determined by the court.

To this complaint defendants demurred, charging that it failed to state facts sufficient to constitute a cause of action and that it was uncertain and unintelligible in certain alleged particulars. The trial court sustained the demurrer with leave to plaintiff to amend within ten days. Plaintiff elected to stand upon his complaint rather than amend, and judgment of dismissal was entered.

[1] It is clearly the law that one who declines to avail himself of leave to amend his complaint after a demurrer thereto has been sustained, which demurrer is both general and special, thereby must stand upon his pleading as against both grounds of demurrer, and if the complaint is objectionable on any ground the judgment of dismissal must be affirmed. California Trust Co. v. Cohn, 214 Cal. 619, 623, 7 P.2d 297; Aalwyn v. Cobe, 168 Cal. 165, 173, 142 P. 79; Craig v. City of Los Angeles, 44 Cal. App.2d 71, 73, 74, 111 P.2d 977; Robinson v. Godfrey, 78 Cal.App. 284, 288, 248 P. 268.

[2] We are of the opinion that the demurrer was properly sustained on the ground that the allegations of appellant's complaint as to the nature or state of the title in Herman Traub at the time of his death are insufficient to apprise defendants of the claim they must meet. Plaintiff's entire case appears to rest on a showing that Herman Traub did not dispose of or sell said ranch during his lifetime. Yet plaintiff alleges a contract of sale, which for all that appears was at least partially executed. If said contract was made by Herman Traub during his lifetime and not by his executrix as we may assume it was, and if it was valid and enforceable, the contingency specified in the will of Stella Traub never came to pass, and appellant acquired no interest in the property in question. If such a contract was made by Herman Traub before his death, then his successor would have nothing more than a bare legal title which he would be required to convey upon the completion of the contract, and a vendor's lien which he would have to exercise for the benefit of Herman Traub's estate. Estate of Reid, 26 Cal.App. 2d 362, 363, 366, 367, 79 P.2d 451.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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72 Cal.App.2d 336

In re MILES' ESTATE.

MILES et al. v. MILES.

Civ. 15043.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1945.

1. Appeal and error 🔑1078(1)

Where appeals from order and decree were not discussed in appellants' brief, order and decree would be affirmed.

2. Appeal and error 🔑106

An order denying continuance is not appealable.

3. Husband and wife 🔑262(1)

Realty acquired by husband and wife after marriage and conveyed to them as "husband and wife" was presumed to have been community property, and unless presumption was satisfactorily controverted by evidence, trial court's finding that realty was community property could not be disturbed. Civ.Code, § 164.

4. Husband and wife ⚷264

Evidence reinforced presumption that realty acquired by husband and wife after marriage and conveyed to them as "husband and wife" was community property. Civ.Code, § 164.

5. Husband and wife ⚷249

Where realty acquired by husband and wife was community property, neither husband's contribution of time and labor to repair and maintenance of realty nor his joining with wife in execution of notes and deeds of trust to secure payment of purchase price gave him an interest in the property. Civ.Code, § 164.

6. Husband and wife ⚷254

Income from community property applied on purchase money notes was of same character as property itself. Civ.Code, § 164.

7. Witnesses ⚷163

Where widow's claim against husband's estate based on husband's oral promise to execute a note in consideration of widow's conveyance of one-third interest in realty to husband was barred by limitation, widow's testimony that husband subsequently agreed to give her the note was properly excluded in so far as it related to the claim under statute disqualifying witnesses to transactions with decedents. Code Civ.Proc. § 339, subd. 1, § 1880, subd. 3.

8. Limitation of actions ⚷148(3)

A letter written by decedent to attorneys of his first wife in which decedent referred to purchase of realty and stated that decedent's second wife had "quite rightly demanded that I secure my obligation to her" was not such an acknowledgment of debt as to waive statute of limitations on second wife's claim based on decedent's oral promise to execute a note in consideration for conveyance of interest in the realty, since an acknowledgment must be direct, unqualified and unconditional admission of debt which a party is willing to pay. Code Civ.Proc. § 360.

9. Limitation of actions ⚷142

Decedent's purported acknowledgment of indebtedness to his second wife which was not made to her or to her agent but to attorneys of decedent's first wife was insufficient to constitute an implied promise to pay and to take the debt to second wife out of statute of limitations. Code Civ. Proc. § 360.

10. Limitation of actions ⚷142

Where decedent, pursuant to advice of his stepson who was an attorney, wrote a letter to attorneys of decedent's first wife regarding second wife's demand for security of obligation to her for realty conveyed to decedent, decedent's delivery to stepson of copy of such letter did not constitute an implied promise to pay so as to take the debt out of statute of limitations, where stepson was consulted as an attorney and was not then acting as agent of his mother but as attorney for decedent. Code Civ.Proc. § 360.

11. Wills ⚷467

When disposition of property is indicated in will by words "wish" or "desire", it is a dispositive command testamentary in character and not precatory.

12. Wills ⚷467

A wish or request of testator for disposition of his estate directed to executor is a command, but if addressed to legatee it will not be construed as a limitation on estate given in absolute terms.

13. Wills ⚷467

Under holographic will providing that "It is my wish to leave all my goods & chattels to my wife" and that "It is my wish that in a reasonable time she give" to testator's children certain sums, the latter wish was precatory since by first portion of will testator had bequeathed his property in such manner that title passed to his widow at his death and title having passed he could not direct manner in which she should dispose of the property.

◆

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Proceeding in the matter of the estate of Leonard Cromwell Miles, also known as Leonard C. Miles, deceased, wherein Flora E. Miles was executrix and Adele E. Miles and another, deceased's children by a first marriage, were the contestants. From orders and decrees, contestants appeal.

The order allowing claim of executrix reversed with directions, appeal from order denying motion for continuance dismissed, and other orders and decrees affirmed.

Glenn S. Roberts, of Los Angeles, for appellants.

Coleman E. Stewart, of Santa Barbara, for respondent.

WILSON, Justice.

During the probate of the estate of the decedent several controversies arose between the decedent's widow and his two children by a former marriage, out of which grew the several appeals herein.

The decedent left a holographic will reading as follows: "Santa Barbara July 13, 1938 I, Edward Cromwell Miles, do make this as my last will & Testament. It is my wish to leave all my goods & chattels to my wife Flora Stewart Miles. She to act as executor without bond. It is my wish that in a reasonable time she give to Adele my daughter $500.00 and to Kenneth my son $100.00. Leonard C. Miles" It was stipulated that the will disposed of personal property only and that decedent died intestate as to the real property herein involved.

The facts necessary to be considered in determining the several appeals are as follows: In February, 1933, prior to the entry of a final decree of divorce dissolving the marriage of decedent and his first wife, respondent and decedent were contemplating marriage. They determined to purchase a parcel of property in Santa Barbara for approximately $7,200. Decedent gave respondent $1,200 in cash which was applied on the purchase price and respondent paid the entire balance with her separate funds. The property was conveyed to her as her separate property. Decedent and respondent were married in March, 1933, and resided on said property. After their marriage a joint bank account was opened. Respondent deposited therein rents amounting to $125 per month which she received from her separate property, and decedent deposited $100 a month in said account for living expenses but he did not draw on the account. He maintained a separate bank account out of which he paid his own personal expenses. This method of handling their funds was continued until the death of decedent, the parties never having had any substantial reserve in the bank account and no property having been acquired out of the earnings of decedent.

Some time in May or June, 1940, decedent and respondent decided to purchase a bungalow court, which is the property involved in this proceeding. At that time Coleman Stewart, a son of respondent, owned another parcel of real property subject to a life estate of his mother. Decedent, respondent, and Coleman Stewart valued the two parcels of property owned by respondent and Coleman Stewart at $15,000. It was agreed that the bungalow court should be purchased and that decedent should pay $5,000, one-third of the valuation placed on said parcels, and that the three persons named should each own a one-third interest in the bungalow court. The latter property was finally purchased for $32,500. The two parcels of real property above mentioned were sold for $12,500. Said sum was paid on the purchase price of the bungalow court and two promissory notes for the total sum of $19,000 were executed by respondent and decedent, secured by trust deeds on said property. Respondent paid $1,073 in cash out of her separate funds, covering the balance of the purchase price and the incidental expenses relating to the purchase. The property was then conveyed to decedent and respondent and they in turn conveyed an undivided one-third interest to Coleman Stewart. Decedent paid $615 to the real estate agent as his commission. This sum he borrowed from a bank, giving as collateral therefor stocks which he owned prior to his marriage. Decedent and respondent thereafter lived in one unit of the bungalow court and the income from the court was placed in a joint tenancy bank account out of which all payments were made on the encumbrances.

In June, 1941, decedent, having become in arrears in the alimony payable to his first wife, conveyed to respondent his one-third interest in the real property and transferred to her his corporate stock and bank accounts for the purpose of preventing the satisfaction of his first wife's claim for delinquent alimony. Thereafter he made a settlement of the claim for alimony and respondent reconveyed to him all of his property excepting the interest in the bungalow court. Decedent repeatedly requested respondent to reconvey said interest in the court but respondent refused to do so. Decedent asked her if she would convey said interest to him if he would sign a promissory note in her favor for $4,500. She executed a grant deed to him for said interest but decedent did not execute the note. Such interest, if any, as he received by the deed remained vested in him until his death.

[1, 2] The appeals are from (1) a decree of partial distribution; (2) a decree determining interest in real property; (3) an order allowing a claim of respondent against the estate; (4) a decree construing the will; (5) an order denying appellants' motion to continue the hearing of the final account; (6) an order settling and allowing the final account; (7) the decree of distribution. The two appeals last mentioned not having been discussed in appellants' brief, the same will be affirmed. The order denying a continuance is not appealable.

1. *The decree determining interest in real property.* The court held that the one-third interest in the property in question standing in the name of decedent at the time of his death was community property and, since he died intestate as to real property, it passed to respondent pursuant to section 201 of the Probate Code. Appellants claim that said interest was his separate property and should be distributed as provided in section 221 of said Code.

[3, 4] Inasmuch as the bungalow court (1) was acquired by decedent and respondent after marriage, and (2) was conveyed to them as "husband and wife", it is presumed to have been community property. Civil Code, § 164. Unless this presumption has been satisfactorily controverted by the evidence the finding of the trial court must stand. Estate of Sehabiague, 47 Cal.App.2d 793, 797, 119 P.2d 30; Falk v. Falk, 48 Cal.App.2d 762, 767, 120 P.2d 714. Before the property was acquired decedent said it was his intention to pay for his one-third interest. He never did so. After the court was purchased he agreed to execute a note for $4,500 to respondent if she would convey a one-third interest to him, but he never signed the note. The only amount paid by him on the entire transaction was the real estate broker's commission amounting to $615. He borrowed that sum from the bank, $300 of which remained unpaid at his death and the executrix paid said sum as a claim against the estate. The value of such labor as he expended in the upkeep of the court was community property. It is clear that respondent did not intend to make a gift to decedent when she executed the deed to him but made the conveyance upon his promise to pay her for it by giving her a promissory note for the sum mentioned. The presumption declared in section 164 of the Civil Code was not only not overcome but was reinforced by the evidence.

[5, 6] Neither decedent's contribution of time and labor to the repair and maintenance of the bungalow court nor his joining with respondent in the execution of notes and deeds of trust to secure payment of the purchase price gave him an interest in the property. Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal.App. 179, 183, 125 P.2d 263; Heney v. Pesoli, 109 Cal. 53, 61, 41 P. 819. The income from the property which was applied on the purchase money notes was of the same character as the property itself. Boyd v. Oser, 23 Cal. 2d 613, 619, 145 P.2d 312.

2. *Respondent's claim against the estate.* Respondent filed a claim for $4,400 representing a purported balance due pursuant to the agreement of decedent to pay $5,000 for an undivided one-third interest in the bungalow court. The difference of $600 represented the amount paid by decedent as commission to the real estate broker (found by the court to have been $615).

[7] When decedent, respondent, and Coleman Stewart were discussing the purchase it was agreed, as above related, that decedent would contribute $5,000 for which he would receive a one-third interest in the property. This discussion took place about June, 1940. Decedent not having paid his share, said sum was advanced by respondent. Decedent's agreement was not in writing; hence at the time of his death in 1943 the claim was barred by the statute of limitations, Code Civ.Proc. § 339, subd. 1, if not waived in some manner by him. The only evidence that he made a subsequent promise to pay was given by respondent (claimant) when she testified that in 1942 he agreed to give her the promissory note mentioned in return for the deed which she executed. This evidence was properly excluded by the trial court in so far as it related to the claim, Code Civ. Proc. § 1880, subd. 3, thus leaving it without support unless a letter written by decedent may be construed as an acknowledgment in writing of the debt.

[8] When decedent became in arrears in his alimony payments to his first wife he consulted respondent's son, Coleman Stew-

art, as an attorney, and the latter advised him to negotiate with his divorced wife's attorneys and attempt to reach a settlement with her. Decedent wrote a letter to said attorneys in June, 1941, in which he referred to the purchase of the bungalow court and stated that respondent had "quite rightly demanded that I secure my obligation to her." The terminology of this statement is not such an acknowledgment of the debt as to waive the statute of limitations. Code Civ.Proc. § 360. The acknowledgment must be a direct, unqualified, and unconditional admission of a debt which a party is willing to pay. Curtis v. Sacramento, 70 Cal. 412, 414, 11 P. 748. Said letter was merely a statement that respondent had demanded security.

[9] For another reason the letter is inadequate as a waiver. It was addressed and delivered to attorneys with whom decedent was attempting to settle an indebtedness then owing by him to a third party who had no connection with the bungalow court transaction. Since the purported acknowledgment of the indebtedness was not made to respondent or to her agent it is insufficient to constitute an implied promise to pay and to take the debt out of the statute of limitations. Estate of Azevedo, 17 Cal.App.2d 710, 712, 62 P.2d 1058; Biddel v. Brizzolara, 64 Cal. 354, 355, 30 P. 609; Visher v. Wilbur, 5 Cal.App. 562, 570, 90 P. 1065, 91 P. 412.

[10] Nor does decedent's delivery to Coleman Stewart of a copy of the letter alter the result. Decedent had consulted Stewart as an attorney and as a result of the advice received by him the letter was written. Stewart was not then acting as the agent of his mother, the respondent, but as attorney for decedent, and the delivery of the copy of the letter to him was a natural consequence of the relation of attorney and client.

[11-13] 3. *Construction of the will and decree of partial distribution.* If the trial court properly construed the will the decree of partial distribution is correct and the appeals from the two orders may be considered together. The question is whether decedent's wish expressed in the will that certain sums of money be given to his children is dispositive or precatory. When the disposition of property is indicated in a will by the words "wish" or "desire" it is a dispositive command, testamentary in character, and not precatory. Estate of Tooley, 170 Cal. 164, 167, 149 P. 574, Ann.Cas.1917B, 516. A wish or request of the testator for the disposition of his estate directed to the executor is a command, but if addressed to the legatee it will not be construed as a limitation on the estate given in absolute terms. In re Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071. The words "it is my wish to leave all my goods & chattels to my wife" is a dispositive expression evincing the will of the testator and declaring his mind as to the manner in which he would have his estate disposed of after his death. In re Estate of Wood, 36 Cal. 75, 80. There is no doubt that the "wish" of decedent herein was a declaration that his wife should receive all of his "goods & chattels." This being true, his "wish that in a reasonable time she give" certain sums to his children was precatory. By the first portion of the will he had bequeathed his property in such manner that title passed to his widow at his death, and title having passed it was not within the power of the testator to direct the manner in which she should dispose of the property.

The order allowing the claim of respondent is reversed with directions to enter an order disallowing the same; the appeal from the order denying motion for continuance is dismissed; all other orders and decrees appealed from are affirmed. Each party will bear his own costs of appeal.

MOORE, P. J., concurs.

72 Cal.App.2d 413

HERMAN v. MORTENSEN et al.

Civ. 12915.

District Court of Appeal, First District,
Division 2, California.

Dec. 31, 1945.

1. Quieting title ⚷27

An action to quiet title by plaintiff out of possession against defendants in possession of realty possessed essential characteristics of old legal action of ejectment.

2. Deeds ⚷61

A grantor's irrevocable delivery of a deed to third person, with instruction that it be given to grantee on grantor's death, has effect of vesting title to property immediately in grantee, qualified only by life tenancy in grantor, and depositary thereby becomes trustee of deed for grantee. Civ.Code, § 1059, subd. 2.

3. Deeds ⚷208(7)

In action by grantee's administratrix against grantor's executor to quiet title to land conveyed by deed of gift which grantor delivered to grantor's attorney to be delivered to grantee upon grantor's death, substantial evidence supported jury's implied finding that grantor intended that title should immediately vest in grantee. Civ. Code, § 1059, subd. 2.

4. Deeds ⚷194(4)

A grantee need not accept a deed of gift but in case of an adult grantee if grant is for his advantage, he will be presumed to have accepted it unless the contrary appears. Civ.Code, § 1059, subd. 2.

5. Deeds ⚷194(4)

As between grantee and estate of grantor of deed of gift, presumption of acceptance is sufficient to vest title in grantee. Civ.Code, § 1059, subd. 2.

6. Deeds ⚷61

When grantor of deed of gift delivered deed to grantor's attorney to be delivered to grantee upon grantor's death, attorney as depositary thereby became trustee of the deed for grantee and any attorney and client relationship became superseded by the trust relation. Civ.Code, § 1059, subd. 2.

7. Deeds ⚷194(4)

That grantor who delivered deed of gift to grantor's attorney to be delivered to grantee upon grantor's death, made no change in fire policy covering the property conveyed, and continued to pay taxes and insurance and collect rents and pay for repairs, did not rebut presumption that grantee accepted the grant, since grantor's actions were consistent with life tenancy which grantor retained under deed. Civ. Code, § 1059, subd. 2.

8. Deeds ⚷194(4)

In action by grantee's administratrix against grantor's executor to quiet title to land conveyed by deed of gift which was delivered by grantor to her attorney to be delivered to grantee upon grantor's death, wherein presumed assent to grant on part of grantee was relied on, burden of showing that deed was not beneficial was upon defendants, where deed bore on its face no evidence of any burdens and property was income-producing. Civ.Code, § 1059, subd. 2.

9. Deeds ⚷194(4)

Where deed of gift bore on its face no evidence of any burdens, and property conveyed was income-producing, beneficial character of transaction sufficiently appeared to bring into operation presumption of grantee's assent to such grant. Civ. Code, § 1059, subd. 2.

10. Deeds ⚷208(5)

In action by grantee's administratrix against grantor's executor to quiet title to land conveyed by deed of gift which was delivered to grantor's attorney to be delivered to grantee upon grantor's death, substantial evidence supported jury's implied finding that deed was beneficial to grantee, so that grantee could be presumed to have assented to the grant. Civ.Code, § 1059, subd. 2.

11. Deeds ⚷194(4)

Where grantor delivered deed of gift to grantor's attorney to be delivered to grantee upon grantor's death, and no rights of third parties intervened, presumption of grantee's assent to grant came into operation at time when deed was delivered to attorney, notwithstanding grantee's lack of knowledge thereof. Civ.Code, § 1059, subd. 2.

12. Deeds ⚷208(5)

Testimony that between 1923 and 1930 grantee's nephew heard grantor of deed of gift say to grantee "Oh, you know, if anything happens to me this is your property" to which grantee expressed her pleasure and assent, was too remote to be invoked as an actual assent in advance to grant under deed which was delivered in 1934 to grantor's attorney to be delivered to grantee upon grantor's death. Civ.Code, § 1059, subd. 2.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Bertha Herman, as administratrix of the estate of Helen B. Glenn, deceased, against Joseph L. Mortensen, individually and as executor of the estate of Virginia R. G. Robertson, also known as Virginia R. Robertson, and as Virginia G. Robertson, deceased, and another, to quiet title to land. From a judgment for defendants notwithstanding a verdict for plaintiff, the plaintiff appeals.

Reversed with directions.

Bernal & Bernal, of Berkeley, for appellant.

J. W. O'Neill and James S. Blaine, both of Oakland, for respondents.

GOODELL, Justice.

This is an appeal from a judgment in favor of the defendants notwithstanding a verdict in favor of the plaintiff.

[1] The action was brought by a plaintiff out of possession against defendants in possession of real property, and although in the form of a suit to quiet title it possesses "the essential characteristics of the old legal action of ejectment" (Southern Pacific Land Co. v. Dickerson, 188 Cal. 113, 116, 204 P. 576, 577; 15 Cal.Jur. p. 335, sec. 12) and, accordingly, was tried to a jury.

The case involves a piece of residential property in Berkeley with a frontage of 40 feet on Piedmont avenue and a depth of 135 feet, which for some years prior to July 9, 1934, was owned and occupied by Virginia R. G. Robertson. On that date Mrs. Robertson executed and acknowledged a deed of gift of the property to Helen B. Glenn, her sister-in-law, and the next day delivered it to the defendant Redmond C. Staats who, as Mrs. Robertson's attorney, had prepared it under circumstances presently to be related. Mr. Staats held the deed in his safe and after Mrs. Robertson's death (which was on July 24, 1943), he learned that the grantee had died over five years theretofore (on November 29, 1937). The deed has not been recorded; Mr. Staats produced it in court, and it was introduced in evidence.

The defendant Mortensen is the executor of Mrs. Robertson's last will and testament and the residuary legatee and devisee thereof. He has been in possession, as executor, and claims title in himself under the will subject to administration. Mr. Staats was joined as a defendant, and promptly filed a disclaimer.

About July 5, 1934, Mrs. Robertson requested Mr. Staats to draw a will for her, which she executed that day, wherein she devised the property in question to Helen B. Glenn, and named her as executrix. After making the will Mrs. Robertson told Mr. Staats that she wanted also to deed the property to Mrs. Glenn. He advised her that the making of such a deed "was a very dangerous proceeding" which "invariably brought trouble" and advised her "very strongly against it". He testified: "I told Mrs. Robertson that she had already provided in her will for that property to go to Mrs. Glenn and that it was the safest and best way to do it. I told her further that if she made a gift deed of the property it would be necessary for her to deliver the deed to some person, that she must deliver it to Mrs. Glenn and if Mrs. Glenn received the deed that she could record it and it would be her property. I told her she could give it to a third person if she wished it to be delivered to Mrs. Glenn upon her death, in which case she would have the right to live in the property and have all the profits from the property and upon her death the delivery to Mrs. Glenn would give Mrs. Glenn the property, that she couldn't sell it to anybody else, that she couldn't deed it to anybody else, that if she gave the deed to a third person that that third person could not return it to her; that if she wanted to dispose of the property afterwards in any way that Mrs. Glenn would have to give her a deed back and the deed she made to Mrs. Glenn would have to be recorded and the deed from Mrs. Glenn to her would have to be recorded. I went into the matter very fully." Further that "She said she wanted to execute it and she asked me if it could be delivered to me and if I could hold it and deliver it to Mrs. Glenn upon her death. I told her I could and I would, but I would rather not do so". The deed was given to him by Mrs. Robertson without any written instructions, and he gave her no receipt for it. It was "all verbal". Nothing was said as to what would happen to the deed in the event Mrs. Glenn predeceased Mrs. Robertson, and no instructions were given Mr. Staats to record the deed after Mrs. Robertson's death. Mr. Staats was asked "Did Mrs. Robertson ever at any time say to you that she intended to part with the immediate ownership of the property at the time she signed the deed" to which he replied, "She didn't tell me that; I told her that if she gave that deed to any third party to deliver that that would be the consequence and she asked me if I would, could hold the deed, and I told her that I would."

After the deed was delivered to him there was no communication between Mrs. Robertson and Mr. Staats on the subject, and the record is silent as to whether Mrs. Glenn ever learned of its existence. On February 13, 1941 Mrs. Robertson executed the olographic will now in probate.

The question presented for decision is whether title ever vested in Helen B. Glenn.

Sec. 1059, Civil Code reads: "Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: * * * 2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed."

[2] The "rule established by a long line of decisions in this state headed by the pioneer case of Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St.Rep. 186" is stated in the recent case of Wilkerson v. Seib, 20 Cal.2d 556, 560, 127 P.2d 904, 906, as follows: "that the grantor's irrevocable delivery of a deed to a third person, with instructions that it be given to the grantee upon the grantor's death, has the effect of vesting the title to the property immediately in the grantee, qualified only by a life tenancy in the grantor, and the depositary thereby becomes the *trustee* of the deed for the grantee. See, also, Moore v. Trott, 156 Cal. 353, 104 P. 578, 134 Am.St.Rep. 131; Husheon v. Kelley, 162 Cal. 656, 124 P. 231; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; and Hunt v. Wicht, 174 Cal. 205, 162 P. 639, L.R.A. 1917C, 961."

[3] The court gave the jury an instruction substantially in accord with the rule just quoted. The verdict carries with it an implied finding that the grantor intended that title should immediately vest in the grantee, and the first question presented is whether there is evidence of any substantiality (see In re Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692; Card v. Boms, 210 Cal. 200, 202, 291 P. 190) to support the implied finding that title was intended to, and did, vest immediately in the grantee. In the conversation between Mrs. Robertson and Mr. Staats four days before the deed was executed he did most of the talking it is true, but what he then advised her as to the legal effect and consequences of her proposed action taken in connection with her action in making the deed following such advice, furnished, in our opinion, a sufficient foundation for the jury's finding. She was thoroughly and correctly advised in accordance with the rule quoted above and it would seem that she fitted her action to such advice. It would appear that the evidence of her intent is just as strong as if *she* had made the declarations, instead of adopting and acting on what was said to her by her legal advisor.

The second question presented is whether there is evidence of any substantiality to support the implied finding that the grantee accepted or assented to the deed.

The court instructed the jury that "The law presumes that the grantee has accepted the grant or gift even though he has no knowledge of it or there is no express consent to such gift, where such gift would be beneficial to such grantee." The jury was also told that before finding in favor of the plaintiff it must believe "that the transfer was beneficial to Mrs. Glenn". The verdict in plaintiff's favor carries with it an implied finding that it *was* beneficial.

The deed itself is evidence that the transfer was beneficial to the grantee. It is a *deed of gift;* it is free, on its face, of all burdens and obligations and there is no extrinsic evidence of any burden or obligation. There is no evidence of any covenant running with the land, or of any other covenant; nor of any easement or servitude. There is no evidence of any incumbrance against the property, or of any indebtedness at all owed by the grantor. On the other hand there is evidence that the property yields some income.

There is not a word in the record to indicate that the conveyance was *not* beneficial to the grantee.

[4] Nobody will contend that a grantee is bound to accept or assent to a grant. The reason for the rule with respect to assent has probably never been stated more concisely than it was in De Levillain v. Evans, 39 Cal. 120, 122, as follows: "In respect to the question of acceptance by the donee, as we understand the civil law, it does not differ materially from the common law. Under neither is the donation valid and obligatory until it is accepted. It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not choose to assume. If he affirmatively declines to accept the donation the law does not force it upon him against his will. This must be so upon every principle of reason and justice. Nevertheless, *in the case of an adult donee, if the donation is for his advantage he will be presumed to have accepted it unless the contrary appears.*" (Emphasis added.) This case has never been modified or questioned. It was followed in Jennings v. Jennings, 104 Cal. 150, 154, 37 P. 794, (a case of a minor); In re Estate of Yano, 188 Cal. 645, 650, 206 P. 995 (a minor); Smith v. Lombard, 201 Cal. 518, 526, 258 P. 55 (an adult); Knox v. Kearney, 40 Cal.App. 290, 292, 180 P. 661 (an adult); Neely v. Buster, 50 Cal.App. 695, 700, 195 P. 736 (an adult); Neil v. Gross, 9 Cir., 101 F.2d 153, 155 (an adult). It was most recently followed in Re Estate of Kalt, 16 Cal.2d 807, 813, 108 P.2d 401, 404, 133 A.L.R. 1424, a case involving an adult, where it is said: " 'There is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee even before the latter has consented to receive it.' Tiffany, Real Property, 3rd Ed., § 1055, p. 253; Brown, Personal Property, § 50; 1 Bogert, Trusts and Trustees, § 150, p. 447. This principle is recognized by the majority of the courts, including those in California, when they hold that a beneficial gift is presumed to be accepted by the donee even without his knowledge or consent. See Cal.Civ.Code, § 1059, subd. 2; Neely v. Buster, 50 Cal. App. 695, 195 P. 736; De Levillain v. Evans, 39 Cal. 120; * * *."

Green v. Skinner, 185 Cal. 435, 197 P. 60, is relied on by the respondents. That case is distinguishable from this in three respects. 1. It appears affirmatively there that the grantee knew nothing whatever of the existence of the deed (in the hands of a third person) until after the grantor's death, while here the record is silent as to whether or not Mrs. Glenn knew of the existence of this deed. Over three years elapsed from the time when the deed was executed until her death, during which time she might well have learned of it from Mrs. Robertson or otherwise. 2. The rule of presumptive assent was not invoked in that case, as it is in this, and is not mentioned in the opinion. 3. There is not in the case at bar any conflict between rights derived from the deed and rights of third persons which had already vested, for there the rights of the surviving joint tenant had existed from the time of the creation of the joint tenancy. See Zeigler v. Bonnell, 52 Cal.App.2d 217, 220, 126 P.2d 118. In the case at bar the controversy is simply between those standing in the shoes of the grantor, on the one hand, and those in the shoes of the grantee on the other, with no rights of third persons intervening.

The same may be said of Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am. Rep. 726, also relied on by the respondents, where there was the intervention of the rights of a creditor of the grantor. In that case, unlike Green v. Skinner, the question of presumptive assent based on the deed being beneficial to the grantee *was* presented and discussed, and the court said that it was not convinced that the deed on its face was in fact beneficial to the grantee.

[5] The decision in Wilkerson v. Seib, supra, furnishes a complete answer to the argument based on Green v. Skinner, supra. In Wilkerson v. Seib the contest was between the grantee and the estate of the grantor. The court expressly held (20 Cal.2d 560, 127 P.2d 907) that "when Mrs. Herbst in 1931 made an absolute and unconditional delivery of the deed to Mitchell, title to the property involved passed at once to the plaintiff, the grantee, subject to a life estate in the grantor." In the Wilkerson case the grantee did not learn of the deed until approximately three years after the grantor's death and over eight years after its delivery to Mitchell. We can see no difference in principle between that case and this. In that case, as in this, there was no evidence of actual acceptance before the grantor's death. Indeed in that case there was express evidence of the lack of actual (as distinguished from presumptive) acceptance, since it was affirmatively alleged and

proved that the grantee did not learn of the deed until after the grantor's death and the proof showed also that the deed never was delivered to the grantee. The case therefore expressly stands for the rule that as between the grantee and the estate of the grantor the presumption of acceptance is sufficient to vest title in the grantee. Green v. Skinner was considered by the court (20 Cal.2d 560, 127 P.2d 907) and held not to control the rights of the grantee against the grantor's estate.

In Neely v. Buster, 50 Cal.App. 695, 700, 195 P. 736, 738, the court quoted from Bryan v. Wash, 2 Gilman, Ill., 557, 565, as follows: " 'The delivery may be made by the grantor himself or by anyone authorized to make the delivery, nor is it indispensable that the delivery be made to the grantee, or even to any person authorized by the grantee to accept the deed, for if the delivery be made to a stranger, for, and in behalf of the grantee, and to his use, it is a good delivery, although the grantee may in truth be entirely ignorant of the conveyance, for, if the delivery be absolute, the assent of the grantee is presumed from the fact that the conveyance is beneficial to him.' " A petition for hearing by the supreme court was denied.

[6] It is argued by the respondent that Mr. Staats acted solely as attorney for Mrs. Robertson and never represented Mrs. Glenn. The law, as restated in the Wilkerson case, is that when the grantor delivered the deed to Mr. Staats, he as depositary thereby became "the trustee of the deed for the grantee." Any attorney-and-client relationship theretofore existing became superseded by the trust relation.

[7] It is also argued that after the deed was made, no change was made in the fire insurance policy covering the property, Mrs. Robertson continued to pay the taxes and insurance, collected the rents, and paid for repairs. All this, of course, is consistent with the life tenancy which she retained, under the rule restated in the Wilkerson case. Knudson v. Adams, 137 Cal. App. 261, 30 P.2d 608.

[8-10] And finally, it is argued that "There is no evidence in the record as to the value of the real property in controversy, whether or not it was mortgaged, whether or not it was burdened with covenants running with the land or whether or not there were other conditions rendering a gift thereof beneficial or detrimental." Subdivision 2 of section 1059 differentiates between the case where the grantee's "assent is *shown*" and the case where such assent "may be *presumed*." The instant case is one where there is no pretense that actual assent was shown. Presumed assent alone is relied on. We are satisfied that the burden of showing that this deed was *not* beneficial was upon the respondents. It has been pointed out earlier that the instrument was a deed of gift, and that it bore on its face no evidence of any burdens whatever. The record shows, moreover, that the property is income-producing. From these facts the beneficial character of the transaction sufficiently appears, in our opinion, to bring the presumption of assent into operation. If that be true, it would be incumbent on the respondents to dispel and overcome the presumption by evidence that the transfer was burdensome or detrimental to the grantee. The jury as heretofore observed impliedly found under proper instructions, that the deed was beneficial, and we are satisfied that there is evidence of sufficient substantiality in the record to support such implied finding.

[11] With no rights of creditors or other third parties intervening, there is no reason why the presumption of assent should not, and did not in this case, come into operation at the time when the grantor placed the deed in the hands of the grantee's trustee even though the grantee at that time knew nothing about it. In re Estate of Kalt, supra.

[12] A nephew of Mrs. Glenn testified that between the years 1923 and 1930 he occasionally took Mrs. Glenn to Mrs. Robertson's home (the property here involved) and heard Mrs. Robertson say to his aunt "Oh, you know, if anything happens to me this is your property" to which Mrs. Glenn expressed her pleasure and assent. From this it is argued that an anticipatory or a prospective assent was given. Boye v. Boerner, 38 Cal.App.2d 567, 101 P.2d 757, is cited in support of this contention, but in that case there was an antecedent agreement that security would be given which actually contemplated the deed of trust which was thereafter made.

The conversations to which the nephew testified were held some years before Mrs. Robertson made the deed and in our opinion were too remote to be invoked as an actual assent in advance. The most that can be claimed for them is that the jury might have inferred, from the fact that Mrs. Robertson had expressed her intention to leave the property to Mrs. Glenn, that after she had actually made the deed she had informed her that the intention expressed some years before had been actually carried into execution by the making of the deed. Over three years elapsed from the time the deed was made until Mrs. Glenn's death during which time she might have told her of the deed. However we are satisfied that the reason first given, namely, that assent is to be presumed as of the time when the deed was delivered is the proper ground upon which to base the decision in this case.

The judgment is reversed with directions to the trial court to enter judgment in favor of the plaintiff on the verdict.

NOURSE, P. J., and DOOLING, J., concur.

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72 Cal.App.2d 467

PEOPLE v. TATE.

Cr. 495.

District Court of Appeal, Fourth District, California.

Jan. 4, 1946.

Rehearing Denied Jan. 14, 1946.

1. Indictment and Information 🔑125(30)

A count of information, charging grand theft in violation of two sections of Penal Code, was not defective as charging two offenses. Pen.Code, §§ 484, 487.

2. Larceny 🔑56

In prosecution for grand theft, two witnesses' testimony that they saw defendant take money from prosecuting witness' pocket was sufficient proof of corpus delicti without testimony of prosecuting witness, who did not know of theft. Pen. Code, §§ 484, 487.

3. Larceny 🔑65

Evidence was sufficient to justify conviction of grand theft. Pen.Code, §§ 484, 487.

4. Criminal law 🔑1201

The statute providing that person convicted of felony after having been twice convicted and served prison terms for enumerated felonies shall be adjudged an habitual criminal and punished by life imprisonment is constitutional. Pen.Code, § 644, subd. a.

5. Criminal law 🔑1202(1)

Violation of Drug Act not being felony enumerated in habitual criminal statute, conviction thereof will not serve as basis for adjudication of habitual criminality on subsequent conviction of another felony. Pen.Code, § 644, subd. a.

6. Criminal law 🔑1202(1)

One successively convicted of and serving prison terms for assault with intent to kill and burglary was properly adjudged to be habitual criminal on his subsequent conviction of grand theft, such previous crimes being enumerated as bases for such adjudication in habitual criminal statute. Pen.Code, §§ 484, 487, 644, subd. a.

7. Judgment 🔑816

In prosecution on information charging grand theft and prior convictions of other felonies, full faith and credit clause of federal Constitution was not violated because of prosecution's failure to introduce properly authenticated documents to support finding of defendant's prior convictions in other states, where no documents or records were introduced and defendant admitted prior crimes and service of sentences therefor. Pen.Code, §§ 484, 487, 644, subd. a.

◆

Appeal from Superior Court, Imperial County; Elmer Heald, Judge.

Fred Tate was convicted of grand theft, and he appeals.

Affirmed.

Fred Tate, in pro. per.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was charged in count I of an information with the crime of grand theft in that he did on May 7, 1945, "wilfully, unlawfully and feloniously take and steal from the person of one Robert

Nealey certain personal property, to wit, lawful money of the United States of America," in violation of sections 484 and 487 of the Penal Code. In counts II, III and IV, he is charged with prior convictions of felonies and the serving of prison terms thereunder. Defendant pleaded not guilty to count I and admitted the prior convictions as charged. After trial, a jury found him guilty on count I. The court sentenced him to state prison for the term prescribed by law and adjudged him to be an habitual criminal. Defendant was represented by counsel at his trial but he has filed his own notice of appeal and has prepared a document setting forth certain claimed errors and denominated it an opening brief.

On May 7, 1945, the complaining witness, Robert Neeley, entered a cafe in Brawley. He had about $80 in bills in his wallet, which wallet was in his pants pocket. He and defendant sat on stools, talking and drinking. Neeley brought out his wallet, in defendant's presence, to buy a drink. He later went to the back of the cafe to the rest room, returned, and then sat at the counter with his head down upon it and went to sleep. After a few minutes passed he moved over to a booth and continued his sleep. Thereafter, he stood up for a while and then fell upon the floor. At that time, defendant went over to him, leaned over him as though he was trying to pick him up, and while doing so, he put his hand in Neeley's trouser pocket, withdrew the wallet containing the currency, and placed it in his own pocket. This was observed by two eye witnesses who were present in the cafe. Defendant immediately left the premises and went down an alley. One of the witnesses followed him, shouted to him, but defendant "broke and ran". Within ten minutes thereafter Neeley aroused himself and discovered that his wallet was gone. He reported the loss to the police.

One witness, who saw defendant remove the wallet from Neeley's pocket, went to defendant's home, told him that too many people had seen him take the money, and that he should give it back. He denied he had it.

At the trial defendant and the proprietress of the cafe testified that when Neeley fell to the floor defendant did not go near him but did leave the cafe shortly thereafter.

Defendant argues first that he "* * * was denied his National and Statutory Constitutional Rights * * * 'Due Process of Law, Equal Protection of the Laws, Privileges of Immunities.'" Const.Cal. art. 1, §§ 13, 21; U.S.C.A. Const.Amend. 14. Second, that he "was prosecuted illegally and unlawfully, as shown in the Information, to-wit: 'Count I, Grand Theft, in violation of Sections 484 and 487 of the Penal Code * * *'"; that "the Trial Court made errors of instructions to the Jury to the extreme prejudice of defendant * * *"; that "the Habitual Criminals Act, which the trial court adjudged him to be illegal and unlawful"; that "no police officer ever testified at the trial * * *"; and third, that the "Information shows two counts or offenses in one count alone, which is placing appellant twice in jeopardy for the same offense"; that "there is room for reasonable doubt, too, as the complainant's testimony was non judicata, due to the fact that he did not prove a corpus delicti, or prima facie whatsoever. * * *"

[1] Wherein defendant has been denied his constitutional right to a fair and impartial trial does not appear from the record nor is it pointed out in his argument. There was no defect in the charging portion of the information as claimed. The count specifically charged defendant with the crime of grand theft. The fact that it contained the additional clause: "in violation of Sections 484 and 487 of the Penal Code" does not charge the defendant with two offenses, as claimed. But one crime, to wit, grand theft, is charged.

[2] Most of the claimed errors will be considered under the question whether the evidence is sufficient to support the verdict. As we view the defendant's argument, it is his contention that the testimony of Neeley was not sufficient to establish the corpus delicti. It is argued that Neeley did not know that defendant took the money from his pocket. There is direct evidence of two other witnesses to the effect that they saw the defendant take the money from Neeley's pocket. This was sufficient proof of that fact without the testimony of Neeley.

[3] It is next argued that the testimony of the witnesses for the defense established, as a matter of law, a reasonable doubt as to his guilt. A mere statement of the testimony of the witnesses shows only a conflict in the evidence. There was substantial evidence, if believed by the jurors, and of which they are the judges, to justify the

finding of guilty as to the first count. People v. Hennessey, 201 Cal. 568, 258 P. 49. We see no merit to this argument.

The last contention is that defendant was improperly adjudged an habitual criminal. The second count of the information charged that he had been previously convicted of a felony, to wit, violation of the Drug Act in the State of Utah, and that he served a term of imprisonment in the United States prison at Leavenworth, Kan.

The third count charges that in Oregon he was convicted of a felony, to wit, the crime of assault with intent to kill, and served a term of imprisonment in the Oregon State Prison.

[4] In the fourth count it is charged that he was previously convicted in the State of Utah with a felony, to wit, the crime of burglary (second degree), and that he served a term of imprisonment therefor in the Utah State Prison. On arraignment, when he was represented by counsel, defendant fully admitted the three prior convictions as charged and thereafter went to trial upon the plea of not guilty as to the charge set forth in the first count. On June 22, 1945, at the time of the arraignment for judgment, the court adjudged the defendant to be an habitual criminal, as provided by Penal Code § 644, subd. (a). The date of the commission of the offense and the date of sentence were both prior to the effective date of the amendment to that section which was enacted on June 16, 1945, and went into effect on the 91st day thereafter. Stats. 1945, chap. 934. Under that section, as it then existed, "Every person convicted in this state of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penitentiary, either in this state or elsewhere, of the crime of robbery, burglary * * * assault with intent to commit murder, * * * felonious assault with a deadly weapon, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the state prison for life." The constitutionality of this section has been determined on many occasions. In re Rosencrantz, 205 Cal. 534, 271 P. 902; People v. D'A Philippo, 220 Cal. 620, 32 P.2d 962; People v. Willison, 116 Cal.App. 157, 2 P.2d 543; People v. Floth, 8 Cal.App.2d 600, 47 P.2d 817; In re Rogers, 20 Cal.App.2d 397, 66 P.2d 1237.

[5, 6] The prior conviction of violation of the Drug Act is not a felony enumerated in section 644, subdivision a, supra, and is not, therefore, a prior conviction which will serve as a basis for an adjudication of habitual criminality. However, assault with intent to kill and burglary are both crimes enumerated in that section and the prior conviction of such, with the service of prison terms therefor, does serve as such a basis. The defendant was properly found to be twice previously convicted of, and served prison terms for, crimes enumerated therein and he was properly adjudged to be an habitual criminal thereunder.

[7] We assume, from defendant's brief, that it is his contention that the full faith and credit clause of Article IV of the federal Constitution was violated because of the failure of the prosecution to introduce properly authenticated documents to support the finding that defendant suffered the prior convictions above mentioned. We are unable to see that any question of violation of such constitutional provision arises here, first, because nowhere in the record does it show that any documents or records whatever were introduced; secondly, defendant admitted the charges of these prior crimes and the service of sentences thereunder, therefore, it was not necessary that any further evidence be taken in reference thereto. People v. Stone, Cal.App., 159 P.2d 701.

We have studied the record of this case carefully and have been unable to find any errors therein. Defendant had a fair and impartial trial. The evidence of his guilt was overwhelming.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

72 Cal.App.2d 208

BERGER v. STEINER.

Civ. 14821.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1945.

Opinion Modified and Rehearing Denied Jan. 2, 1946.

1. Appeal and error ⚷1011(1)

Where the evidence is conflicting, findings of the trial court are conclusive on appeal when supported by substantial evidence.

2. Mortgages ⚷270

Evidence sustained finding that a $10,000 note payable to defendant and a trust deed securing it were left with maker's attorney by defendant for safekeeping only, and that the alleged signatures of defendant on another note payable to plaintiff, the endorsement of the $10,000 note and the assignment of the deed of trust to plaintiff were forgeries, and justified finding that plaintiff acquired no title to the notes or deed of trust. Civ.Code, §§ 2299, 2300, 2315–2317, 3104, 3133, 3140.

3. Evidence ⚷595
Witnesses ⚷315

Inferences may be drawn not only from the evidence but from the demeanor of witnesses and their manner of testifying.

4. Mortgages ⚷270

Where it was established that defendant's signatures on note payable to plaintiff and defendant's alleged indorsement of another note secured by deed of trust and alleged assignment of deed of trust to plaintiff were forgeries, and that in acquiring the notes and deed of trust plaintiff did not deal with defendant but only with party with whom plaintiff had had other transactions which should have placed plaintiff on his guard, evidence was insufficient to show that plaintiff was holder in due course of the deed of trust or the note which it secured. Civ.Code, §§ 2315–2317, 3104, 3133, 3138, 3140.

5. Estoppel ⚷72

Where a note payable to defendant and deed of trust securing it were left by defendant with party for safekeeping, and plaintiff, who had had previous transactions with the party which should have placed plaintiff on his guard, made a loan to the party and defendant, and took from such party's assignments of deed of trust and note without knowledge that defendant's signatures thereon had been forged, plaintiff was guilty of the greater negligence and was required to suffer the loss resulting. Civ.Code, §§ 2315–2317, 3104, 3133, 3138, 3140, 3543.

6. Bills and notes ⚷509

Purchase of a note for a grossly inadequate price without inquiry as to the consideration of the note is a circumstance to be considered in determining whether the purchase was made in good faith. Civ. Code, §§ 3133, 3138, 3140.

7. Pleading ⚷93(2)

Where defendant's answer denied allegation in complaint that defendant had assigned note and deed of trust sued upon, filing of a separate special defense that defendant was induced to sign the assignments and received no consideration therefor was a permissible pleading of inconsistent defenses, where defendant did not ascertain as a certainty that she had not signed the documents until they were shown to her in court. Civ.Code, §§ 3104, 3140.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Elmer Berger against Margaret Steiner, as executrix of the last will of Margaret Kitching Perky, deceased, and Margaret Steiner to foreclose a deed of trust. From an adverse judgment, plaintiff appeals.

Affirmed.

Williamson, Hoge & Judson and J. M. McCroskey, all of Los Angeles, for appellant.

Charles E. Beardsley, of Los Angeles, for respondent.

WILSON, Justice.

This is an action to foreclose a deed of trust on real property executed by Margaret Kitching Perky in favor of respondent Margaret Steiner to secure a promissory note for $10,000. In the circumstances hereinafter related the deed of trust and note were purportedly assigned to plaintiff by Miss Steiner to secure a loan for $3,000.

From a judgment cancelling and annulling the assignments and refusing plaintiff's plea for foreclosure, this appeal is taken.

Mrs. Perky, elderly and in feeble health, requested her niece, Miss Steiner, to come from her home in the state of Washington and care for her for the remainder of her life and agreed that in consideration of such services she would make a will bequeathing all of her property to Miss Steiner. Mrs. Perky executed her will according to the agreement and in addition conveyed the property in question in this action to herself and Miss Steiner as joint tenants.

One Irving H. Roth, an attorney at law who had been a friend of Mrs. Perky and of her deceased husband, who was also an attorney, became acquainted with Miss Steiner after she had undertaken the care of her aunt. Upon his advice Mrs. Perky also executed a deed of trust and a $10,000 note to Miss Steiner dated June 5, 1939. Roth advised the latter instruments as additional assurance to Miss Steiner that she would be compensated for her services and as protection to her against other relatives who might contest the will. The note and deed of trust were signed "Margaret Perky." The title to the property was vested in "Margaret Kitching Perky." At the request of the title company which was writing a guarantee of title, a similar deed of trust and note dated June 23, 1939, were signed with Mrs. Perky's full name and were delivered to Miss Steiner. These are the documents involved in this action. Roth suggested as a further precaution and protection to Miss Steiner and to aid further in the defeat of any attack that might be made by other relatives that she assign the deed of trust and promissory note dated June 23 to a third party. He suggested appellant, who was a friend and client of Roth, as being a trustworthy third party to whom the assignments could safely be made.

Miss Steiner was a stranger in Los Angeles and had no close friend upon whom she could rely and no one to whom she could appeal for counsel except Roth. She trusted him by reason of his having been a friend of the deceased Mr. Perky and adviser to Mrs. Perky after she became a widow. Pursuant to Roth's advice and relying on his promise that he would keep the papers safely in his own possession, Miss Steiner agreed to execute the assignments. (It will appear later herein that her name was forged to the alleged assignments.)

At that time Roth was indebted to Berger in the sum of $500 and when Berger pressed for payment Roth suggested that Berger loan the sum of $3,000, taking said assignments of the $10,000 note and deed of trust as security. Appellant had never previously heard of Mrs. Perky nor of Miss Steiner. Roth told Berger that he and Miss Steiner had intended getting a loan from a bank but he did not feel that they could give a financial statement of the character required by the bank.

Roth and appellant went to the title company where the latter examined the papers and agreed to make the loan of $3,000. The note and deed of trust were recorded, a title policy was issued showing the deed of trust to be a first lien on the premises described therein, and appellant personally filed for record the assignment thereof to himself.

After delivering the papers to Roth Miss Steiner departed for Seattle and did not return to Los Angeles until the middle of August following. She then asked Roth for her papers. He said he had handed them to appellant and would get them for her. In December, 1939, Roth wrote a letter to Miss Steiner stating that he had a reconveyance and suggesting that she call and get it. He had not procured a reconveyance from appellant, but when she called on him he handed her the papers dated June 5 which had been incorrectly signed "Margaret Perky." Miss Steiner assumed that they were the papers that had been correctly signed and that the others had been destroyed.

The loan of $3,000 not having been paid, Berger brought this action to foreclose the original deed of trust. After the commencement of the action Mrs. Perky died, Miss Steiner was appointed executrix of her will, and, as such, was substituted as a defendant in this action in the place of Mrs. Perky.

The validity of the original deed of trust and promissory note dated June 23 are not in question, the only dispute in the action being between Miss Steiner, the payee and purported assignor thereof, and Berger, the holder and purported assignee. Findings and judgment were in favor of Miss Steiner.

Appellant asserts that he is the holder in due course of the $10,000 note; that Miss

Steiner, and not he, was guilty of negligence in the transaction, and that therefore he is entitled to recover; that Miss Steiner ratified the unauthorized action of Roth in pledging the deed of trust and note as security for the loan of $3,000. Miss Steiner, who will hereinafter be referred to as respondent, disputes these propositions and asserts that appellant was culpable and negligent and that the circumstances surrounding his dealing with Roth put him on notice as to the invalidity of the transaction.

[1] 1. *Does the evidence sustain the findings?* In discussing this question certain well known basic rules are applicable which have been recently referred to by this court. Buckhantz v. R. G. Hamilton & Company, Cal.App., 163 P.2d 756, and Woodbine v. Van Horn, Cal.App., 163 P.2d 895; Estate of Isenberg, 63 Cal.App.2d 214, 216, et seq., 146 P.2d 424. The evidence is conflicting and there being substantial evidence supporting the findings they are conclusive on appeal. In accord with the rules stated in said cases the findings are considered.

[2] The court found that the signatures of respondent on the $3,000 note to appellant, the endorsement on the $10,000 note and the assignment of the deed of trust, and on the receipt for $3,000 delivered by Roth to appellant when the former received the proceeds of the loan, were not her genuine signatures but were similar to the writings of her name on other documents established beyond doubt to have been made by Roth. The court also found that she did not authorize her signatures on the $3,000 note or on the receipt and that they were not ratified or approved by her. These findings relating to the non-genuineness of her signatures are sustained not only by the evidence of respondent but by the examination by the court of exemplars of her handwriting and of other documents upon which Roth had subscribed her name, and the finding that she did not authorize or ratify her signatures is amply sustained by the record. The evidence is uncontradicted that respondent did not sign the $3,000 note held by appellant. She testified that the signature was a forgery. Her counsel offered to share the expense of handwriting experts but appellant declined to participate in the cost. After she had so testified it was realized by counsel for both parties that Roth, who had previously been on the witness stand, had not been asked about the signatures. Counsel for appellant inquired if the court desired Roth to be recalled, to which the court responded: "No, if the plaintiff wants to establish the validity of the signature on the $3,000 note, the plaintiff can recall Mr. Roth and see what he says about it." Appellant, notwithstanding the apparent trend of the court's thought, did not recall Roth and was content to rest the matter on respondent's uncontradicted denial of her signature.

The finding that she ratified and acquiesced in the signing of her name to said assignments not for the purpose of an actual transfer thereof but for safe keeping only, is sustained by the evidence. She was a stranger in Los Angeles. She did not know Berger but she trusted Roth as an attorney and as a friend of her aunt and of the latter's deceased husband. She relied on Roth's statement that the procedure suggested by him was for her protection against contesting heirs after Mrs. Perky's death. She believed that he would retain possession of the documents as he promised to do. These facts sustain the finding that she was not negligent in placing the papers in Roth's possession for safe keeping and that her act did not effect any change in appellant's rights or status. Nor did she show any want of ordinary care in entrusting the documents to Roth for safe keeping. The facts, as hereinbefore related, demonstrate that Roth acquired no title to the note or deed of trust and that his acts did not convey title to appellant. The latter did not know respondent or Mrs. Perky prior to his receipt of the note and deed of trust and the assignments thereof but for a long time prior thereto he had been Roth's personal friend and client. The facts surrounding the transaction show that appellant relied throughout the negotiations upon Roth's representations that he had authority to act, and that no act of respondent influenced appellant in making the loan to Roth.

When respondent returned to Los Angeles from Seattle she asked Roth for her papers but the latter evaded her request. Later he admitted that he had delivered them to appellant but that he would get them for her. Subsequently she ascertained that the assignment to appellant was on record. Upon being confronted with this fact Roth admitted that he had used the papers as security, first for a loan of $1,000 and finally $3,000. She stated to Roth that appellant might hold the papers for more than that amount and he agreed to and did obtain a letter from appellant that he would hold them as security for said amount and no more. Roth at the same time said that he expected to receive some fees and that he would pay the amount due and recover the papers. This did not constitute a new agreement nor was it a ratification by respondent of Roth's unauthorized act. Apparently ignorant of business methods, she was merely trying to protect herself from further claims of appellant until Roth could pay his debt and return the papers to her.

[3] Inferences may be drawn not only from the evidence but from the demeanor of the witnesses and their manner of testifying. Appellant's evidence was replete with evasiveness, uncertainty, contradiction, and confusion. Only a few of his many controversions need be noticed. He testified that his loan of $500 to Roth was the only transaction he had had with the latter prior to the one involved here. He subsequently stated on cross-examination that Roth had acted as his attorney in a traffic violation with which appellant had been charged; that he and Roth had been friends for a long time, and that on many occasions he had taken Roth's money to race tracks for the purpose of placing bets for him. All of these events occurred before his receipt of the assignments in question. He testified that within a month after his mother's death he paid Roth $1,000 as a part of the statutory attorney's fees in the estate, but in his final account, verified by him as executor, he stated that Roth, as attorney for the executor, was entitled to attorney's fees in the sum of $1,611.14, which was the total statutory fee. In an action against Roth an attachment was levied on his fees. Thereafter an amended final account, verified by appellant, was filed in which appellant recited that Roth waived and renounced his right to any attorney's fees in the estate. A petition to set aside the attorney's fees, prepared later by Roth and verified by appellant but apparently not filed, was produced at the trial, wherein appellant swore that prior to his appointment as executor he had loaned Roth $3,000, and that after appellant's appointment as executor he had loaned an additional sum of $1,000 and asked that Roth's fee as attorney in the estate be set over to him as part payment of the existing debt. Whether appellant and Roth were successful by this vermiculation in evading the effect of the attachment does not appear, but the scheme furnishes an index to what might be expected of both in other transactions.

Appellant's statements were in complete contradiction, one with the other, with reference to the payment of the sum of $3,000 to Roth when the latter delivered the assignments to him. In his deposition taken before the trial he testified positively that he gave Roth three cashier's checks, one for $1500, and two for $500 each, stating from whom the funds came, to whom the checks were payable, and how they were endorsed. The difference between the total of these checks and the sum of $3,000 he testified was represented by the $500 loan previously made by appellant to Roth. At the trial appellant stated that he gave Roth a check drawn by the firm of Kerr & Bell, brokers, for $2,064.76, and cash amounting to $845.24, and that the balance of $90 represented prepaid interest on the loan.

After the delivery of the papers to appellant and prior to the trial of this action Roth had been convicted of a felony and had been disbarred from the practice of law. His evidence was contradictory as to many of the particulars relating to his dealings with respondent as well as to his transaction with appellant.

It is evident that the trial court gave but little if any weight or credence to appellant's evidence, and we can give no more. The court was justified in disbelieving and disregarding all of the evidence given by appellant and by Roth, or in believing only such portions thereof as, when considered with the other evidence, seemed to be credible. The argument that the findings are not supported by the evidence falls when the testimony of the two chief actors in the transaction is weighed against that of respondent, whose statements were not impeached or even questioned, coupled with the inferences that are reasonably deducible from all of the evidence in the case.

[4] 2. *Is appellant the holder in due course of the note and deed of trust?* He claims that he took the papers in good faith and for value and had no notice of any defect in the title, Civil Code, sec. 3133, and that he holds the same in due course and free from any defenses of respondent. Civil Code, sec. 3138. But section 3140 provides that "when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as

holder in due course." Peoples State Bank v. Penello, 67 Cal.App. 103, 106. The evidence shows that the signatures of respondent on the assignments were written by Roth and not by respondent, that Roth had no title to the note and deed of trust, and that without respondent's knowledge, he transferred the same to appellant to secure a loan to himself. Appellant failed to sustain the burden cast upon him by said section 3140. The evidence which we have outlined shows that appellant should have been on his guard in negotiating with Roth. Appellant did not know respondent or Mrs. Perky but he did know Roth intimately. Roth told him that he and not respondent was to receive the proceeds of the loan. These and other circumstances herein related destroy appellant's pretense of good faith or of holding in due course.

[5] 3. *Who was guilty of the greater negligence?* Section 3543 of the Civil Code provides: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Admittedly respondent was an innocent party in the transaction. She delivered the papers to Roth relying on his advice that her protection against adverse claimants would be enhanced by so doing. She did not authorize him, actually or ostensibly, to transfer them. Civil Code, secs. 2315, 2316, 2317. She did nothing to create an agency, either actual or ostensible. Civil Code, secs. 2299, 2300. Her acts were all at the suggestion of an attorney whom she trusted because of his friendly relations with her aunt and who, because of his having been admitted to practice law, was presumably reliable.

Appellant's innocence does not appear from the record. That he did not trust Roth is apparent from his acts. He insisted upon having a receipt from Roth for the money loaned in addition to possession of the note purportedly signed by respondent and the endorsement and assignment of the other papers. He obtained the form of the receipt from another attorney, notwithstanding that Roth had been appellant's attorney. These and other acts indicated that appellant was on notice that there might be some obliquity in the transaction. Roth testified that he told appellant that the money was to go to him, Roth, and not to respondent. Yet appellant did not make any inquiry of respondent, with whom he had no acquaintance, as to Roth's authority to act for her or as to the authenticity of the signatures. Appellant did not rely on any act or statement of respondent but relied entirely on Roth.

The circumstances under which appellant made the loan were such as would create a presumption in the mind of any reasonable person that facts existed that would impeach the validity of the transaction in so far as respondent was concerned.

[6] The purchase of a note for a grossly inadequate price without inquiry as to the consideration of the note is a circumstance to be considered in determining whether the purchase was made in good faith. Such fact is sufficient to arouse the suspicion of an ordinarily prudent person and to put him on inquiry as to the consideration. Jordan v. Grover, 99 Cal. 194, 196, 33 P. 889; Witty v. Clinch, 207 Cal. 779, 783, 279 P. 797; Bishop v. Morrow, 12 Cal.App.2d 720, 725, 55 P.2d 1216. Appellant claims to be the owner of the $10,000 note and deed of trust. He so alleged in his complaint and prayed judgment against Mrs. Perky for the full sum. After her death he presented a claim against her estate for the same amount and filed a supplemental complaint so alleging.

The court found on substantial evidence that the purported signatures of respondent on the assignments of the $10,000 note and deed of trust and on the $3,000 note and the receipt delivered to appellant for $3,000 were all forgeries and were not ratified or approved by respondent. No title to the note or deed of trust passed to appellant by reason of the forged documents and he is without right to retain the same or to enforce payment. Civil Code, sec. 3104; 8 Am.Jur. 318. Respondent is not and never was indebted to appellant.

If appellant should prevail in the action respondent would unjustly lose $3,000 and interest thereon from the date of the note. If the judgment in favor of respondent is sustained appellant will still have the note signed by Roth and will have his right of action for recovery thereon.

[7] 4. *The pleadings.* In respondent's answer she specifically denied the allegation in the complaint that she assigned the note and deed of trust to appellant. In a separate special defense she alleged that no assignment was effectively made, but that she was induced by Roth to sign the assignments and that she received no consideration therefor and that any such transfer was void for lack of consideration.

This was a permissible pleading of inconsistent defenses. The evidence shows that when the answer was verified and filed respondent did not know what papers she had signed. She thought she had signed the assignments as suggested by Roth. She did not ascertain as a certainty that she had not signed the documents until they were shown to her in court during the trial. Her pleading cannot be construed as an admission of the genuineness of the signatures.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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72 Cal.App.2d 320

GRIFFITH v. STEIMLE et al.

Civ. 3415.

District Court of Appeal, Fourth District, California.

Dec. 27, 1945.

Hearing Denied Feb. 21, 1946.

Innkeepers 🔑10

Whether resort guest suing for injuries sustained when she fell from unlighted porch of cabin was contributorily negligent in walking on porch though because of darkness she could neither see nor know anything of what was in front of her, was a question of fact.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Ruth Griffith against Leonard N. Steimle and another for personal injuries sustained in a fall on premises of a resort hotel operated by defendants. From an order granting plaintiff's motion for new trial on grounds of errors of law occurring during the trial and insufficiency of the evidence to sustain the verdict, defendants appeal.

Order affirmed.

Sidney A. Moss, of Los Angeles, for appellants.

Fred A. Wilson, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an order granting plaintiff's motion for a new trial on the grounds of errors of law occurring during the trial, and the insufficiency of the evidence to sustain the verdict.

Defendants maintained and operated a resort hotel known as Pine View Lodge in the San Bernardino Mountains. Plaintiff and her friends made reservations at the lodge. They reached the hotel on the evening of July 4, 1944, and were shown to a three room cabin by a maid. The night was dark and the maid lighted the way with a flashlight, there being no other illumination. She conducted the party to the cabin, up steps to a porch and into the center room, lighting the light there. The guests wanted some water and the maid, accompanied by plaintiff, obtained a pitcher of water by walking to the east end of the porch and down two steps to a hydrant. There were six in the party with but one drinking glass in the room, so plaintiff offered to get some from the next room.

She went out of the room leaving the door open. Her course took her onto the porch and out of the area of the light shining through the door. She proceeded west along the porch in complete darkness guiding herself with her hand on the wall of the room. She could see nothing in front of her. She proceeded thus for a distance of seven feet nine inches when she fell off the unprotected end of the unlighted porch and was injured. She could neither see nor know anything of what was in front of her as she felt her way along the porch prior to her fall.

Defendants argue that the foregoing evidence conclusively shows plaintiff guilty of contributory negligence as a matter of law, and, as she could not recover because of such contributory negligence, it was error to grant her motion for new trial.

We consider the case of Skaggs v. Willhour, 210 Cal. 524, 292 P. 649, controlling here because of the identity of the questions decided. The district court of appeal reversed a judgment in favor of the plaintiff Skaggs because, in the opinion of the Justices, he was guilty of contributory negligence as a matter of law in continuing to drive his automobile along a highway after he had been totally blinded by the glaring headlights of an approaching truck. Skaggs v. Willhour, Cal.App., 289 P. 181. A hearing was granted and the Supreme Court affirmed the judgment.

The Skaggs case was reviewed and the facts were more fully set forth than in the Supreme Court decision, in Morehead v. Roehm, 118 Cal.App. 312, 4 P.2d 995, 996, where it was said: "The case of Skaggs v. Willhour, 210 Cal. 524, 292 P. 649, has an important bearing upon the legal question of the negligence or contributory negligence of a plaintiff who looks but does not see danger which he is approaching. In this case, the plaintiff, Skaggs, was traveling north on the State highway across the Tejon Pass in Kern county. In front of him were two trucks, one traveling south and the other traveling north. The trucks met more than 150 feet ahead of Skaggs. When Skaggs approached within about that distance from the trucks, he was completely blinded by the headlights of the one southbound. In his testimony he described the effect of the lights as follows: 'As I approached the trucks, the headlights of this truck facing me were very bright—I could not see the highway for the rays of light.' * * * 'It was impossible for me to see anyone within the rays of the headlights.' * * * 'After I came within the rays of the light facing me I was continually in the rays of the light until I passed the rays, and I hit the rear end of the trailer.' * * *

"'Q. Prior to that time could you see any tail-lights or any lights of that kind? A. You could not see anything past the rays of those lights.

"'Q. Couldn't you even see the road there? A. I could not see the highway there.'

Skaggs further testified that he did not see the rear of the northbound truck until he was within about fifteen feet from it and too late to avoid a collision. The appellant contended that this evidence established contributory negligence on the part of Skaggs as a matter of law. The Supreme Court held: 'According to the evidence favorable to plaintiff, the defendant's truck and trailer were parked entirely on the paved portion of the highway. Directly opposite the defendant's truck and trailer, on the other side of the highway, facing southerly, stood another parked truck, the property of a third person. The headlights on this second truck were shining brightly and blinded the plaintiff for a distance of about 150 feet behind the defendant's trailer. The plaintiff was traveling at a speed of about 25 miles per hour when his car entered the blinding rays of light from the second truck and he slowed his speed down to 15 miles per hour, at which rate he was traveling when he first saw defendant's trailer. He then swerved to the left and applied his brakes to the utmost of their capacity. He was within about 4 feet of coming to a dead stop when he ran into pipes extending from the rear end of the defendant's trailer. The defendant's negligence is clearly shown, and, under the facts appearing in the record, a brief outline of which is given above, we are of the opinion that it was a question of fact for the jury whether the plaintiff did everything that a reasonable man would have done under like circumstances to safeguard the life and property of others and to avoid injury to himself.'" See also Peri v. Los Angeles Junction R. Co., 22 Cal.2d 111, 137 P.2d 441.

We cannot distinguish between blindness caused by glaring headlights and blindness caused by darkness. Both causes have the same results, namely, inability to see, so here, as the Supreme Court held in the Skaggs case, we must conclude that the question of contributory negligence is one of fact and not of law.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

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72 Cal.App.2d 332

In re SOULIE'S ESTATE.

Civ. 12860.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1945.

1. Wills ⚷455

A testator who drew his own will, presumably without legal aid, may not be supposed to have used the same niceties of descriptive language as would be employed by an expert draftsman.

2. Wills ⚷449

That testator made will raised presumption of intention to dispose of all of his property.

3. Wills ⚷448, 449

In construction of a will, whenever disputed word or phrase may reasonably be given more than one meaning, that meaning should be given, if possible, which will prevent intestacy, partial or total. Probate Code, § 102.

4. Wills ⚷462

Court cannot supply omissions nor insert words in will.

5. Wills ⚷470

In construing a will, instrument should be read from its four corners and all parts thereof construed in relation to each other to form one consistent whole. Probate Code, § 103.

6. Wills ⚷439, 440

The cardinal principle applicable to construction of a will is to ascertain intention of testator as expressed therein. Probate Code, §§ 101, 105.

7. Wills ⚷463

Under holographic will bequeathing specific legacy to testatrix' sister-in-law and another legacy to testatrix' deceased hus-
of my
band's nephew and "the rest to his brother" and leaving $1 to any one of half-sister's family who would contest the testament, quoted clause was not void for uncertainty so as to require residue of estate to pass under laws of succession to next of kin, since the words "of my" could be regarded as surplusage. Probate Code, §§ 101–103, 105.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Marie J. Soulie, wherein Mrs. Charles Passerini filed a petition to determine heirship and Urbain Lasalle filed an answer. From an order denying the petition to determine heirship, the petitioner appeals.

Affirmed.

Robert E. Hatch, of San Francisco, for appellant.

A. W. Brouillet, of San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order denying a petition to determine heirship. The appeal is presented wholly on a settled statement under Rule 7(b) of the Rules on Appeal.

Marie J. Soulie died on April 4, 1943, leaving the following holographic will:

"Feb—18/43. in case of Death I bequeath $1,000–00 to my Sister in Law—Mrs. Pierre Nombolot of St—Mitchel Flecazeville France, if she is not living thento her children Madeleine and Morris.

"To my Late Husbands nephew Joseph
of my
Lasalle 1000.00—and the rest to his brother Urbain Lasalle of Fernie B. C. Canada.

"To my half-sister—Mrs. Charles Passerini I leave one dollar 1^{00} or to any one of her family who tries to contest this testament

"Also one dollar to my brother in-law Eugene Soulie if he or any of his family tries to contest this testament.

Marie J. Soulie
377–3rd St.
San Francisco
Calif."

The will was admitted to probate on May 11, 1943, at which time Phil C. Katz was appointed administrator of the estate with the will annexed. The estate exceeds the sum of $4,000 after payment of the two specific legacies in the amount of $1,000 each, the payment of all debts of the decedent and the expenses of administration including taxes. On November 27, 1943, Mrs. Charles Passerini, who was bequeathed $1 under the will, filed per petition to determine heirship. She alleged that she was the sister of decedent and that she was entitled to distribution of the residue of the estate because the decedent died intestate except for the two specific legacies, there being no residuary clause in the will. Urbain Lasalle filed an answer alleging that the decedent bequeathed to him all of her estate except the amounts provided for by the two legacies plus the sum of $1 to petitioner. At the trial the parties stipulated that neither contested the two $1,000 legacies. The matter was thereupon argued and submitted for decision. On July 19, 1944, the court entered its order denying the petition, ordering all of the residue of the estate to be distributed to Urbain Lasalle and ordering that the sum of $1 be paid to Mrs. Charles Passerini.

The question presented on this appeal concerns the construction of the clause
of my
reading: "and the rest to his brother Ur-

bain Lassalle of Fernie B. C. Canada." Appellant contends that since the court has no power to insert a missing word or words, the clause must be held to be void for uncertainty and incompleteness and that as a result the residuum passes under the laws of succession to the next of kin. We cannot agree with that contention.

[1-3] In the recent case of In re Estate of Wierzbicky, Cal.App., 159 P.2d 699, this court was called upon to construe certain words contained in an olographic will. The well settled rules on the subject were set down in that case and since they are equally applicable to the instant appeal we quote them herein (159 P.2d at page 700):

"Certain settled rules for the construction of wills support the construction given to this language of the will by the probate court. The will was drawn by the testator, presumably without legal aid, and he may not be supposed to have used the same niceties of descriptive language as would be employed by an expert draftsman. [In re] Estate of Olsen, 9 Cal.App.2d 374, 50 P.2d 70; [In re] Estate of Gracey, 200 Cal. 482, 253 P. 921; 26 Cal.Jur. p. 895. The will as construed by the probate court disposes of the testator's entire estate. The construction contended for by appellants would result in intestacy as to the group insurance. '"The very fact of making a will raises a presumption that the testatrix intended to dispose of all her property." 26 Cal.Jur., p. 899. Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy. While this rule is codified as to total intestacy (Probate Code, § 102), the principle is also applicable to avoid partial intestacy. [In re] Estate of Farelly, 214 Cal. 199, 206, 4 P.2d 948; [In re] Estate of Heberle, 153 Cal. 275, 95 P. 41; O'Connor v. Murphy, 147 Cal. 148, 81 P. 406. In other words, constructions which lead to either total or partial intestacy are not favored. [In re] Estate of Gracey, 200 Cal. 482, 253 P. 921; [In re] Estate of O'Gorman, 161 Cal. 654, 120 P. 33.' [In re] Estate of Olsen, supra, 9 Cal.App.2d 379, 50 P.2d at page 72. Cf. [In re] Estate of Northcutt, 16 Cal.2d 683, 689, 690, 107 P.2d 607."

[4-6] It is true, as pointed out by appellant, that the court cannot supply omissions nor insert words in the will (In re Estate of Young, 123 Cal. 337, 344, 55 P. 1011; In re Estate of Lynch, 142 Cal. 373, 377, 75 P. 1086), but there is certainly no necessity for that in this case. The instrument should always be read "from its four corners" (In re Estate of Thompson, 62 Cal.App. 493, 496, 217 P. 127, 128) and all parts of the will construed in relation to each other to form one consistent whole. Probate Code, § 103; In re Estate of Northcutt, 16 Cal.2d 683, 689, 107 P.2d 607; In re Estate of Spence, 57 Cal.App.2d 922, 925, 135 P.2d 419. The cardinal principle applicable to the construction of a will is to ascertain the intention of the testator as expressed therein. Probate Code, §§ 101, 105; In re Estate of Hartson, 218 Cal. 536, 539, 24 P.2d 171; In re Estate of Layton, 217 Cal. 451, 458, 19 P.2d 793, 91 A.L.R. 480; In re Estate of Smith, 58 Cal.App.2d 352, 354, 136 P.2d 366.

[7] Reading the will herein, with the foregoing rules in mind, it is obvious that the probate court arrived at the proper conclusion. The appearance of the instrument indicates that it was written with little or no legal assistance. However, the testatrix' desire to avoid intestacy is shown by her specific exclusion of petitioner and other relatives. The intent manifested by the words of the residuary clause, which is under attack, is most apparent and reveals a desire to dispose of all of the decedent's property. If that cause had read "and the rest to his brother Urbain Lasalle", the meaning could certainly not be questioned. The addition of the words "of my" which appear just between and above the words "rest to" would not appear to negative the intent manifested therein. The two words inserted in the position in which we find them concededly have no meaning, and consequently they may be regarded as surplusage. In re Estate of Wood, 36 Cal. 75, 81; In re Estate of Heard, 25 Cal.2d 322, 328, 153 P.2d 553; 26 Cal.Jur. 887.

The trial court's construction of the will is in accord with the recognized rules of construction and carries out the obvious intent of the testatrix to dispose of her entire estate.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

72 Cal.App.2d 357

HALDOR, Inc., et al. v. BEEBE.

Civ. 14778.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Hearing Denied Feb. 25, 1946.

1. Assignments ⟹19

Where corporate motion picture employment agency owned by plaintiff, under a contract not delegating a particular person to act for defendant, procured employment for defendant and assigned contract to plaintiff, who for a time assigned right to share in its profits to others, defendant could not cancel, and be relieved from liability under, contract on ground services to be rendered under it were personal and contract could not be assigned without defendant's consent.

2. Assignments ⟹19

The rule against assignment of personal service contracts does not apply to merely nominal owners, officials of parties bound, or employees without control over business or voice in its management, and assignment of such contract without change of ownership, control or management, does not relieve other party from his obligations.

3. Master and servant ⟹14½

In action by employment agency and its assignee on contract under which employment for defendant was procured under an original and renewal agreement, evidence did not warrant finding that plaintiffs failed to comply with license requirements of the Labor Code, so as to justify defendant's discharging plaintiffs. St.1937, pp. 232, 234, §§ 1581, 1595.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Haldor, Inc., a corporation, and another, against Ford I. Beebe on an employment contract, tried by the court without a jury. From a judgment against defendant, defendant appeals.

Judgment affirmed.

Kaplan & Livingston, of Los Angeles, and Eugene S. Goodwin, of Hollywood, for appellant.

Alfred Gitelson, of Los Angeles, for respondents.

DESMOND, Presiding Justice.

The defendant appeals from a judgment in the sum of $4,133 entered against him in a non-jury case for money due upon a contract, reading as follows:

"Hallam Cooley Agency,
"California Bank Bldg.
"Beverly Hills, Calif.
"Crestview—6161
"Date 2/8/35
"Beverly Hills, Calif.

"Hallam Cooley Agency, Inc.

"California Bank Bldg.,

"Beverly Hills, Calif.

"Gentlemen:

"1. I hereby employ you to render your services to me as my personal representative in the entertainment industry for a period of 5 years and you accept such employment and agree to render your services to me during the term hereof.

"2. Your duties hereunder are to be as follows: To use all reasonable efforts to procure employment for me; at my request, to advise me with respect to my career and to act in matters concerning my professional interest.

"3. As compensation for your services I agree to pay you an amount equal to Ten (10%) per cent of all money or other consideration received by me during the term hereof, and thereafter, for so long as I remain employed or receive compensation under or upon engagements and/or agreements entered into or negotiated for during the term hereof, or on extensions or renewals of such agreements or engagements, or on any engagements or agreements substituted for and/or replacing such prior engagements and/or agreements. Payment shall be due you immediately upon receipt of money or other consideration by me.

"4. I agree that you may render services to other persons. However, I agree not to employ any other person to act for me in the capacity for which I have engaged you.

"5. Should I fail to obtain a bona fide offer of employment from a responsible employer during a period in excess of four (4) consecutive months, during all of which time I am ready, able and willing to accept employment, either party hereto shall have the right to terminate this contract by a notice in writing to such effect sent to the other party by registered mail.

"6. Controversies arising between us under the Private Employment Agency Act, and under the rules and regulations for the enforcement thereof, shall be referred to the Commissioner of Labor, as provided in Section 19 of said Act.

"7. This instrument constitutes the entire agreement between us and no statement, promise or inducement made by any party hereto which is not contained herein shall be binding or valid and this contract may not be enlarged, modified or altered except in writing signed by both the parties hereto.

"(Signed) Ford I. Beebe
Name
749 W. Crescent Hts. Blvd.
Address
OR. 0385

"Agreed to and accepted:
"Hallam Cooley Agency, Inc.,
"By: (Signed) S. Geo. Ullman

"This agency is licensed by the Commissioner of Labor of the State of California."

The action was commenced August 6, 1942. The first amended complaint, captioned, "Haldor, Inc., a corporation (whose corporate name was formerly Hallam Cooley Agency, Inc. and S. George Ullman, a corporation, and prior thereto, Hallam Cooley Agency, Inc., a corporation); Hallam Cooley, Plaintiffs, vs. Ford I. Beebe, Defendant," alleges that on June 30, 1936, the "plaintiff corporation procured for said defendant and said defendant did enter into a limited term agreement of employment as a Director with Universal Production, Inc."; that approximately four months later and on or about October 15, 1936, Universal Productions, Inc., entered into another agreement by which the defendant was employed by that corporation as a director, producer and writer; "That ever since said 15th day of October, 1936, said defendant has been and now is employed under and receiving compensation under the said agreement of October 15th, 1936, entered into during the original term of the agreement * * * and the extensions and renewals of said agreements. That the said Universal Productions, Inc. has exercised each and every of the said thirteen (13) options granted unto it by the terms of the said agreement of October 15th, 1936 and has thereby extended the term of said agreement, each of said options being for a period of six (6) months' extension, so that said agreement will not expire until on or about the 15th day of October, 1943." It is further alleged that the defendant on April 22, 1941, notified the plaintiffs that he no longer desired to be represented by them and to discontinue to represent him in the capacity of motion picture agent; that since the last mentioned date he has not paid to the plaintiffs or either of them any sum whatsoever; that the plaintiff, Hallam Cooley, on April 22, 1941, "was and now is ready, willing and able to perform the services on the part of the agent to be performed" under the contract of February 8, 1935.

Nothing to the contrary appears in the agreed statement of facts upon which the issues in this case were submitted to the trial court, but in that statement certain additional facts and circumstances attract our special attention. For example, Paragraph I of said statement asserts that the corporation known as "Hallam Cooley Agency, Inc.", was chartered on or about February 16, 1934; that on or about September 13, 1937, its articles of incorporation were amended to show that the name of the corporation was changed to "Hallam Cooley Agency, Inc. and S. George Ullman"; that thereafter and on or about February 2, 1942, an amendment to the articles of incorporation of the last mentioned corporation was filed under and by virtue of which the name of the corporation was changed to "Haldor, Inc." This same Paragraph I of the agreed statement recites that the plaintiff corporation, Haldor, Inc., is thereafter referred to as "Haldor," and in Paragraph XVII, "That plaintiff, Haldor, Inc. joins in the action for the use and benefit of Hallam Cooley." Under the theory that "Haldor" has been in existence since November 15, 1934, when it was known by a name entirely different, to-wit, Hallam Cooley Agency, Inc., it is declared in the statement that on November 15, 1934, and since then "at all times herein involved and concerned, the plaintiff Hallam Cooley has been and now is the owner and holder of all of the issued and outstanding capital stock of Haldor, Inc., a corporation. That during all of said time, said plaintiff Hallam Cooley was the President of and a Director of said corporation and in control of the policies and acts of said corporation. That the remaining members of the Board of Directors of said corporation at all times herein involved, did act solely during the pleasure of said plaintiff Hallam Cooley and did perform such acts and do such things as were by him directed." One instance of this procedure is noted in Paragraph VI of the agreed statement where it appears "That on or about the 21st day of December, 1937, Haldor, its corporate name then being Hallam Cooley Agency, Inc. and S. George Ullman, did assign unto the co-plaintiff Hallam Cooley, all motion picture agency contracts owned by said Haldor or to which it was a party, including the said agreement, 'Plaintiff's Exhibit 1' [the contract of employment, dated February 8, 1935, quoted at the beginning of this opinion]."

The agreed statement also recites "That defendant had no actual knowledge of the manner in which the capital stock of Haldor, Inc. was issued or held or who constituted its Directors." This last statement is not surprising, since, as we have indicated, the corporate name "Haldor, Inc.", did not come into existence, so far as we can determine from the pleadings and the briefs, until almost a year after the defendant had attempted to sever his connection with his employment agency. This he did by means of a notification which, according to the agreed statement, he served "upon Hallam Cooley and Haldor, designated as 'Hallam Cooley Agency, Inc.'". It reads as follows:

"April 22nd, 1941

"Hallam Cooley and
"Hallam Cooley Agency, Inc.,
"9111 Sunset Blvd.,
"Hollywood, California.

"Gentlemen:

"It has come to my attention that S. George Ullman whom I signed to represent me in February 1936 [1935] for a period of five years, has withdrawn from the firm of Hallam Cooley Agency Inc. and S. George Ullman. Theodore, [Therefore?] please be advised that I no longer desire to be represented by you or your agency and this is your notice to discontinue acting in any capacity as my agent.

I hereby revoke any authority you may have had to collect moneys due me from any source whatsoever and/or to endorse my name to any check and/or deposit same to any account, and shall hold you responsible for any violation of this notice.

"Very truly yours,
"(Signed) Ford I. Beebe"

Still proceeding under the theory that "Haldor" has been in existence since a date prior to February 8, 1935, the agreed statement declares: "That from February 8th, 1935 to December 21st, 1937, one S. George Ullman was an employee of plaintiff Haldor and was the employee of said Haldor, primarily handling the defendant. That from December 21st, 1937 to April 22nd, 1941, the said S. George Ullman continued to handle primarily the defendant. That defendant was induced to execute the said agreement of February 8th, 1935, 'Plaintiff's Exhibit 1' primarily as a result of the negotiations between the said defendant and the said S. George Ullman. That defendant did not have actual notice or knowledge of the said assignment from Haldor unto Hallam Cooley and the entering into of the 'Articles of Co-partnership', 'Plaintiff's Exhibit 2', nor the termination by the said Hallam Cooley of the interest of the said Paul W. Wilkins and James Stanley and he, the said Hallam Cooley acquiring their interests, all as provided by Article X of 'Plaintiff's Exhibit 2' and as hereinbefore agreed and said defendant had no actual knowledge thereof. That on or about the 22nd day of April, 1941, the said S. George Ullman and the said Hallam Cooley had dissolved their partnership and that at said time and for the first time told said defendant of the assignment by Haldor unto Hallam Cooley of the said agreement, 'Plaintiff's Exhibit 1', the entering into of 'Plaintiff's Exhibit 2', the termination of the interest of the said Paul W. Wilkins and James Stanley and the acquiring of their interests by Hallam Cooley and the termination by Hallam Cooley of the interest of the said S. George Ullman and the acquiring of his interest, all under Article X of 'Plaintiff's Exhibit 2'. That thereupon, the defendant did serve upon plaintiffs Hallam Cooley and said Haldor, the said letter hereinbefore set forth."

Plaintiff's Exhibit 2 mentioned in the foregoing passage is attached to the first amended complaint, entitled "Articles of Co-Partnership," which were signed on April 1, 1938, between Hallam Cooley, S. George Ullman, James Stanley and Paul W. Wilkins, respectively first, second, third and fourth parties. By the terms of this agreement the parties recognized that "Hallam Cooley is the owner of various actors agency contracts, sometimes hereinafter referred to as 'agency contracts,' wherein Hallam Cooley Agency, Inc. and S. George Ullman, a corporation, was named as agent, and which said contracts were by the said Hallam Cooley Agency, Inc. and S. George Ullman, a corporation, heretofore assigned to the said Hallam Cooley." The partnership agreement provided that the party of the first part, namely, Hallam Cooley, would assign to the co-partnership the so-called "agency contracts" and all other contracts which the co-partnership might procure or be a party to for the representation of others, upon the condition that "neither the said party of the second, third, or fourth part shall have any right, title, interest or estate in and to the said 'agency contracts' or 'contracts,' the only right and interest of the said parties of the second, third and fourth parts being to share,—and only while a partner, and only as in these articles of co-partnership provided,—in the earnings therefrom * * *." Article II of the partnership agreement provided: "(1) Said partnership shall be conducted and carried on under the partnership name and style of 'Hallam Cooley Agency and S. George Ullman.' (2) The principal place of business of this co-partnership shall be at Number 9111 Sunset Boulevard, County of Los Angeles, State of California, or at such other place as the party of the first part may from time to time designate in writing. * * * (3) The parties hereto do hereby agree that whenever it shall be deemed necessary by the party of the first part, they will execute a certificate of fictitious firm name, and will file and publish the same, all as provided by Chapter II, Division Third, Part IV, Title X, being Sections 2466 to 2472 of the Civil Code of the State of California." Article III provided that: "The business of this co-partnership shall be the owning, operating and conducting of a 'theatrical' * * * and 'motion picture' * * * 'radio' and 'amusement' employment agency, and any other business related thereto and deemed to be for the best interests of the co-partnership." Article VI provided that the net profits of the co-partnership should be distributed, under stated conditions, in the following proportions: To Hallam Cooley, fifty per cent.; to S. George Ullman, twenty-five per cent.; to James Stanley, ten per cent.; to Paul Wilkins, ten per cent.; five per cent. to a "capital account." It is further provided in Article IX that: "(1) The party of the first part shall be the Manager of the co-partnership; he shall have full, complete, arbitrary and [un]controlled power and authority to fix and determine the policies and conduct and other operations of the partnership business, to designate the forms of all contracts to which the partnership may be a party, to designate, determine and order the duties of each of the remaining partners hereto. (2) Whenever under these articles of co-partnership any act or decision is provided to be done or determined by a majority of the partners, if a majority cannot agree, or in the event of an equal division of the members of the co-partnership upon any matter, the said party of the first part shall have the right, power and authority to make the final and conclusive decision thereon. (3) The party of the first part, as such Manager, shall have the power and authority to bind the partnership in all business transactions and to sign the name of the partnership to all contracts within the scope of the aforesaid contemplated business of this co-partnership." Article X gives to Hallam Cooley as the party of the first part the right, in the exercise of his "absolute, arbitrary and uncontrolled discretion and opinion," to terminate the interest of any of his co-partners in the partnership and also gives him the "exclusive and irrevocable right and option" to purchase such interest.

Summarizing at this point the essential facts disclosed by the pleadings and the agreed statement, it is apparent that a single corporation operating successively under three different names, to-wit, "Hallam Cooley Agency, Inc.," "Hallam Cooley Agency, Inc. and S. George Ullman," and "Haldor, Inc.," has existed from 1934 until the date of the agreed statement and that during all that time Hallam Cooley individually has had entire and exclusive control of the contract which the corporation, Hallam Cooley Agency, Inc., made with appellant and of all business relating thereto. This control he was in position to exercise either by means of the corporation, owned at all times solely by him, or by the unusual partnership which, by its articles, expressly provided that none of his three partners should have any right, title, interest or estate in or to the contracts which he might assign to the firm, although they might take their share of what those contracts should earn. The iron-bound provisions of that agreement secured for Cooley the same complete control of the Beebe contract that he possessed as the sole stock-holder of the corporation which signed the agreement of February 8, 1935, and which the corporation later assigned to him as an individual.

[1, 2] By that contract, as we have seen, the agency was bound to use all reasonable efforts to secure employment for appellant, to advise him, on his request, with respect to his career and to act for him in matters concerning his professional interest. On the ground that these are services personal in their nature, appellant claims that the contract providing for them could not be validly assigned without his consent, and that the violation of this rule justified his cancellation of April 22, 1941, and relieved him of any further liability under the contract. If this contract of employment had been made with a person possessed of some special skill, art, or knowledge, the benefit of which appellant desired to secure and that person, without the consent of appellant, had transferred the contract with full control thereof to a third person, we could see the strength of appellant's position under the authorities which he cites, but we are not considering here that kind of a contract and cannot accept his view. In this case the agreement was made with a corporation which, in the nature of things, cannot perform personal functions.

We think, therefore, that it is fair to say that under the circumstances it must have been in contemplation of the parties when the contract was signed that the services bargained for would be rendered by a human representative delegated to perform that duty by the corporation and subject to being succeeded, if occasion should arise, by one with proper qualifications. In this case no such occasion did arise however. The contract itself did not specify any individual who should be so delegated but it appears from the agreed statement that S. George Ullman was the one who acted for the corporation in connection with the Beebe contract until his partnership with Cooley in sharing profits was dissolved more than a year after the five year contract of February 8, 1935, had expired. Furthermore, it does not appear that appellant was in any way aggrieved by the technical assignments which were made. Actually there was no change in the ownership of the contract; it remained always with Hallam Cooley.

In this connection we are impressed with the observations of the court in Model Baking Co. v. Dittman, Tex.Civ.App., 266 S.W. 802. In that case the defendant Dittman had contracted with a partnership known as Model Baking Co. to build an oven according to specifications peculiarly his own and as part of his contract had guaranteed the oven for a period of five years against defect of any kind and agreed to repair the same free of cost to the firm. The partnership consisted of two brothers, one of whom held exclusive management and control, although the net profits of the business were distributed one-fourth to his brother, the remaining three-fourths to him. After the inactive partner had retired, assigning his interest in the business to the active partner, and after the oven had fallen to pieces because of defective construction, Dittman endeavored to escape liability on his contract upon the ground that it was of a personal nature involving personal trust and confidence and was, therefore, not assignable. The language of the court seems appropriate to the present situation, page 803: "We do not think the rule against assignment of personal service contracts contemplates, or should be extended to include, merely nominal owners or officials of the parties bound, or employees who have no power or control over the business, or voice in its management. And where such contracts are made and afterwards assigned, if the assignment does not change the ownership, or control, or management, but leaves them in precisely the same hands they were in prior to the assignment, the other party should not be permitted to defeat the purposes of the pact and escape his solemn obligations simply because a technical, but ineffectual, assignment has been made. Technically, the contract was assigned, but practically it was not. Technically, the new concern was a distinct legal entity from the old, but to all practical intents and purposes it was the same concern. There was no actual substitution of parties * * *."

While the Texas court held that the contract before it, calling for service personal in its nature, was not terminated by a non-effectual assignment, the instant case relates to a contract with a corporation which, as we have said, cannot, as such, render personal service. We feel, therefore, that, a fortiori, the reasoning of the cited case as to technical assignments applies.

A well-considered opinion distinguishing between contracts which, because of their nature are assignable or non-assignable, may be found in La Rue v. Groezinger, 84 Cal. 281, 24 P. 42, 18 Am.St.Rep. 179, cited by both appellant and respondent.

[3] Appellant contends that "by reason of the wrongful assignments of his agency contract, as well as respondents' failure to comply with the license requirements of Section 1581 and 1595 of the Labor Code, St.1937, pp. 232, 234, he was justified in discharging respondents." His point in regard to license requirements is, in our opinion, not well taken in view of the recitals upon the subject in the agreed statement and the reports attached thereto issued by the California Department of Industrial Relations. From those documents it appears that in each year succeeding 1935 until April 1, 1941, licenses were issued in each instance "on request for renewal." The first of these licenses were issued to the corporation known as "Hallam Cooley Agency Inc.," then in 1937 to the corporation known as "Hallam Cooley Agency Inc. and S. G[eorge Ullman]." In the following years licenses were issued annually until 1941 to a partnership known as "Hallam Cooley Agency," or "Hallam Cooley Agency and S. George Ullman" doing business as a partnership, in each instance the names of the partners being shown individually. On April 22, 1941, permission was granted by the department "to transfer interest of S. George Ullman to Hallam Cooley doing business as Hallam Cooley Agency." Thereafter until 1943 the annual licenses were issued to "Hallam Cooley Agency (Individual)." With the exception of the early period during which the licenses were issued to the corporation they were all issued to individuals (including Hallam Cooley) doing business as a partnership, until the last few years during which the license was issued to Hallam Cooley.

The judgment is affirmed.

WOOD, J., concurs.

SHINN, Justice (concurring).

I concur in the foregoing opinion, but deem it advisable to point out that the defense to the action lacks merit for a reason other than the one stated in the opinion. The amount of the judgment represented plaintiff's percentage of defendant's earnings under his contract with Universal, which, as extended under the options, ran for seven years and terminated October 15, 1943. So far as can be determined from the statement of facts, there was no occasion for plaintiff to render any services in connection with that contract subsequent to the date of its execution. If defendant's compensation came to him from Universal under the original contract and as the result of services which had been fully performed by plaintiff, as would appear to be the case, the latter was entitled to the agreed percentage and defendant could not, by terminating the contract, escape liability for commissions which plaintiff had already earned.

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72 Cal.App.2d 457

HOSNER v. SKELLY.

Civ. 7163.

Sac. 5722.

District Court of Appeal, Third District,
California.
Jan. 3, 1945.

1. Judgment 🔑443(1)

Where a party has been given proper notice of an action and has not been prevented from full participation therein and has had an opportunity to present his case to the courts and protect himself from any fraud attempted by his adversary, such party cannot attack judgment after time for appeal or other direct attack has expired, as fraud perpetrated by adversary under such circumstances is "intrinsic fraud" even though unsuccessful party does not avail himself of opportunity to appear before the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

2. Appeal and error 🔑914(1)

Where record shows due service of process, court must assume that process included a copy of the complaint. Code Civ. Proc. § 410.

3. Divorce 🔑286

Where divorce judgment recited award of alimony against husband and due service of process upon him, court was required to assume, in absence of any allegations to the contrary, that wife had asked for alimony in her complaint, since otherwise court could not have awarded it. Code Civ.Proc. § 580.

4. Judgment 🔑495(1)

Court's jurisdiction of parties and of action and its order made in exercise of that jurisdiction must be presumed to have been based upon adequate pleadings and evidence.

5. Judgment 🔑495(1)

Presumption arises in favor of validity of judgment and existence of all matter going to power of court to render it, in absence of any showing of lack of jurisdiction.

6. Evidence 🔑82

Judicial tribunals, proceeding within their proper jurisdiction, are deemed to have acted rightly, impartially and honestly.

7. Divorce 🔑255

Where husband and wife entered into property settlement agreement in lieu of all other claims for alimony or support, and thereafter husband by due service of process was given notice of wife's action for divorce and of request for alimony therein, and had opportunity to appear and protect himself from any fraud attempted by wife by concealment of property settlement agreement from court and failed to do so, husband could not attack alimony judgment in a subsequent separate suit for equitable relief against such judgment but should have made a direct attack thereon. Code Civ.Proc. § 473.

8. Divorce 🔑255

Where statutory proceeding for relief from divorce judgment allegedly entered against husband through his mistake or excusable neglect was not commenced within time limited and no appeal was taken from order dismissing proceeding, dismissal of such proceeding was not subject to review in subsequent independent action for equitable relief against divorce judgment. Code Civ.Proc. § 473.

9. Appeal and error 🔑927(2)

Where plaintiff in action for equitable relief against alimony award in a divorce judgment alleged that his order to show cause in statutory proceeding for relief against such judgment was dismissed, but did not disclose how or in what manner he was not permitted to make a showing or upon what grounds order to show cause was dismissed, reviewing court would assume that grounds were adequate to support order of dismissal. Code Civ.Proc. § 473.

10. Divorce 🔑255

Where husband's complaint in independent suit for equitable relief against alimony award in divorce judgment disclosed that husband had knowledge of wife's alleged fraud in obtaining alimony award contrary to provisions of property settlement agreement in time to have moved to set aside award, but failed to do so in reliance on wife's alleged promise not to enforce award, complaint was insufficient to warrant a collateral attack upon judgment awarding alimony or to create an estoppel against wife.

11. Estoppel 🔑85

The doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as to contracts.

12. Divorce 🔑255

Where husband failed, through negligence, to avail himself of his legal remedy in wife's divorce suit against him until too late to do so, he was not entitled to ask equity to set aside or enjoin enforcement of divorce judgment and alimony award contained therein against him.

13. Judgment 🔑436

A judgment may be attacked upon ground of fraud and misrepresentation but relief against such judgment will not be granted if judgment has been brought about through carelessness of injured party, or unless he has been free from negligence.

◆

Appeal from Superior Court, Napa County; Harold Jacoby, Judge.

Action by Cleo Hosner against Josephine Skelly for equitable relief from the interlocutory and final decrees of the court granted to defendant and providing for payment of alimony in violation of the alleged terms of a property settlement agreement. From an adverse judgment after a demurrer to the complaint was sustained, plaintiff appeals.

Affirmed.

Francis H. Frisch, of Napa, for appellant.

Rutherford, Rutherford & Rutherford, of Napa, for respondent.

ADAMS, Presiding Justice.

In this action plaintiff (appellant), who was formerly the husband of respondent, seeks equitable relief from the provisions of the interlocutory and final decrees of divorce granted to respondent, which decrees, entered upon the failure of appellant to appear in the divorce action, provided for payment by appellant to respondent of alimony in the sum of $50 per month. He alleges in his complaint that prior to the filing of the action for divorce he and defendant entered into an oral property settlement wherein he transferred to defendant a home of the approximate value of $3,000, a Chrysler automobile of the approximate value of $800, and $300 in cash; that said property was transferred to defendant "in lieu of all other claims for alimony or support; that defendant agreed to accept the same in lieu of any other claims to which she might be entitled for support or maintenance; that in reliance upon said promise and representation of defendant plaintiff did not appear in said divorce proceedings; that defendant fraudulently concealed from the Court all of the details of the said property settlement agreement which at the time of the divorce hearing was fully executed"; that at the time of the making of the agreement defendant had no intention of living up to her promise not to ask for alimony; that he "believed and relied upon said false and fraudulent promises of the defendant and in reliance thereon refrained from appearing in said divorce proceedings." He also alleged that in February, 1943, defendant had secured the entry of a judgment in her favor for $880 as accumulated payments under the divorce decree; that in May, 1943, he had secured the issuance of an order for defendant to show cause why the portion of the decrees providing for payment of alimony should not be vacated, but "that plaintiff was not permitted to make a showing or to introduce evidence or testimony showing the facts surrounding the oral property settlement and plaintiff was upon said order to show cause summarily dismissed from Court"; that he had exhausted all his legal remedies and must now present this equitable proceeding in an effort to protect his financial interests.

The second count incorporated the allegations of the first one, and further alleged that plaintiff and his then wife were the owners of certain described real property in Napa County, that defendant had caused the judgment mentioned in paragraph III of the first cause of action to be recorded and said judgment constitutes "a lien or cloud of plaintiff's title" to said real property.

The third count also incorporated the allegations of the first one, and further alleged "that a short time after the entry of the interlocutory decree of divorce" he had talked to defendant about the order for $50 awarded by the trial court, and "that plaintiff told defendant not to worry about the award for support; that she did not intend to enforce said judgment against him"; that plaintiff relied upon said representation and did not move to set aside the award at that time; and that due to said representation defendant was estopped to enforce said judgment.

It was prayed that the portion of the decrees awarding alimony be declared null and void and be set aside from the time of the entry of the interlocutory decree, that the court set aside and cancel the oral contract referred to, and that plaintiff have judgment that the recorded judgment be declared null and void and the cloud on plaintiff's title thereby created be removed, and that defendant be declared to be estopped from enforcing said judgment for support.

Attached to the complaint and made a part thereof were copies of the interlocutory and final decrees of divorce. The complaint in the divorce action does not appear in the record. The interlocutory decree recites that defendant was duly and regularly served with process in Napa County, that not having appeared within the time allowed by law his default had been duly entered, that the sum of $50 a month was a reasonable amount to be allowed plaintiff considering the ability of defendant to pay, and that plaintiff was entitled to a decree of divorce on the ground of defendant's extreme cruelty. Nothing was stated in either decree as to the property of the parties.

To the foregoing complaint defendant demurred on both general and special grounds. Her demurrer was sustained by the court, plaintiff being granted leave to amend. He declined to amend within the time allowed, judgment was duly entered against him, and this appeal followed.

Before this court it is urged by appellant that his first cause of action is well pleaded, and that an actionable fraud on the part of defendant is sufficiently alleged therein; and that his third cause of action sufficiently pleads an equitable estoppel. No argument is presented on the second cause of action.

[1] Regarding the first cause of action appellant's argument is that defendant's alleged concealment from the trial court of the facts of the property settlement agreement and her failure to live up to the alleged oral agreement to accept the property conveyed to her in lieu of any other claims for support amount to *extrinsic* fraud, and warrant the intervention of a court of equity. In support of this contention he cites certain authorities dealing with extrinsic fraud. But we find nothing in those authorities sustaining appellant's contention that the allegations of his complaint make out a case of extrinsic fraud. On the contrary, it was held in Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, that where, as here, a party has been given proper notice of an action and has not been prevented from full participation therein, and has had an opportunity to present his case to the court and protect himself from any fraud attempted by his adversary, the fraud is *intrinsic* rather than *extrinsic* even though the unsuccessful party does not avail himself of his opportunity to appear before the court; and that having had an opportunity to protect his interests he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Also see Horton v. Horton, 18 Cal.2d 579, 584, 116 P.2d 605; Neblett v. Pacific Mutual Life Ins. Co., 22 Cal.2d 393, 397, 398, 139 P.2d 934; Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439.

[2-7] In the case before us appellant was duly served with process which, we must assume, included a copy of the complaint, Code Civ.Proc. sec. 410. He therefore knew whether respondent had or had not revealed in her pleading that there had been a property settlement. Also he must have known that she was asking for alimony, for since the trial court granted alimony in a default case, we must assume, in the absence of any allegation to the contrary, that plaintiff in the action had asked for same in her pleading else the court could not have awarded it. Code Civ.Proc. sec. 580; Darsie v. Darsie, 49 Cal.App.2d 491, 494, 122 P.2d 64; Peck v. Peck, 52 Cal. App.2d 792, 793, 127 P.2d 94; Bennett v. Bennett, 50 Cal.App. 48, 49, 194 P. 503; Eddy v. Eddy, 64 Cal.App.2d 672, 149 P.2d 187. That court had jurisdiction of the parties and of the action, and its order made in the exercise of that jurisdiction must be presumed to have been based upon adequate pleadings and evidence. In the absence of any showing of lack of jurisdiction a presumption arises in favor of the validity of the judgment, and the existence of all matters going to the power of the court to render it. Judicial tribunals, proceeding within their proper jurisdiction, are deemed to have acted rightly, impartially and honestly. 1 Freeman on Judgments, sec. 383, pp. 820, 821; sec. 387, pp. 830-832. Appellant, then, had notice of the action and of the request for alimony, and had an opportunity to appear and protect himself from any fraud attempted by respondent; and having failed to avail himself of that opportunity he cannot attack the judgment in such an action as this, but should have made a direct attack thereon by appeal or by proceedings under section 473 of the Code of Civil Procedure. He does not allege that he was prevented from making an appearance in the divorce action, but only that he failed to appear because he believed in and relied upon defendant's promise made before the action was filed. But, assuming, as we must, that he had notice that respondent had not kept such promise, he cannot be heard to say that he was justified in relying thereon and in failing to protect himself by appearing in the action. Furthermore, he alleges in his third cause of action that "a short time" after the entry of the interlocutory decree he talked to respondent about the award, which shows knowledge of same on his part, presumably at a time when he could have sought relief under the provisions of section 473 of the Code of Civil Procedure; and he does not allege that he did not have such knowledge.

He only alleges that he did not move to set aside the award because he relied upon her oral promise, made before the action was filed.

[8, 9] Regarding the allegations in the first cause of action pertaining to plaintiff's attempt in February, 1943, to have the alimony provisions of the decree set aside, and his allegations that he "was not permitted to make a showing or to introduce evidence" showing the facts surrounding the oral property settlement, and that he was "summarily dismissed from Court," such allegations do not furnish grounds for relief in this collateral attack upon the divorce decrees which had become final long before said proceeding was instituted. While in appellant's brief said proceeding is referred to as one under section 473 of the Code of Civil Procedure, it does not appear from the complaint that it was such, and if it was brought under that section it came too late, as more than six months had elapsed since the decrees in the divorce action were made and entered. Furthermore, no appeal was taken from the order of the court dismissing said proceeding and it is not subject to review in this action. We are not advised how or in what manner plaintiff was not permitted to make a showing or upon what grounds the order to show cause was dismissed. We therefore must assume that the grounds were adequate to support the order of dismissal.

[10] Coming now to appellant's third cause of action and his allegations that a short time after the entry of the interlocutory decree he talked to respondent about the order for payment of alimony, that she then told him that she did not intend to enforce it, and that he failed to move to set aside the award because he relied upon her representation, these allegations not only show that appellant had knowledge of the award in time to move to set it aside, but that he failed to do so in reliance upon an alleged promise of respondent, who, according to his contentions, had already perpetrated a fraud upon him by asking for alimony. Said allegations furnish no ground for a collateral attack upon the judgments, nor are they sufficient to constitute an estoppel against respondent.

[11] It is said in Rottman v. Hevener, 54 Cal.App. 474, 480, 481, 202 P. 329, 332: "The rule is stated in Corpus Juris (vol. 21, p. 1142) as follows: 'The doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts.' Nor can estoppel be predicated of the oral statement alleged to have been made subsequently to the execution of the note, to the effect that that obligation would not become due until payment should be demanded. Aside from the fact that, by the express terms of his written contract, defendant specifically waived demand, the alleged representation was only of a present intention or purpose; and the rule is that the doctrine of estoppel will not arise simply from a breach of promise as to future conduct or from a mere disappointment of expectations. There was no consideration for any extension of the time of payment as fixed by the terms of the written contract. Nor did defendant alter his position by any affirmative action on his part. * * * The intent of a party, however positive and fixed, concerning his future conduct with respect to such a matter, is necessarily uncertain as to its fulfillment, and must depend upon contingencies and be subject to change and modification by subsequent events and circumstances. See Travis v. Davis, 15 S.W. 525, 12 Ky.Law Rep. 825, and Langdon v. Doud, supra [10 Allen, Mass., 433]."

That case is cited and followed in Bank of America v. Pacific Ready-Cut Homes, 122 Cal.App. 554, 562, 10 P.2d 478, 482, where it is said: "It is the general rule that, in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future. Promises as to future conduct or performance, if binding at all, must be binding as contracts. Rottman v. Hevener, 54 Cal.App. 474, 480, 202 P. 329; 10 Cal.Jur., p. 630; 21 Cor. Jur., p. 1142." Also see 19 Am.Jur., pp. 656, 657, sec. 52. And while there are exceptions to this general rule, appellant's pleading does not bring him within any exception that has come to our attention.

[12, 13] Appellant's record reveals a case where he has failed, through negligence, to avail himself of his legal remedies until too late to do so. He is, therefore, in no position to ask a court of equity to intervene to set aside or enjoin the enforcement of a judgment against him. It is said in Champion v. Woods, 79 Cal. 17, 21, 22, 21 P. 534, 12 Am.St.Rep. 126, that judgments may

be attacked on the ground of fraud and misrepresentation, but that relief will not be granted unless the party seeking same has been free from negligence; and that if a judgment has been brought about through the carelessness of the injured party he will not be relieved therefrom. Also see Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 P. 1016; Stone v. Stone, 58 Cal.App. 415, 208 P. 493; Hersom v. Hersom, 67 Cal.App. 116, 226 P. 937; State ex rel. Matt v. District Court of Fourth Judicial District, 86 Mont. 193, 282 P. 1042, 1044; Raines v. Raines, 138 Ga. 790, 76 S.E. 51, 52; 3 Freeman on Judgments, 5th Ed., sec. 1204, pp. 2500, 2501.

We agree with the trial court that plaintiff's complaint does not make out a case for equitable relief, and the judgment is therefore affirmed.

PEEK and THOMPSON, JJ., concur.

27 Cal.2d 401

PEOPLE v. WEATHERFORD.

Cr. 4664.

Supreme Court of California, in Bank.
Dec. 14, 1945.

1. Criminal law ⚷1186(4)

Where it was apparent from circumstantial nature of evidence and conflicting inferences which could be drawn therefrom that a close case was presented, any error committed by trial court which materially affected substantial rights of accused and might have resulted in miscarriage of justice must be deemed prejudicial. Const. art. 6, § 4½.

2. Criminal law ⚷636(7)

Where jury through bailiff asked court whether prosecution or defendant had burden of showing defendant's whereabouts on date of murder, to which the court answered in absence of defendant and his counsel that jury were not concerned with anything that was not in the evidence or the law as given to them by the court, such instruction through agency of bailiff violated statutory procedure. Pen.Code, §§ 1043, 1138.

3. Criminal law ⚷1134(8)

Where trial court in denying accused's motion for new trial refused to consider affidavits of jurors on ground that they could not by such means impeach their own verdict, and accused appealed only from "judgment and sentence" and not from order denying new trial, on appeal from judgment, any error in connection with charge to jury may be reviewed. Pen. Code, § 1259.

4. Criminal law ⚷1119(1)

Where jury through bailiff asked court whether prosecution or accused had burden of showing accused's whereabouts on date of murder to which court answered in absence of accused and his counsel that jury were not concerned with anything that was not in evidence or law as given to them by the court, there was sufficient foundation for presentation of point upon uncontradicted affidavits of bailiff and accused's counsel, even if misconduct of officer in charge of jury, or improper communications of judge, affidavits, testimony and depositions of jurors are inadmissible to impeach their verdict. Pen.Code, §§ 1043, 1138, 1259.

5. Criminal law ⚷1186(4)

Whether error consisting in communication by judge through bailiff to jury in absence of accused and his counsel is prejudicial, depends upon particular facts. Const. art. 6, § 4½.

6. Criminal law ⚷1186(4)

Where evidence in murder prosecution was circumstantial and there was no confession and allegedly incriminating circumstances were as consistent with innocence as with guilt, and jury through bailiff asked court whether prosecution or accused had burden of showing accused's whereabouts on date of murder to which court answered in absence of accused and his counsel that jury were not concerned with anything that was not in evidence or law as given to them by the court, which reply was interpreted by jury as meaning that matter was none of jury's business, charge and procedure employed in delivering it constituted reversible error. Pen.Code, §§ 1043, 1138; Const. art. 6, § 4½.

7. Criminal law ⚷1186(4)

"Miscarriage of justice" within constitutional provision that no judgment shall be reversed for any error in matter of procedure, unless court shall be of opinion that the error complained of has resulted in a miscarriage of justice, does not mean that a guilty man has escaped or that an innocent man has been convicted, but the phrase is equally applicable to cases where acquittal or conviction has resulted from some form of trial in which essential rights were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

8. Criminal law ⚷419(1)

Hearsay evidence is admissible only if there appears to be a necessity for that type of evidence and a circumstantial probability of its trustworthiness, and if it falls within accepted exception to hearsay rule.

9. Criminal law ⚷415(1)

In murder prosecution, decedent's declaration concerning selling of decedent's cafe interest and receipt of cash from accused were admissible under exception to hearsay rule which permits evidence of declarations by one in possession of property characterizing his possession and statements of money receipts. Code Civ. Proc. § 1870, subd. 4.

10. Criminal law ⚷415(5)

Where prosecution's theory was that landlord had murdered tenant because tenant refused to vacate premises, tenant's declarations to a friend shortly before the murder concerning tenant's intended trip into the mountains were admissible under exception to hearsay rule which covers evidence of intent.

11. Criminal law ⚷415(5)

The declarations of intent are admissible not only as evidence of probable doing of the act, but also as evidence of intent itself, even if act has not been done.

12. Criminal law ⚷342

When perpetration of a crime has been brought home to defendant, motive for its commission becomes unimportant, but the absence of motive tends to support presumption of innocence, and is a fact to be reckoned on side of innocence.

13. Criminal law ⚷1186(4)

Where prosecution's theory was that landlord had murdered tenant because tenant refused to vacate premises and in order to get possession of most of her property, exclusion of testimony that shortly before murder tenant had told a friend that landlord had purchased tenant's property and had paid cash therefor, which had been put in the bank, and that tenant was going to vacate the premises was prejudicial error. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jackson M. Weatherford was convicted of murder in the first degree, and he appeals.

Reversed and cause remanded for new trial.

Prior opinion, 160 P.2d 210.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Robert Wheeler, and J. Miller Leavy, Deputies Dist. Atty., all of Los Angeles, for respondent.

Frank C. Collier, of Pasadena, amicus curiæ on behalf of respondent.

CARTER, Justice.

Defendant appeals from a judgment of conviction entered upon a jury verdict finding him guilty of the murder on April 5, 1943, of Mary Annette Struck, and fixing his punishment at life imprisonment. He contends that numerous errors were committed in connection with the charge to the jury, that material evidence was erroneously excluded, and that the evidence adduced is insufficient to support the verdict.

Since the first two points seem to be well taken, it is unnecessary to pass upon the sufficiency of the evidence.

[1] The facts, however, must be considered in some detail because it is apparent from the circumstantial nature of the evidence and the conflicting inferences which may be drawn therefrom, that a very close case is presented, and, therefore, any error committed by the trial court which materially affected the substantial rights of defendant and might have resulted in a miscarriage of justice, must be deemed prejudicial and ground for reversal. People v. Albertson, 23 Cal.2d 550, 145 P.2d 7; People v. Dail, 22 Cal.2d 642, 140 P.2d 828; People v. Silver, 16 Cal.2d 714, 108 P.2d 4.

About two weeks after the murder, defendant reported to the police that he had just discovered the body of the victim in the cafe which she occupied as his tenant. But from the circumstances there has been woven a web of suspicion assertedly strong enough to support the conclusion that defendant was the perpetrator of the crime. The facts and circumstances fall into three time classifications: 1. Occurrences prior to April 5, 1943, supposed date of murder; 2. Occurrences between April 5 and April 18, 1943, date of defendant's reported discovery of the body; and 3. Occurrences between April 18 and November 3, 1943, date of defendant's arrest.

1. Occurrences prior to April 5, 1943.

Defendant was born in 1874 in Athens, Alabama, the son of a minister. He helped with farming and had some schooling, in all about the equivalent of a grammar school education. At the age of 26 he married, and although he and his wife have lived apart at times, the marriage still endures and they have a son and grandson. Except for his present predicament, defendant has never been arrested or been in any trouble whatsoever.

In 1909, after working at various trades, railroading and carpentry, defendant came to Southern California. Since 1922 he has been interested in building construction and real estate in Highland Park, Los Angeles. At the time of trial he was 70 years of age, and had a rental and property income of from $700 to $1,000 a month. About three years previously he had built a small restaurant called Oh! Johnnie's Cafe, located on the southwest corner of North Figueroa Street and 100 N. Avenue 50, Los Angeles, and a year and a half later he had built the Hurry Back Cafe in the same vicinity. He owned the nearby Weatherford Apartments, and also a residence located about 20 feet south of Oh! Johnnie's Cafe, with its front window facing the rear storeroom window of the restaurant.

In the spring or early summer of 1942, defendant met the homicide victim, a Mrs. Annie Struck, who ran a small restaurant on Avenue 26. She was a German alien, then 53 years of age, of normal health, and had come to this country 35 years previously. On November 1, 1942, Mrs. Struck inserted in the Los Angeles Times a personal or "lonely heart" ad reading, "LONE LADY of means, meet refined business man, 50-60. Box Y 110 Times." On November 2, 1942, defendant, then living separate from his wife, wrote in reply to the ad: "* * * I am alone and lonesome. I have plenty but it does not keep me from getting lonly, I am 60 and am very active, have a 42 Dodge Coup. If you wish phone me after 7 P.M. or better write me. Yours very truly * * *." Defendant claims that he never received an answer to this epistle and that until the fact was disclosed by the murder investigation, he never knew that the ad he answered was that of Mrs. Struck. Mrs. Struck ran the ad three or four times in a year, and replies from other men were found among her effects.

The man for whom defendant built the Oh! Johnnie's Cafe, and who was renting it at $25 a week, became ill, and the business was turned over successively to others, one a drunkard who disappeared after defendant had refinanced him to the extent of $130. In repossessing the property defendant refused to pay back wages of $135 claimed by a cook named Jack Branham, known as Three Finger Jack. Defendant states that a vegetable or groceryman told him of a woman who was looking for a new location and suggested a "lady cook." This woman turned out to be Mrs. Struck.

Later, in November, 1942, and about the time of his negotiations with Mrs. Struck, defendant moved into his residence back of the Oh! Johnnie's Cafe. His wife, with whom he was again living, helped him fix it up. However, the wife still kept her apartment over the Hurry Back Cafe and stayed there at times. About the first of December, 1942, defendant moved Mrs. Struck into the cafe. He signed a written agreement for rental to her of the cafe and equipment for five years at a rental of 7 per cent, later reduced to 5 per cent, of the gross earnings, payable monthly, the tenant to pay all water, gas, power, light, license and operating expenses and to keep the place in good repair. The restaurant was equipped with two ice boxes. Mrs. Struck brought in two more, together with a steam table, hot plate, and fireless cooker. She also brought a trailer which she parked alongside of the building. Defendant was in and around the cafe almost every day and helped Mrs. Struck install her equipment. He generally parked his car in the lot to the west or in a lot between his house and the Weatherford Apartments.

Mrs. Struck opened the cafe for business the latter part of January, 1943. Her operation of the restaurant was not profitable and defendant soon wanted to get her out. One Steve Salatich, an experienced restaurateur and operator of three cafes in the locality, had known defendant for ten or twelve years and had heard that Oh! Johnnie's was for lease. He approached defendant in late January or early February, 1943, and offered to rent the place for $60 a month for three months and $75 a month thereafter. Defendant accepted the proposal and agreed to ask Mrs. Struck to vacate. He reported back to Mr. Salatich that she had consented to go, but that she wanted a few days to get rid of the food she had on hand. Salatich arranged for Three Finger Jack to work as cook after he took over the cafe.

Several conversations were had by Mrs. Struck, defendant, and Salatich. In fact, Salatich talked to defendant personally or on the telephone almost every day and also talked with Mrs. Struck. He was eager to effect the change but Mrs. Struck was slow in taking action to vacate. On February 12, 1943, defendant stated he thought that things "looked kind of funny" at the cafe and for that reason he and his wife "broke up and moved over on Colorado Boulevard," although defendant still stayed part of the time in the apartment over the Hurry Back Cafe. Defendant claims that all of his dealings with Mrs. Struck were purely business; that he had no social association with her; and no sentimental attachment for her. There is no evidence to cast doubt upon this assertion.

On February 13, 1943, defendant rented the rear residence to a family named Farmer, and to them he made various complaints about Mrs. Struck and her reluctance to move. On February 15, 1943, he filed a suit against her for rent in the small claims court; on February 17th, he gave her written notice to pay $48 rent for the month then ending, or to quit the premises. On February 26th, he gave written notice that on and after March 1, 1943, she would have to pay $7 a week rent in advance for trailer space. He claims that the purpose of the latter notice was to keep her from sleeping in the trailer in violation of health regulations and that he offered free parking for the trailer on the back of the lot. He also claims that Mrs. Struck was not angry with him for going to court; that in fact after the session was over and he had procured judgment against her, he drove her home in his car, helping her shop enroute. She did not keep any cash register tapes or records of the business transacted in the cafe. She paid defendant $11 about the time he went to court, supposedly as rental for January and part of February, and she paid another $11 in March. Other than these two payments, defendant received no rental from her.

In the latter part of February defendant reported Mrs. Struck to the O.P.A. for sugar hoarding, and exhibited to the authorities some sugar stored in his office which he said had been put there by Mrs. Struck. He repeatedly told the Farmers she was insanitary, dirty, and filthy, and asked them to report her to the Health Department for sleeping in the trailer. He used the telephone in the Farmer house to make complaint himself in their name. He also called personally on the authorities. Some investigation was made by an inspector who told Mrs. Struck that she could not live in the trailer, but a week later he found her still living there. Defendant put a padlock on the trailer door. He claims that this was done at her request to keep her from violating the health regulations but that she later accused him of locking her out.

The Farmers testified that defendant told them, pounding his fists, that he would do "anything" to get Mrs. Struck to vacate. He spoke against her to various other people, among them Three Finger Jack. This man testified that defendant offered to pay him double the amount of the old claimed debt if he would go down and get the lease from Mrs. Struck, but that he protested against stealing; that on another occasion defendant stated he would give him "$2500.00 to get rid of that woman * * * in any way that you can; get rid of her for good." Defendant denied these offers and several witnesses attested the fact that despite Three Finger Jack's protestations of respectability, his reputation is very bad. Defendant went to the police and accused Mrs. Struck of removing his equipment, dishes and silverware. The officers referred him to the city attorney.

Some time after the middle of March defendant told Salatich that he had bought Mrs. Struck out for $350. He exhibited a memorandum of sale bearing her acknowledgment of payment and purportedly listing certain articles reserved by her and excluded from the sale. Later, and about March 25, 1943, a moving man, under defendant's direction and with Mrs. Struck's co-operation, moved one of her ice boxes, which was included in the sale, from the Oh! Johnnie's Cafe to the Hurry Back Cafe.

During March also Mr. Salatich referred defendant to M. J. Dauk, a real estate broker, with whom defendant twice discussed the problem of evicting Mrs. Struck. He complained of her in anger, said she was beating the government on income tax and might be beating him. Mr. Dauk visited Mrs. Struck and told defendant that she would surrender her lease and equipment, which were worth $1,000, for $500, but that she would hold out one ice box. Defendant said that was more than the place was worth, but appeared to be disappointed rather than angry. Paul Farmer overheard an argument between defendant and Mrs. Struck wherein she refused to give back the lease to defendant and said she would get out when "good and ready", to which defendant replied that if she did not give him the lease he was going to do something desperate.

In the Los Angeles Times of March 16, 1943, Mrs. Struck inserted another "Lonely Lady" advertisement, and replies were found among her effects, one dated March 16th and another March 22d. A torn menu was also found, on the back of which she had apparently started to draft a reply to one of the writers. This note was dated March 18th, started, "Dear Sir: Your precious letter to hand * * *," and gave her address and telephone number. Defendant claims to have seen men in the kitchen of the cafe and states that on one occasion several men, whom he suspected might be Nazi spies, were sitting around a table with documents on it and were speaking with a German accent.

Defendant claims that the last time he saw Mrs. Struck alive was on Sunday morning, April 4th, when he stopped by for coffee. At that time he heard a man's voice in the kitchen and there seemed to be loud talking. He says that although Mrs. Struck had promised to vacate on March 25th and had broken the promise, he had no argument with her, but on the contrary promised to bring her a gallon of shellac to replace some which she accused him of having taken from her; that Mrs. Struck then spoke of going away and mentioned Bishop where she had a sister.

In corroboration of these statements, defendant offered the testimony of a Miss Orpha Hayden to the effect that she had last seen Mrs. Struck on Saturday, April 3d; that Mrs. Struck had told her of getting the $350 from defendant in cash and placing it in a deposit box, and of her intent to give up the business and take her trailer up into the mountains; that she had invited Miss Hayden to accompany her. This evidence was excluded by the trial court, and the exclusion is an error relied upon for reversal of the judgment.

Defendant states that he passed the cafe at least twice on Monday, April 5th, with intent to deliver the shellac but found the place locked. He knew that the cafe was generally closed on Mondays. Mrs. Struck had had the locks changed so that he had no key by which he could enter. Although he claims to have left the shellac in his automobile, it was never found by the police. However, an item of such a purchase showed in his memorandum book.

Mr. Palmer, a regular customer of the cafe, last ate there on Monday evening, April 5th, about 8:30 p.m. He stated that Mrs. Struck sat between him and the cash register and had a cup of coffee. When he went back at 11 o'clock the next morning for breakfast, the door was locked. Defendant's tenant, Mrs. Farmer, last saw Mrs. Struck alive about 4:30 or 5 p.m. on the evening of April 5th. She was walking about a block from the cafe with four shopping bags full of groceries.

2. Occurrences from the evening of April 5th to April 18, 1943.

The apparent time of the homicide is fixed by the testimony of the Farmers' son Paul, a 15 year old high school boy. On April 5th he delivered newspapers on his route and got home about 7:30 in the evening. His father, mother, and brother had gone out and he was alone in the house. Later while listening to the radio in the living room, the window of which faces the back storeroom window of the cafe, he heard "unusual noises" of "two people arguing." He looked out the window and could tell that one voice was that of Mrs. Struck and the other was that of a man. The argument continued for about 15 minutes. He could see Mrs. Struck; also a man's arm "about up to the elbow," "leaning up against the shelves there by the window." The man's arm was covered with a "medium gray" colored sleeve. He heard Mrs. Struck say, "No, no, no," with her hands "up in front of her." The boy then ceased to listen, but in two or three minutes he heard a "very noticeable scream." He then went into the next room, and although the lights were still on in the cafe and he could see the storeroom window clearly, "something black" had been put up in front of it. He immediately turned out all lights in the house and watched for about five minutes for some one to come out of the cafe. He saw no one but in five or ten minutes the lights went out in the cafe. He then became so frightened that he turned on all the lights in the house, locked himself in, and hid under the bed clothes. It was in this excited and fearful state that the rest of the family found him when they returned home about 11 p.m., and were forced to enter through a window. In passing the cafe, Mr. Farmer noticed that all lights were out, including the neon lighted clock which ordinarily was left burning, although defendant had repeatedly told Mrs. Struck that she should turn it off because of a possible blackout. Mrs. Struck was not seen alive by any witness after this night. The condition of her body, when found, indicated that she was probably killed about April 5th.

Defendant claims that on Tuesday night, April 6th, he had a telephone call in which a man's voice said that Mrs. Struck would be back in a day or two; that about a week later the same voice called and said she was going to Bishop and it would be several days before she came back. Defendant knew that her former landlord, a man named Jones, was from Bishop, and says that he did not worry at first. Among the effects of Mrs. Struck were found two telegrams, one dated in May, 1941, from a Jones in Bishop to a Jones in Los Angeles, and one dated February 8, 1943, from the Jones in Los Angeles to Mrs. Struck.

Defendant denies having committed the murder or having hurt Mrs. Struck in any way. He claims that he was not inside the cafe on the evening of April 5th, that he was working at his place on Colorado Boulevard, and that he stayed there. Mr. Farmer testified that although the blackout cardboard had only been over the cafe window intermittently prior to April 5th, it was there permanently after that date, and that he once saw a gentleman over there that he thought was defendant's son, although he could not be positive.

Defendant passed the cafe nearly every day after April 5th. He claimed to have tried the front door a time or two and the back door at least once. He reported to Mr. Salatich that Mrs. Struck was away for a few days and that he had given her $50 more to get her out, to which Mr. Salatich replied that "it was all right, whatever he paid I would stand half the expense. * * * We were just waiting for the lady to come back. She was supposed to be away." Defendant also said that Mrs. Struck "was up to Fresno on some business and that she would be back on Tuesday and hand him over the keys." Defendant suggested having new keys made, but Salatich advised against this course, and recommended that defendant consult an attorney, and also that he confer with the police. Defendant talked over the telephone to Salatich's attorney who stated that as long as defendant was the landlord and had a bill of sale and there was no lease signed, he could go into the place.

On April 8, 1943, Patrick Shepheard, a boy who attended military school but lived nearby, was playing with another boy around the cafe. Looking in the kitchen window they could see something silver, which they thought was water, and they could hear it plainly running on dishes. They spoke of this to Mrs. Farmer, who was sitting on her porch. They opened the outer screen door of the cafe and also opened the inside door about three inches, but then ran away because they thought they were doing wrong. This door was securely shut and locked at the time of defendant's discovery of the body of Mrs. Struck. Four or five days later when Patrick was again playing around the cafe, he peered in the same window and listened, but the water was no longer running. The water meter showed a greatly increased water consumption over the days in question, but not as much as would have been consumed had the water been running during the entire period from April 5th to April 18th at the volume fixed by the boy in a police test had after discovery of the murder.

Defendant insists that he turned the water off on April 18th after he had made his discovery of the body and called officers to the scene. Under the theory of police computations the water must have been turned off about April 9th. On the latter date defendant called on Mrs. Farmer to collect her rent, and seemed ill and nervous. He sat down to write out her rent receipt, contrary to his custom. He inquired as to Mrs. Struck's whereabouts and asked if any noises had been heard at the cafe. He said that in order to keep hard feelings down he had come to bring Mrs. Struck a gallon of shellac which she falsely accused him of losing. He did not complain about her as he had theretofore done.

On April 17th, at the suggestion of Mr. Salatich, the defendant called at the Highland Park Police Station, identified himself, told of his difficulties with Mrs. Struck, exhibited the memorandum of sale, and asked if he could force his way in, saying he did not want to get in any trouble. The police first said it was a civil case and that they had nothing to do with it, but later said, according to defendant's report to Salatich, that defendant should go ahead in and they would back him up.

On the following day, Sunday, April 18th, a neighbor, Mr. Dietz, claims to have seen defendant open the front door of the cafe about 7 or 7:15 a.m., and walk inside. Some doubt was cast upon the correctness of this witness' recollection of the exact date. Defendant's story is that he went to the cafe about that time on the morning of the 18th, but found the door still locked; that he returned about 9 o'clock and gained entry by taking a wire and unhooking the screen door, and then pushing the paper out of a broken pane in the solid door, and reaching through to unlock it. The condition of the screen door indicated this tampering with the wire.

On opening the door defendant saw the dead and partially decomposed body of Mrs. Struck and apparently was shaken by the sight. He states that he immediately drove to his apartment a few blocks away and telephoned the police. This call came through about 9:30 a.m. Defendant's speech was at first somewhat incoherent. He identified himself and reported a "murder." When asked how he knew the woman was murdered, he said she was dead and that they ought to look at the body. Defendant then returned to the cafe and stayed there while the police investigated its condition. He claims that he then noticed that the water was running in the sink, and turned it off. He produced his memorandum of sale and suggested that the motive may have been to rob Mrs. Struck of the $350 he had paid her. In explanation of why he returned to his apartment to report his discovery, instead of telephoning from the cafe or some adjoining place, defendant stated that the phone in the cafe was dead when he tried to use it, and that he did not have a nickel change to put in any other phone. The police state that defendant said he wanted to "save a nickel," and they hold this remark against him. The wires of the wall telephone were found to be cut close to the instrument, but the cut was not observable upon casual observation. Defendant said he did not know this was what was wrong when he tried to use the phone.

The police officers found all windows in the cafe closed and all doors locked except the one by which defendant had gained entry. The rear window was covered by a piece of ply board. The cafe was well stocked with food and the ice boxes were filled with perishables. In the sink was an accumulation of water and dirty dishes. The general condition of the place showed no sign of preparations by the occupant to vacate but on the contrary indicated that she was interrupted while having a cup of coffee. Only her fingerprints on a not quite empty coffee cup were found in the place. A gas jet of the stove was turned on, but no gas was escaping. The gas was found to have been turned off at the outside meter with a wrench. Defendant at first denied, but later admitted turning it off on April 6th or on the 9th when he went to collect the Farmers' rent. His explanation was that he thought Mrs. Struck was away and knew she generally turned the gas off at the meter, that being easier and safer because of some defect in the inside equipment.

In the outside screen door were two holes, one rusty and one seeming to have been recently cut with a wire or similar object. On the storeroom floor was the large ball of newspaper which defendant said he pushed through the paneless aperture of the door. The body of Mrs. Struck lay in a corner of the storeroom. Although badly decomposed it showed that the immediate cause of death was a compound depressed fracture of the skull, which could have been produced by "the blunt end of a hammer, although any instrument of similar shape could do that." No bloody garments, weapons, or other incriminating objects connecting defendant with the murder were found in his possession, nor did he at any time make any confession of guilt. Alongside of Mrs. Struck's body was a garden tool, a pronged hoe, but it was the opinion of the autopsy surgeon that death could not have been caused by this instrument. The several hammers possessed by defendant were examined, but none gave evidence of having been used in the murder. The police claim that one hammer mentioned by defendant was not found. His possessions were kept at his various properties and there is no showing of any attempt at concealment on his part. Deceased's trailer was found to be in good order. It was locked but not padlocked. The padlock was found in the cafe on a shelf under the dining counter. In the trailer were two beds without mattresses, and in the cafe restrooms were two mattresses. Personal papers of the deceased were found in various places in the cafe, including her alien registration card and the answers to her lonely lady advertisement. In a purse alongside her body was found a key to the front door. There was some money in the cash register, some money alongside of it, some in a saucer, and a few pennies on top of an ice box, less than $5 all told. In a purse in a shut drawer of the kitchen table was $26 or so in currency. A search failed to reveal any trace of the $350 which defendant claims he paid Mrs. Struck. One bank account in her name was found containing about $130, and also a parcel of real property. These assets, with clothing, furniture, and the like constitute her estate.

The police claim that defendant seemed to be very nervous while they were at the cafe, and that he was talking to himself. Defendant said the crime looked like robbery to him; later, when it appeared that the money had not been taken, he said that Mrs. Struck had boy friends; also that it looked like German alien enemies had come there.

3. Occurrences between April 18, 1943, and November 3, 1943, date of arrest.

On April 19th, defendant returned to the police the key to the cafe which they had given him on finding it the day before. On April 20th, defendant brought the officers a scrap of paper on which was printed faintly in pencil "Keep your mouth shut or you will be *sorry*. I mean it." On the bottom defendant had written in scrip "over," and on the reverse side, "This was under my door Tue morning." Defendant said the note had been shoved under his door during the night and that he had had seven or eight telephone calls threatening his life. Handwriting experts attribute the entire note to defendant.

On April 21st defendant's written statement was taken by the police, at the conclusion of which he told them they were welcome to every key in his possession, and that they might search all of his properties. After this questioning defendant was released. On the next day, April 22d, defendant telephoned the police about 3 o'clock in the morning. They proceeded to his apartment where they found him in a state of excitement. He said that he had answered a knock at his door; that some one had struck him so that he became unconscious; and that when he awoke he found himself tied with a towel and with a burning quilt over his head; that he struggled free, put out the fire, and called the police. Nothing in the apartment seemed to be disturbed. The towel drawer was open. A quilt was partly burned, defendant's hair was singed slightly, and he had three or four little scratches on his forehead which looked as though they might have been made with a sharp instrument. A fully loaded revolver was also found. Defendant stated that his assailant was probably a man who had been calling him on the phone during the past week, possibly one of the men he had seen around the table with Mrs. Struck.

Defendant was taken to the hospital. On the way he was continually pinching and twisting his cheek. But the doctor, after an examination, said he could find nothing to indicate that defendant had been unconscious. Defendant was placed under arrest and after further questioning finally said he would talk no more about the matter. Around 2 or 3 o'clock in the afternoon of the same day he is said to have admitted that both his story and the previous story of finding a note under his door were fabricated. On the trial, however, he testified to the events as true and said he had never told the police that they were a hoax; that under the pressure of continued questioning and the threat of five policemen standing over him as if about to jump on his stomach, he had merely said, "Have it your own way." He said he had lost about 20 pounds and had not slept for six weeks.

The police found two copies of the so-called bill of sale whereby Mrs. Struck sold defendant certain articles for $350, and reserved others. One copy, in indelible pencil, made no reservation by Mrs. Struck of her remaining ice box; the other copy, in plain pencil, made the reservation by listing "smalest Frigidare," where the indelible pencil copy listed "smaller Table." Both contain the purported signature, "O K M. A. Struck." Defendant claims that the memorandum in plain pencil was prepared by him as a copy of the original for his files, and that Mrs. Struck signed the original. It is the theory of the prosecution, supported by the testimony of handwriting experts who studied the papers thoroughly and tested them with infra-red rays, that the indelible writing on the one was substituted by defendant for what was originally on the paper; that the signature "O K M. A. Struck" was traced by defendant in indelible pencil over Mrs. Struck's genuine signature; and that by means of this forgery defendant planned to get possession of the remaining ice box which Mrs. Struck intended to reserve from the sale. Defendant did not offer any expert handwriting testimony in rebuttal. The experts also testified that defendant was the author of both the handwriting and the printing on the "I Mean it Note," with which the police claim he perpetrated a hoax upon them.

Although only the fingerprints of Mrs. Struck were found in the cafe, defendant told the police his prints would also be found. In a conversation with the police on April 26th, he stated that he had used the garden tool found alongside Mrs. Struck's body to clean out the sewer pipe and that his fingerprints would probably be found on it. When the police stated an intention to take scrapings from under his finger nails and test them for blood, defendant said he had cut himself while shaving about two weeks previously and they would find blood under the nails of his right hand; that he also cut himself on the left side of the neck at the same time, so they would also find blood under the nails of that hand. The prosecution claims that these previous incredible, and too eager explanations are clearly indicative of guilt.

On November 3, 1943, after the grand jury had reopened investigation of the case, as defendant knew, the police looked for defendant all day and at night. They placed a small piece of wood in the jamb of the door leading to defendant's apartment over the Hurry Back Cafe, so they could tell if the door was opened. When they returned on November 4th, the wood had fallen out but they could get no reply to their poundings. When they went inside they finally found defendant running across the top of the roof 25 to 30 feet away. Defendant turned and said, "Don't shoot; don't shoot. I thought it was holdup men." It is the theory of the police that defendant had been anticipating his arrest, and preparing for flight. They found pencil notes on which he had written "Tell the attorney to get an injunction against disturbing that box" (apparently referring to the second ice box of Mrs. Struck) and had listed such items as "Pay gas Pay water. * * *" Defendant was carrying $1,149.49 in cash. He claimed that to carry so large a sum was not unusual for him. When asked if he was preparing to leave town, he denied any such plan but stated he was leaving the notes for his wife.

The prosecution finds convincing proof of defendant's guilt in the many questionable occurrences before and after the homicide. Among other things are these: The many complaints made by defendant against Mrs. Struck prior to April 5th, and his constant efforts to get her to vacate, as contrasted with his change of attitude after April 5th, when complaints ceased and he expressed anxiety about giving her a gallon of shellac. He seemed to be unusually patient over the length of her supposed absence. The man whom Paul Farmer states he heard threaten Mrs. Struck had a gray coat sleeve. Defendant wore a gray coat on week days. Between April 8th and 18th the cafe door which the boy Patrick says was unlocked became locked, and the water faucet was turned off. Defendant first denied and then later admitted turning off the gas. The neon clock was off after April 5th. Defendant showed that he knew how to enter the cafe by making use of the paneless aperture in the rear door. He could have left by the self-locking front door without leaving trace of his entry. Defendant, being a carpenter, might naturally choose a hammer as a weapon. Defendant is said to have been seen actually entering the cafe about 7 o'clock in the morning of April 18th, whereas he says he merely tried the door. He did not report his alleged discovery of the body until two hours later. Defendant was nervous with the police and promptly propounded his robbery and German spy theories. He is supposed to have forged the victim's signature on the memorandum of sale. He attempted by the alleged hoax acts to divert suspicion to others. He allegedly planned to evade arrest.

None of these incriminating circumstances are left without some explanation or contrary theory advanced by defendant. He pleads his good record, ample income, absence of any evidence directly connecting him with commission of the crime, absence of motive other than perhaps to repossess the cafe more quickly and secure the ice box, his age and nervousness under pressure of police questioning.

After a prolonged trial the case was given to the jury at 10 a. m., February 14, 1944. They deliberated that day, and on February 15, 16 and 17th. On the 17th, the testimony of Paul Farmer and that of defendant were reread to the jurors. On

February 18th, a juror became ill and an alternate was substituted in her place. Deliberations were then continued for the remainder of that day and, after two days' recess, were resumed on Monday, February 21st. At 3:09 p. m. a verdict of guilty was returned, with recommendation of life imprisonment.

[2] At some time during the deliberations, according to an affidavit of the bailiff, the forewoman requested him to ask the judge "Whether or not it was the duty of the prosecution or the defense to put the defendant on the scene." The bailiff relayed this question to the trial judge and was told by him to advise the jury "that they were not concerned with anything that was not in the evidence or the law as given to them by the court." The bailiff so advised the forewoman in the presence of the other jurors, whereupon one juror said to the bailiff, "In other words, the rest of it isn't any of our business," and the bailiff replied, "I guess that's it." Affidavits of some of the jurors aver that the question asked was "whether it was incumbent upon the prosecution to show the whereabouts of the defendant on April 5, 1943, or whether such duty rested upon the defense," and that when the bailiff apprised them of the court's reply one juror said, "In other words, its none of our business," to which the bailiff replied, "That's just about it." Defendant's attorneys were not present during this procedure and were not advised of what had taken place.

This instruction of the jury through the agency of the bailiff was obviously violative of the procedure prescribed by sections 1138 and 1043 of the Penal Code. The section first cited provides that "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have [been] called." Section 1043 states that "If the prosecution be for a felony, the defendant must be personally present at the trial."

[3, 4] In denying defendant's motion for a new trial the court refused to consider the affidavits of the jurors on the ground that they could not by such means impeach their own verdict. Defendant appealed only from the "judgment and sentence"; not from the order denying a new trial. Upon the appeal from the judgment, however, any error in connection with the charge to the jury may be reviewed. Pen. Code, § 1259. Even assuming that the courts of this state are committed to the minority rule that, without recognition of any exception relating to improper extraneous influences, misconduct of the officer in charge of the jury, or improper communications of the judge, the affidavits, testimony, and depositions of jurors are inadmissible to impeach their own verdict (Maffeo v. Holmes, 47 Cal.App.2d 292, 295, 117 P.2d 948, and cases cited; DeGarmo v. Luther T. Mayo, Inc., 4 Cal.App.2d 604, 41 P.2d 366; 20 Cal.Jur. p. 61; § 41; 90 A.L.R. 249; 146 A.L.R. 518), nevertheless in the present record there remains a sufficient foundation for presentation of the point upon the uncontradicted affidavits of the bailiff and of counsel for defendant.

[5] But respondent contends that even if the communication by the judge through the bailiff to the jury was improper, it did not affect the substantial rights of the defendant or constitute prejudicial, reversible error. Const. art. VI, § 4½. Whether error of this character is prejudicial must in the last analysis depend upon the particular facts of the individual case. Among the cases relied upon by respondent in which such error was found to be nonprejudicial is People v. Alcalde, 24 Cal.2d 177, 188, 189, 148 P.2d 627, 632, which illustrates the factual distinction. There the foreman of the jury sent the judge a note asking "May we render a decision of life imprisonment *and not eligible for parole?*" The judge returned the paper with the notation "The answer is 'No'." This court, after commenting upon the impropriety of the procedure, said: "But in this instance the court could not have responded by any other answer than 'No' or its equivalent, namely, that the jury was to be guided solely by the instructions already given. The answer of the trial judge could properly have been made over the objection of the defendant or his counsel if the ordinary procedure had been followed. The episode may not be deemed to be prejudicial and would therefore not justify a reversal of the judgment or of the order denying the motion for a new trial." However, it is also said that "courts are practically unanimous in holding that private

communications between court and jury are improper, and that all communications should be made in open court. Dodge v. United States, 2 Cir., 258 F. 300, 169 C.C.A. 316, 7 A.L.R. 1510."

[6] The present case is one in which the practice in question must not only be condemned, but must be held to have constituted reversible error. Here, there was not, as in the Alcalde and like cases, overwhelming evidence of guilt. On the contrary the evidence of defendant's connection with the murder is largely circumstantial. The possibility of his presence at the scene of the crime, assuming that it was committed on the evening of April 5th, rests upon the testimony of a frightened fifteen year old boy who merely observed a gray coatsleeve and an unrecognizable man's voice. No bloody garments, weapons, or incriminating objects were found in defendant's possession. There were no confessions of guilt. Many of the alleged incriminating circumstances are as consistent with innocence as with guilt. Where evidence is such that the jury could reasonably have arrived at opposite conclusions therefrom, a definite error in procedure may well be sufficient to turn the scales against a defendant who, without the interposition of such error, might be acquitted.

The question upon which the jurors sought the advice of the trial judge was a pertinent one—whether it was incumbent on the prosecution or the defense to show the whereabouts of the defendant at the supposed time of the murder. The reply sent in to the jury room seems to have been interpreted as meaning that the matter was none of the jury's business. This was clearly incorrect. The question touched upon the subjects of burden of proof and presumption of innocence. It indicated that the jurors were in grave doubt, and unaware of the fact that it was not essential to acquittal for defendant to establish an alibi. To instruct the jury in effect that the whereabouts of defendant at the time in question were "none of their business" was to misadvice them on one of the most vital phases of the case. Both the charge and the procedure employed in delivering it constituted reversible error under the circumstances of this case.

[7] The phrase "miscarriage of justice" (Const. art. VI, § 4½), as said in People v. Wilson, 23 Cal.App. 513, 524, 138 P. 971, 975, "does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty." See, also, People v. Albertson, supra, 23 Cal.2d at page 553, 145 P.2d 7; People v. Dail, supra; People v. Silver, supra.

Defendant contends that it was prejudicially erroneous to exclude the proffered testimony of Orpha Hayden. That witness testified that she lived across the street from Mrs. Struck and saw her practically every day; that she last ate at the cafe on Saturday, April 3d at 1 p. m.; that she then went down town and when she returned there was a "back later" sign on the door; that at 6 p. m. she went by the cafe and the sign was down, but looking through the glass she saw coffee and peas at the end of the counter where Mrs. Struck customarily sat to fix vegetables; that thereafter she inquired every day for Mrs Struck but never saw her again.

An offer of proof was then made that the witness would further testify that she "had a conversation with Mrs. Struck about two weeks before April 3rd, at which time Mrs. Struck told her that she sold Mr. Weatherford an ice box and other trinkets in Oh! Johnnie's Cafe for $350.00; that she received $350.00 in cash from Weatherford; that she asked Mrs. Struck whether Weatherford paid her in cash or check, and she said that he had money in a money belt. Then the witness asked Mrs. Struck why she kept money around there in such large amounts, and Mrs. Struck replied that she deposited that money in a safe deposit box in a bank. This witness will further testify that Mrs. Struck told her that she was going to leave Oh! Johnnie's Cafe, give up the business there, in two weeks, because she had sold out her interest in there to Mr. Weatherford. * * * Yes, this witness will further testify that Mrs. Struck told her because she sold her business and was through down there she was going to take her trailer and go in the mountains, and invited the witness to be with her, spend some time as a friend, take a rest."

It will be noted that the proffered testimony falls into two categories: (1) Declarations of the deceased victim relative to selling out to defendant for $350, and (2) Declarations relative to her intent to go into the mountains.

[8] That the evidence is hearsay is not denied; hence, it is admissible only if there appears to be a necessity for that type of evidence and a circumstantial probability of its trustworthiness (V Wigmore, p. 202, § 1420), and if it falls within an accepted exception to the hearsay rule. All of these elements are present. The death of the declarant creates the necessity for resort to hearsay and the declarations, being those of a present existing state of mind, made in a natural manner and not under circumstances of suspicion, carry the probability of trustworthiness. VI Wigmore, § 1725, p. 80.

[9] The decedent's declarations concerning the selling of her cafe interest and receipt of $350 in cash were admissible under the exception to the hearsay rule which permits evidence of declarations by one in possession of property characterizing his possession and statements of money receipts (V Wigmore, § 1460, p. 265, § 1476, p. 281; 31 C.J.S., Evidence, § 247, p. 997, § 219, p. 963), or, as codified in this state: "The act or declaration of a deceased person done or made against his interest in respect to his real property." Code Civil Proc. § 1870(4); 10 Cal.Jur. pp. 1097 et seq.

[10] The decedent's declarations concerning her intended trip into the mountains were admissible under the exception to the hearsay rule which covers evidence of intent. The trial court recognized that a deceased victim's declarations of the existence of a design, plan, or intent to do an act are admissible as evidence of the probable doing of the act, for in rejecting the evidence he said: "So far as declarations as to where she intended to go, the intent of the deceased is not in issue, because there is no evidence as to her having gone anywhere. If she had left, had been seen going away, and driven away in the trailer, there might possibly be a basis upon which the evidence as to her intent to go some particular place, or the purpose of going might be admissible. But we haven't anything to predicate that on."

[11] In so ruling, the trial court unduly restricted the exception. The declarations of the intent are admissible not only as evidence of the probable doing of the act, but also as evidence of the intent itself even if the act has not been done. As said by Mr. Wigmore, "But, as a condition of mind, the plan or design may also, it is clear, be evidenced under the present Exception by the *person's own statements* as to its existence." VI Wigmore, § 1725, p. 79 et seq.; see, also, 20 Am.Jur. § 344, p. 319; 31 C.J.S., Evidence, § 256, p. 1007; 10 Cal.Jur. p. 1073, § 315. In People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627, the deceased victim had declared her intention to go out with "Frank," which was the name of the defendant, and the declaration was held to be admissible as proof that the intention was probably carried out. The opinion in that case, however, also reviews authorities (24 Cal.2d at pages 185–187, 148 P.2d at pages 630–632) wherein decedent's declarations of intent were admitted to show merely the intent itself, regardless of whether it was carried out. In People v. Selby, 198 Cal. 426, 245 P. 426, for example, declarations were admitted to show a condition of mind to refute the suicide theory, but not to show the motive of defendant. In New York Life Ins. Co. v. Mason, 9 Cir., 272 F. 28, involving death by gunshot, the deceased's expressions negativing an intention of suicide were held admissible, and many similar cases may be found. The only elements essential to admissibility are, as stated in the Alcalde case, "that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case."

That both the declarations relative to the $350 and those relative to the intended trip are relevant to the main issue in the case, that of defendant's guilt, is obvious. The declarations of payment of the $350 rebut the theory that defendant may have killed Mrs. Struck for her equipment or interest in the cafe, and forged a receipt. Mrs. Struck's admission that defendant paid by taking money from his money belt, is strong corroboration of his own testimony. If defendant bought Mrs. Struck out, she must have intended to vacate the cafe, and he must have known of that intent. Thus, these motives for the murder are eliminated. Furthermore, if

Mrs. Struck received the $350 and it was not found after the killing, robbery may have been the motive of some killer other than defendant. Similarly, proof of intent to go into the mountains rebuts the theory that defendant killed Mrs. Struck to get her out of the cafe. It is also susceptible of the inference that she intended to vacate and that in contemplation of the trip she may have had more money in her possession than that discovered with the body. These inferences rebut the prosecution's theories of motive.

[12, 13] This case is the converse of the Alcalde case. There the evidence of intent led to an inference of identity of the defendant as the murderer; here the evidence of intent leads to the inference that defendant lacked any motive and may not have been the murderer. Although it is true that when the perpetration of a crime has been brought home to the defendant, the motive for its commission becomes unimportant (People v. Planagan, 65 Cal.App.2d 371, 150 P.2d 927, 952), nevertheless, the "absence of motive tends to support the presumption of innocence"; it is "a fact to be reckoned on the side of innocence." People v. Albertson, 23 Cal.2d 550, 557, 145 P.2d 7, 15, and cases there cited. Thus, the intention here of the deceased, bearing on the matter of motive, was clearly relevant to the issue of guilt, and the ruling of the trial court excluding evidence of such intention was prejudicial.

The judgment is reversed, and the cause is remanded for a new trial.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concurred.

SCHAUER, Justice.

I concur in the judgment upon both of the two principal grounds discussed in the opinion: (1) That it was error to, *"in effect,"* instruct the jury through the bailiff that it was "none of their business" as to whether the burden of proving the whereabouts of the defendant at the time of the crime rested upon the defendant or the People; and (2) that it was error to exclude the proffered hearsay testimony of the witness Hayden concerning admissions of the decedent against her interest in property and declarations of the decedent as to her intent to leave the premises.

In making such rulings, however, it seems but fair to the trial judge to note that as to error number 1, while the procedure was technically irregular and such irregularity provided the opportunity for the prejudice in the incident, the real mischief arose through the construction seemingly placed upon the message by the jurors and acquiesced in by the bailiff rather than from the inherent meaning of the language which, it is asserted, was actually authorized. The assertedly authorized message—that the jurors "were not concerned with anything that was not in the evidence or the law as given to them by the court"—was not technically inaccurate. A reference to the instructions shows that the jurors had been properly instructed as to the burden of proof. The incident emphasizes the wisdom of the rule which forbids informal communication with jurors after a case has been submitted to them. (Cf. McDowd v. Pig'n Whistle Corp. (1945), 26 Cal.2d 696, 160 P.2d 797, wherein, by a divided court, it was held that jurors could be permitted to separate after submission of the cause, thus creating opportunity for entirely unsupervised informal communication with each of them.) And as to error number 2, in so far as concerns excluding the hearsay statement of the decedent declaring her intent to vacate the premises, we today rely strongly upon People v. Alcalde (April 26, 1944), 24 Cal.2d 177, 185 et seq., 148 P.2d 627, which case has been decided since the trial in the case at bar.

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27 Cal.2d 424

In re PLAUT'S ESTATE.

LOW v. LOW et al.

L. A. 19038.

Supreme Court of California, in Bank.

Dec. 18, 1945.

1. Wills 🔑229

An "interested person" within Probate Code sections allowing only an interested person to contest a will is one who has such an interest in estate as may be impaired or defeated by the probate of the will, or benefited by setting it aside. Probate Code, §§ 370, 380.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Person".

2. Wills ⇨319

A court may require proof of contestant's interest in estate before proceeding with the trial of contest of a will. Probate Code, §§ 370, 380.

3. Wills ⇨215

Upon contest of a will, whether before or after probate, court will ordinarily not construe the instrument.

4. Wills ⇨215

The only issue before court on will contest is whether instrument contested is or is not the will of testator, and power to construe can be exercised only in so far as it is necessary to determination of that issue.

5. Wills ⇨215

In will contest, court was without power to determine whether trust provision in will was invalid because of suspending power of alienation beyond period allowed by law since decision would not be binding on beneficiaries.

6. Wills ⇨229

A beneficiary under an earlier will may contest a later one without first obtaining probate of the former. Probate Code, §§ 370, 380.

7. Wills ⇨263

Since a proceeding to probate or contest a will is a proceeding in rem, and at the end of the six months' period during which it may be contested, the probate of the will is conclusive, all persons whose interests may be affected should be given an opportunity to be heard. Probate Code, § 384.

8. Wills ⇨229

The requirement of the Probate Code that a will contestant be an interested person does not compel a person who has established that his interest may be impaired, to prove that it will in fact be impaired. Probate Code, §§ 370, 380.

9. Wills ⇨229

A contingent remainderman under will may contest a codicil modifying that will. Probate Code, §§ 370, 380.

10. Wills ⇨229

A residuary legatee of a trust created by will which had been probated and could no longer be contested, was an "interested person" within the Probate Code so as to be entitled to contest a codicil to the will whereby testator left a substantial sum to his nurse. Probate Code, §§ 370, 380.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Petition by Nan Low, a minor, etc., opposed by Sylvia Plaut Low and another to revoke a codicil to the will of Louis Plaut, deceased, upon the ground of undue influence. From an adverse judgment, petitioner appeals.

Reversed.

Prior opinion, 158 P.2d 745.

Roth & Brannen and David H. Paltun, all of Los Angeles, for appellant.

Julius V. Patrosso, of Los Angeles, for respondents.

Musick, Burrell & Ingebretsen, of Los Angeles, and Lawrence Livingston and H. W. S. Leeker, both of San Francisco, amici curiae, on behalf of respondents.

TRAYNOR, Justice.

Louis Plaut died testate at the age of 80 years. Surviving him were a daughter, his only heir at law, and her son and daughter. Two months before his death he added a codicil to his will giving his nurse, respondent herein, $15,000. After the admission to probate of the will and codicil, testator's granddaughter filed a petition praying that the probate of the codicil be revoked on the ground of undue influence. The probate court sustained respondent's demurrer to the petition on the ground that petitioner was not an interested person within the meaning of section 380 of the Probate Code and was therefore not entitled to contest the codicil. The petition was dismissed and petitioner appeals.

[1, 2] Only an interested person may contest a will, either before or after probate. Probate Code, §§ 370, 380. It is settled that an interested person is one who has "such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside." In re Estate of Land, 166 Cal. 538, 137 P. 246, 248; see 26 Cal.Jur. 1081; and that the court may require proof of the contestant's interest before proceeding with the trial of the contest. In re Estate of Edelman, 148 Cal. 233, 82 P. 962, 113 Am.St. Rep. 231; In re Estate of Wickersham, 153 Cal. 603, 96 P. 311; In re Estate of Land, supra.

Petitioner contends that she is entitled to contest the codicil on the ground that she is a residuary legatee under the will and that her interest as such legatee would be impaired by the payment of respondent's legacy. The residuary provisions under which petitioner claims to have an interest are as follows: "X: All the rest of my property * * * I devise, bequeath and appoint unto my trustees * * * 4: To hold * * * in trust * * * and to pay the net income thereon quarterly to my daughter Sylvia Plaut Low, for and during the term of her natural life; and upon her death to pay, transfer, set over and convey the corpus thereof to such one or more of her issue, in such estates and upon such trusts as she shall by last will and testament or any codicil thereto in writing appoint; and in default of appointment, to divide the same among her issue, equally, per stirpes and not per capita. In the event, however, that my daughter shall survive all of her issue, so that there shall not be any of her issue living, although she still is alive, then and in that event, anything hereinabove to the contrary notwithstanding, the trust shall terminate and my said daughter be entitled outright to all of the trust estate * * * 5: In the event that the issue of my daughter shall take in default of appointment, then my trustees shall during the minority of such issue continue to hold the corpus of any such issue and apply the income thereof to the support, maintenance and education of such issue during his or her minority, and shall not pay any part thereof to any guardian of such issue, and pay the corpus of such share to such issue on such issue attaining the age of twenty-one years, unless such issue shall have been born in my lifetime, in which event my trustees shall continue to hold the share of the corpus of my estate going to each of such issue, in trust, until such issue born in my lifetime shall respectively attain the age of twenty-five years, and pay quarterly the income thereon to such issue, and upon such issue respectively attaining the age of twenty-five years, my trustees shall pay, transfer and set over to such issue respectively one-half of the corpus then held in trust for him or her, and shall continue to hold the other half in trust until he or she shall attain the age of thirty years, and shall pay quarterly the income thereon to him or her, and upon such issue respectively attaining the age of thirty years, shall pay, transfer and set over to such issue the balance of the corpus to which such issue respectively shall be entitled, together with accumulations of income thereon, the trust thereupon terminating as to him or her then thirty years of age."

Respondent contends that the trust provisions attempt to suspend the power of alienation beyond the period allowed by law; that they are therefore void, and petitioner can take no interest thereunder. Thus, respondent seeks to have this court construe the provisions of the trust.

[3-5] Upon the contest of a will, whether before or after probate, the court will ordinarily not construe the instrument. In re Estate of Cook, 173 Cal. 465, 468, 160 P. 553; In re Estate of Fay, 145 Cal. 82, 87, 78 P. 340, 104 Am.St.Rep. 17; In re Estate of Pforr, 144 Cal. 121, 125, 77 P. 825; In re Estate of Murphy, 104 Cal. 554, 566, 38 P. 543; In re Estate of Cobb, 49 Cal. 599, 604; see 2 Woerner, Administration, 3d Ed., 774. The only issue before the court is whether the instrument contested is or is not the will of the testator, and the power to construe will be exercised only in so far as it is necessary to the determination of that issue. See In re Estate of Murphy, supra, and cases cited in 2 Page on Wills, 3d Ed., § 639. If this court were now to pass upon the validity of the trust, it would be passing upon an issue that ordinarily cannot be raised until a later stage in the administration of the estate. Even if the trust provisions were held to suspend the power of alienation beyond the period allowed by law, a question would arise as to the separability of any valid provision. This court would be compelled to determine whether it could allow the valid provisions to stand without making a disposition of the estate so different from that intended by the testator that he presumably would have foregone the valid provisions had he foreseen the invalidity of the others. In re Estate of Micheletti, 24 Cal.2d 904, 909, 151 P.2d 833, and cases cited therein. Thus, the court would be determining how to distribute a part of the estate that is not even disposed of by the codicil but by the will. It would be making that determination at the instance of a person, respondent, not interested in the trust, without having heard all the persons interested therein. Petitioner's mother

and brother would of course not be bound by a decision as to the validity of the trust rendered merely for the purpose of determining petitioner's interest to contest the codicil, although they were joined as defendants and would be bound by a decision as to the probate of the codicil. A determination, however, of the validity of the trust on this appeal would be persuasive authority in any future litigation by parties not now before this court.

[6] Moreover, it is not necessary that this court pass upon the validity of the trust to determine whether petitioner's interest is sufficient to contest the codicil. It is settled that a beneficiary under an earlier will may contest a later one without first obtaining probate of the former. In re Estate of Langley, 140 Cal. 126, 130, 73 P. 824; In re Estate of Phillips, 202 Cal. 490, 498, 261 P. 709; Ruth v. Krone, 10 Cal.App. 770, 781, 103 P. 960; In re Estate of Visaxis, 95 Cal.App. 617, 620, 273 P. 165; In re Estate of Munfrey, 61 Cal.App.2d 565, 567, 143 P.2d 414, 144 P.2d 370; and cases cited in Page, op.cit., § 612 and Atkinson on Wills, 464. In Estate of Langley, supra, this court pointed out that the validity of the later will, the one being contested, not the validity of the earlier, was the main issue in the case; and that, if the earlier will had been probated, the matter would be concluded and the contestant would have no occasion to attack some other will. This court held accordingly that a prima facie showing of the contestant's interest was sufficient.

[7, 8] The contest of a will is not an end in itself. It is but the first in a series of proceedings by which the contestant seeks to have his claim to all or part of the estate adjudicated. If the court allowed respondent to raise the issue of the validity of the trust, it would in effect prevent petitioner from initiating the first of these proceedings unless she established at the outset the very right that she seeks to establish in the final proceeding. Although the right to ask the court for an adjudication of his claim to the estate should be denied a person whose interest "has not even the appearance of validity or substance" (Cohen v. Sharp, 44 Cal. 29, 31), it should not be denied a person who, even though he may ultimately not receive any part of the estate, has at least established a prima facie interest in that estate. Since a proceeding to probate or contest a will is a proceeding in rem (In re Estate of Baker, 170 Cal. 578, 585, 150 P. 989) and at the end of the six-month period during which it may be contested the probate of the will is conclusive (Probate Code, § 384; see In re Estate of Allen, 176 Cal. 632, 633, 169 P. 364; In re Estate of Dorn, 190 Cal. 343, 212 P. 206; In re Estate of Parsons, 196 Cal. 294, 299, 237 P. 744), all persons whose interests may be adversely affected should be given an opportunity to be heard. In re Zimmerman's Will, 104 Misc. 516, 172 N.Y.S. 80, 94. The requirement that the contestant be an interested person prevents persons with no interest from delaying the settlement of the estate, but does not compel a person who has established that his interest "*may* be impaired" (Estate of Land, supra, 166 Cal. at page 544, 137 P. at page 248), to prove that it will in fact be impaired. In First Nat. Bank of Waldron v. Ary, 180 Ark. 1084, 24 S.W.2d 336, it was contended that three contestants whose interests were conflicting, each claiming to be an heir at law of the testator to the exclusion of the others, should litigate the merits of their respective claims before being allowed to contest the will. The court held, however, that there was no occasion for such litigation until it was determined that there was no will, and that, since each contestant had made a prima facie showing of his interest, each should be allowed to contest. See, also, In re Estate of Kenny, 233 Iowa 600, 10 N.W.2d 73; In re Harjoche's Estate, 193 Okl. 631, 634, 146 P.2d 130.

An issue similar to that presented here may arise whenever a person is required to make a preliminary showing of an interest before he is allowed to bring an action. Thus, in Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, it was contended that an action for declaratory relief could be maintained only by a plaintiff entitled to a favorable declaration. This court rejected that contention and pointed out that "the fact that the party seeking to set the judicial machinery in motion is on the wrong side of a controversy cannot be ascertained prior to the court's consideration and determination thereof." 23 Cal.2d 719, 731, 146 P.2d 673, 679, 151 A.L.R. 1062. Even in an action in equity to set aside a judgment on the ground of extrinsic fraud or mistake, the requirement that the complaint allege a meritorious case is not a requirement of an absolute guarantee of victory. Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564, 140 A.L.R. 1328.

Estate of Land, supra, is distinguishable. In that case the proponent of the contested will was allowed to raise an issue as to the contents of the earlier will, which was not before the court, but no issue was presented as to its construction. Moreover, contestant had not made a prima facie showing of his interest, so that the court would have dismissed his contest in any event.

[9-10] Like Estate of Langley, supra, the present case is a contest of a later testamentary disposition, the codicil in respondent's favor, by a person who claims to be a beneficiary under an earlier will. It is clear that petitioner has made the prima facie showing required by that case. In one respect she has made an even better showing, since the will containing the provisions under which she claims to have an interest has been probated and can no longer be contested. Respondent contends, however, that even if petitioner had an interest under the trust, that interest is at best a contingent remainder, insufficient to support the contest. Although no case has been found holding that a contingent remainderman under a will may contest a codicil modifying that will, there are explicit dicta to that effect. State ex rel. v. District Court, 25 Mont. 355, 65 P. 120; Blake v. Blake, 159 Md. 539, 150 A. 861. State ex rel. v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L.R.A.,N.S., 643, upon which respondent relies, is not in point. That case held merely that the possibility that all or some of a decedent's heirs might not appear, so that if the will were successfully contested, the property would eventually escheat to the state, did not give the state an interest sufficient for a will contest. Respondent also relies on cases from other jurisdictions in which "remote" or "contingent" interests were held to be insufficient. These cases hold merely that the heirs of a person who is entitled to but does not contest a will have not themselves such direct and pecuniary interest in the estate of the testator as will entitle them to contest his will. They have no interest, however remote, under any earlier will he may have made, nor would they take any part of his estate by intestacy if their contest were successful. In the present case, however, petitioner is at least a possible beneficiary under a plan of devolution established by the testator himself. Although she may never take any part of his estate, any part that she takes as a remainderman will come to her by the testator's will, not by succession to a beneficiary under that will. She should, therefore, be allowed to contest any testamentary disposition of the testator likely to impair her legacy.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

72 Cal.App.2d 478

PEOPLE v. ORONA.

Cr. 1941.

District Court of Appeal, Third District, California.
Jan. 7, 1946.

1. Criminal law 🔑577

A defendant, who was twice granted continuances for one week, pleaded not guilty after denial of his motion for third continuance, and was tried without objection on tenth day after date to which case was last continued, had ample time, and not prejudiced by lack of opportunity, to prepare for trial.

2. Criminal law 🔑265

Where defendant was granted seven days after his arraignment for purpose of pleading to information, without objection, denial of his attorney's motion for further time to plead, without assigning specific reason therefor, was not abuse of discretion. Pen.Code, § 990.

3. Automobiles 🔑355(10)

Evidence supported conviction of taking and driving automobile without owner's consent, with intent to deprive owner of possession thereof, contrary to felony, not misdemeanor, statute. Pen.Code, § 499b, Vehicle Code, § 503, St.1939, p. 1481.

4. Automobiles ⚷339

To constitute felony of taking and driving automobile without owner's consent, with intent to deprive him of possession thereof, defendant's intention to steal or permanently deprive owner of title to automobile need not be proved, but crime may be consummated by taking and driving automobile with intent to deprive owner of possession thereof temporarily. Vehicle Code, § 503, St.1939, p. 1481.

5. Automobiles ⚷316

The provision of Vehicle Code, defining felony of taking and driving automobile without owner's consent with intent to deprive him of possession thereof, must prevail over previously adopted and amended Penal Code provision, designating misdemeanor of taking automobile for accused's temporary use or pleasure, if statutes are irreconcilably conflicting. Pen. Code, § 499b; Vehicle Code, § 503, St.1939, p. 1481.

6. Automobiles ⚷355(10)

A jury is justified in assuming that one taking and driving automobile without owner's consent took it with felonious intent to deprive owner of its possession, contrary to felony statute, though he afterwards abandoned it, and felonious intent may be established from circumstances of case. Vehicle Code, § 503, St.1939, p. 1481.

7. Assault and battery ⚷92

Evidence supported conviction of felonious assault by means of force likely to and actually producing great bodily injury, rather than mere misdemeanor of simple assault, though deadly weapon was not used. Pen.Code, § 245.

8. Assault and battery ⚷55

An assault by means of force likely to produce great bodily injury may be accomplished, though attack is made only by use of hands or fists. Pen.Code, § 245.

9. Assault and battery ⚷95

In prosecution for assault by means of force likely to produce great bodily injury, whether means employed by defendant was likely to produce such injury is for jury to determine from manner in which assault was made and circumstances of case. Pen.Code, § 245.

◆

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Marguerito Orona was convicted of taking and driving an automobile without the owner's consent, with intent to deprive the owner of his title to and possession of the vehicle, and of assault by means of force producing great bodily injury, and he appeals.

Affirmed.

Marguerito Orona, in pro. per., for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was convicted by a jury of two counts of an information, together with two prior convictions of other felonies. The information contained three counts. The second one charged him, under Section 4532 of the Penal Code, with escaping from an Industrial Farm in which he was imprisoned. On motion of the defendant, he was granted a separate trial on that charge, and it is not involved on this appeal. The first count, of which the defendant was convicted, charged him, under Section 503 of the Vehicle Code, St.1939, p. 1481, with taking and driving an automobile, without consent of the owner, with intent to deprive the owner "of his title to, and possession of, said motor vehicle." The third count, of which he was convicted, charged the defendant, under Section 245 of the Penal Code, with an assault upon Jean Harper, "by means of force likely to and which did produce great bodily injury." The defendant pleaded not guilty to counts one and three, and admitted the alleged prior convictions of other felonies. A motion for new trial was denied. At the trial the defendant was represented by counsel. From the judgment of conviction, and from the order denying his motion for new trial, the defendant has appealed. On appeal the defendant appears in proper person.

For grounds of reversal of the judgment the appellant contends that the court abused its discretion in failing to grant him "an opportunity to properly prepare his case for trial"; that the court erred in denying his motion to dismiss the first count of the information after the prosecution's evidence had been closed, on the ground that there was an absence of proof that the defendant took and drove the automobile with intent to deprive the owner "of his title" to the vehicle, and that the court erred in refusing defendant's motion to dismiss the third count of the information, on the ground that the proof shows he did not make an assault under Section 245 of the Penal Code upon Jean Harper with a deadly weapon, and that he was therefore guilty of no higher offense than a simple assault. It is asserted the verdicts and judgment of convictions of the first and third counts of the information are not supported by the evidence.

We are of the opinion there is no merit in this appeal. There is an abundance of evidence to support the verdicts and judgment of convictions of the first and third counts of the information. The defendant admitted the two prior convictions of other felonies as alleged in the pleading. The defendant appears to have had a fair and an impartial trial. He was represented throughout the proceedings by an attorney. At the trial he did not take the witness stand in his own behalf.

[1] The defendant was granted ample time in which to prepare for his trial. He first appeared in court on May 21, 1945, at which time the court appointed an attorney to represent him, and continued the case to May 28th. On the last mentioned date he appeared with counsel and was duly arraigned. Without objection, the case was then continued for plea to June 4th. On the last mentioned date the defendant appeared in court with his attorney, and moved for continuance of the plea for another week, without giving any definite reason therefor. That motion was denied. Without objection the defendant then pleaded not guilty to the three counts of the information and he then admitted the two charges of prior convictions of other felonies, as alleged. Subsequently, on motion of the defendant, he was granted a separate trial upon count two of the information. On the last mentioned date, at his request, another attorney was associated as counsel for the defendant. Without objection, the case was then formally set for trial for June 14th. Thereafter the defendant appeared in court with his attorney and waived "his statutory time for trial" on said count two of the information, which was thereupon set for trial for June 22, 1945. The trial on counts one and three was heard on June 14th, without objection on the part of the defendant. It does not appear that the defendant was prejudiced by lack of opportunity to prepare for his trial. No showing is made on appeal in that regard.

[2] The defendant may not complain of the denial of his motion for extension of time to plead. He was arraigned on May 28th. His attorney was then present. Without objection the time for plea was then set for June 4th. Section 990 of the Penal Code declares that the defendant, if he requires it, shall be granted "a reasonable time, not less than one day, to answer the * * * information." He was granted seven days for that purpose. On June 4th his attorney asked for further time to plead, but assigned no specific reason therefor. That motion was denied. There was no abuse of discretion in denying further time to plead. No prejudice to appellant's defense appears or is suggested on this appeal. The court did not err in denying that motion.

[3-5] The appellant contends that he was erroneously charged and convicted of feloniously taking and driving the automobile of Wood Young, without his consent, and with the intention of depriving the owner of the possession of his machine, contrary to the provisions of Section 503 of the Vehicle Code. It is asserted that the offense of which the defendant was convicted amounted to no more than a misdemeanor under Section 499b of the Penal Code. We are of the opinion the evidence amply supports the felonious taking of the machine contrary to said section of the Vehicle Code.

It appears without conflict that Wood Young owned the Dodge machine in question; that he lived in the Suisun Valley, near Rio Vista; that he was not acquainted with the defendant, and that he did not consent that he should take or use the car on April 26, 1945, or at any other time. The owner left his machine with Mr. and Mrs. Halloran, employees on his ranch near Rio Vista, for their temporary use. On the afternoon of April 26th, Mrs. Ethel Halloran drove to Rio Vista, about three o'clock in the afternoon of that day, to meet her daughter, Florence, who was attending the Rio Vista Grammar School. She parked the car at the curbing in front of the Mollison residence, where she was to meet her daughter. When she entered the house, she left the key in the car. She went upstairs. About four o'clock her daughter arrived from school. Recognizing their machine, and observing the defendant sitting in the car, she supposed he had come with her mother to take her home. She opened the door of the machine and threw her coat on the seat, asking the defendant where her mother was. He replied that "she had gone." She then ran into the house, but glancing out, she saw the defendant driving away. She ran to the door and "hollered" at him, but he disappeared with the automobile.

About nine o'clock that evening the defendant drove the car to Fairfield, about twenty miles from Rio Vista. He stopped in front of the Beatty residence, where Jean Harper was taking care of the children of Mr. and Mrs. Beatty. The parents were absent for the evening. Jean was also a stranger to the defendant. When he honked the horn of the automobile, thinking it was a friend who was calling for her Jean went out to the car and he tried to persuade her to get in and ride with him, which she refused to do, and she immediately went into the house. He followed her on the false pretense that he was a friend of the Beattys and that he wanted to leave some money or a note for them. When he discovered that the owners of the home were gone he attempted to entice Jean into a bedroom, and upon her refusal to accompany him, he made a brutal attack upon her, striking her with great violence about her face, wrenching her arm and otherwise seriously injuring her. A struggle ensued between them. He finally grasped her and threw her over a piano stool. Her frantic screaming brought a neighbor to her assistance and the defendant fled, leaving the car in front of the house. The Chief of Police of Fairfield was called and he went immediately to the Beatty home where he found the machine parked in front of the house. The coat of Florence Halloran was then on the front seat. It was subsequently returned to the owner. Later that evening, Manuel Perez, who lives in Fairfield, was driving his car along the street in the neighborhood of the railroad depot. Several other boys were with him. They overtook the defendant, who was walking. He asked them for a ride. They drove over to Suisun and stopped on the main street. The defendant got out and walked away. From his conduct, the boys became suspicious of the defendant and they followed him. The defendant crawled under a building to hide. The boys informed a policeman, who arrested the defendant and took him to the county jail.

The foregoing facts satisfactorily prove that the defendant took and drove the automobile belonging to Wood Young from Rio Vista to Fairfield, without his consent, with the intent to deprive him, at least temporarily, of the possession of the vehicle, contrary to the provisions of Section 503 of the Vehicle Code. To constitute the offense prohibited by that section, it is not necessary to prove that it was the defendant's intention to steal the machine, or to permanently deprive the owner of his title thereto. The crime may be consummated when one takes and drives a vehicle, not his own, without the consent of the owner, "with intent to * * * temporarily deprive the owner thereof of his * * * possession of such vehicle." People v. Zervas, 61 Cal.App.2d 381, 142 P.2d 946. That section specifically declares such offense to be a felony whether the vehicle is so taken "with or without intent to steal the same." There is a distinction between grand theft of an automobile, Penal Code, sec. 487, and the offense prohibited by Section 503 of the Vehicle Code, as above suggested. There is also a distinction between the offenses prohibited in Section 499b of the Penal Code and Section 503 of the Vehicle Code. The former has been called the "Joy-ride" statute. It does not require proof of the intent to "deprive the owner" of either the "title to or possession of such vehicle." People v. Neal, 40 Cal.App.2d 115, 118, 104 P.2d 555. The misdemeanor designated by Section 499b of the Penal Code may be accomplished by merely taking the machine for the temporary use or pleasure of the accused person for a "joy-ride". If it be assumed that the offenses, or the penalties, provided for in Section 503 of the Vehicle Code and Section 499b of the Penal Code, are irreconcilably conflicting, which we do not concede, then, under the well known rule of construction, the Vehicle Code provision must prevail since it was last adopted and amended. People v. Dobbins, 73 Cal. 257, 14 P. 860, 861; 59 C.J. 1101, § 649. In the Dobbins case, supra, the Supreme Court said:

"It is an old and well-settled rule that when two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail."

Section 499b was first adopted in 1905. It was last amended in 1935. Stats.1935, p. 1337. Section 503 of the Vehicle Code was last amended in 1939. Stats.1939, p. 1481. If the two sections are deemed to be inconsistent, the latter prevails. The defendant was therefore properly convicted of the felony. In re Kepford, 125 Cal. App. 675, 14 P.2d 145.

[6] When a defendant takes and drives an automobile, without the consent of the owner, even though he afterwards abandons it, the jury is justified in assuming that he took the car with the felonious intent to deprive the owner of its possession. The felonious intent may be established from the circumstances of the case. People v. Jeffries, 47 Cal.App.2d 801, 808, 119 P.2d 190; People v. Deininger, 36 Cal. App.2d 649, 98 P.2d 526.

[7] With respect to defendant's conviction of the third count of the information, there is no merit in his contention that he was merely guilty of a misdemeanor instead of a felony in his assault upon Jean Harper, a young school girl. The third count of the information charged him with an assault "by means of force likely to and which did produce great bodily injury." It is conceded he did not use a weapon in committing the aggravated assault upon the young girl. He did, however, beat her brutally with his fists about her face, bruising her seriously and causing injuries from which she did not recover for several days. He forced his hand into her mouth, tearing her throat. He twisted her arm, and injured her collar bone. He seized her by the neck and threw her over a piano stool. When she screamed frantically, he finally fled from the home, leaving his stolen car parked in front of the dwelling. A neighbor, Mr. Teeters, hearing her screams, came to her rescue. Doctor Gordon Bunny, a physician of Fairfield, examined her injuries the following day and confirmed the fact that she then had evidence of the violent struggle and injuries. He found that she was suffering from contusions about her face, swollen eyes, abrasions in her mouth, a stiff neck and an injured arm as the result of the beating.

The assault occurred in an effort on the part of the defendant to commit rape. It was about nine o'clock at night. Miss Harper was taking care of two young children at the home of Mr. and Mrs. Beatty, while they were absent for the evening. The defendant, having taken the car, without consent, from the street in Rio Vista, where it was parked, drove it to Fairfield, a distance of about twenty miles, and stopped in front of the Beatty residence. He honked the horn. Thinking that the horn was a summons from a friend, Miss Harper went out to the machine, in which the defendant then sat. She discovered that he was a total stranger to her. He asked her who was at home. When she replied that the owners were absent, and she returned to the house, he followed her, with the false statement that they were his friends, and that he wanted to leave some money belonging to them. He asked for some note paper and pretended to write them an explanation. The defendant then attempted to entice the young lady into a bedroom. She refused to go into that room, and vigorously resisted his importunities. A struggle ensued. He violently assaulted her, striking her repeatedly and forcibly with his fists about the face. He thrust his hand into her mouth and tore her throat. He wrenched her arm and injured her collar bone. He beat her unmercifully, and finally threw her over a piano stool. She was seriously injured and suffered from the beating for several days thereafter. A physician was called to treat her injuries.

[8, 9] Clearly the assault was perpetrated "by means of force likely to and which did produce great bodily injury", in spite of the fact that a deadly weapon was not used. In fact, the assault did result in great bodily injuries. It constituted a felonious assault under the provisions of Section 245 of the Penal Code. It has been repeatedly held that an assault by means of force likely to produce great bodily injury may be accomplished although the attack is made only by use of the hands or fists. People v. Bumbaugh, 48 Cal.App.2d 791, 797, 120 P.2d 703; People v. Kimmerle, 90 Cal.App. 186, 189, 265 P. 525; People v. Nudo, 38 Cal.App.2d 381, 101 P.2d 162; People v. Blake, 129 Cal.App. 196, 205, 18 P.2d 399; People v. Hinshaw, 194 Cal. 1, 17, 227 P. 156; 3 Cal.Jur. 202, Sec. 19; 6 C.J.S., Assault and Battery, § 79, subsec. b, p. 937. It is for the jury to determine from the manner in

which the assault is made and from the circumstances of the case whether the means employed is likely to produce great bodily injury. The jury determined that issue against the defendant. The facts of this case support the finding of the jury in that respect.

For the reasons previously stated, we are satisfied the court properly denied defendant's motion for a new trial.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

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72 Cal.App.2d 487

BUSH v. BUSH.

Civ. 3426.

District Court of Appeal, Fourth District, California.

Jan. 8, 1946.

Rehearing Denied Jan. 29, 1946.

Hearing Denied March 1, 1946.

1. Divorce 🔑130

Evidence of wife's conduct displaying loss of affection for husband sustained finding of extreme cruelty entitling husband to a divorce, notwithstanding absence of direct testimony as to husband's suffering.

2. Divorce 🔑130

Conflicting evidence sustained findings that wife told husband she no longer loved him and would no longer live with him, and that she moved to beach resort in order to carry on unstated activity as constituting extreme cruelty, entitling husband to a divorce.

3. Divorce 🔑127(4)

Husband's charge of extreme cruelty as ground for divorce was sufficiently corroborated, in absence of collusion.

4. Divorce 🔑127(4)

Only slight corroboration of plaintiff's testimony showing ground for divorce is required in absence of collusion.

5. Divorce 🔑253

Findings as to extreme cruelty of wife, which were amply supported by evidence, sufficiently supported judgment awarding more of community property to husband than to wife.

6. Divorce 🔑296, 298(6)

While mother should generally be given custody of a child of tender years, other things being equal, a large degree of discretion is left with trial court. Civ.Code, § 138(2).

7. Divorce 🔑298(6)

Trial court did not abuse its direction in awarding custody of child approximately two and a half years of age to father, where mother had tired of home life and of work of caring for child and had sought outside activity and the company of a man other than her husband and showed no disposition to change her conduct or her attitude toward her responsibilities in life. Civ.Code, § 138(2).

8. Divorce 🔑296, 303(1)

The matter of custody of minor child of divorced parents is necessarily in the sound discretion of the trial court but is subject to change at any time when conditions warrant. Civ.Code, § 138(2).

9. Divorce 🔑303(2)

Where divorce judgment awarded custody of minor child to father, any change with respect to custody of child should rest upon and be governed by whether mother changes her attitude toward her responsibilities and her manner of living. Civ. Code, § 138(2).

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action for divorce by Ronald A. Bush against Pauline Bush. From a judgment granting plaintiff a divorce, custody of the minor child, and approximately five-eighths of the community property, defendant appeals.

Judgment affirmed.

Head, Wellington & Jacobs and Winthrop O. Gordon, all of Santa Ana, for appellant.

Rutan & Tucker, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The defendant wife appeals from a judgment awarding her husband a divorce, custody of the minor child and approximately five-eighths of the community property. The parties were married in 1937; the child, a boy, was born in July, 1941; the parties separated on November 15, 1943; and this action was commenced on December 31, 1943.

The case is unusual in that the appellant in no way complains of the conduct of her husband. She testified that he worked steadily and brought his wages home; that he was helpful about the house and in caring for the baby; that he took her to shows and dances; and that he never quarreled or used harsh language toward her. He drove a bakery wagon, receiving around $200 a month and after his regular hours worked part-time at another place. The parties in about six years accumulated property worth between $8,000 and $9,000, including a nice home and furniture. The home was worth $7,000 and the encumbrance on it had been paid down to $900.

The baby was sickly from the time of his birth and the evidence clearly indicates that the appellant became dissatisfied with remaining in the home and caring for the baby. Two witnesses testified that she told them she would not have had the baby had she known how much trouble it was. When the baby was about a year and a half old she took a job against her husband's wishes and against the advice of her grandmother and aunt, her nearest relatives. She went to work as bookkeeper for an officer's mess at a Marine Base near Santa Ana. From that time her attitude toward her husband rapidly grew worse, although it had begun to change prior to that time.

About a year after the baby was born the appellant replaced the double bed the parties had used with twin beds. There is evidence that the appellant frequently refused to permit her husband to get in bed with her, giving as her reason "There are times when people have children that they don't care for each other any more, and that is the way she felt toward me." About this time the appellant began to go to places in the evenings which were different from those to which she had said she was going, at times going to dances in Los Angeles and Long Beach without her husband. She also tried to get him to join the army and when he had a week's vacation insisted that he go on a hunting trip rather than remain at home, which he wanted to do. A month before the separation these parties went to a dance with another couple. The appellant refused to dance with her husband after the first dance saying she was too tired, but she continued to dance with the other man when his turns came. On the way home she told her husband that she had not had a good time and that "I never enjoy going anywhere with you."

After the appellant went to work at the Marine Base she began to go around very considerably with a certain sergeant. She brought his picture home and put it on her dresser, brought him to the house at times, stayed late at the Marine Base and admits drinking there, and made trips with him to Los Angeles and other places. The respondent testified that he saw her kissing this sergeant while en route to Los Angeles in an automobile. While the appellant denied this she admitted kissing the sergeant on other occasions. She also admitted that she corresponded with the sergeant both before and after the separation; that she had his picture in her home; that she had taken trips with him to Los Angeles and Long Beach; that he helped her move from Santa Ana to Laguna Beach; that she took him to the train in Los Angeles when he left; and that she was still corresponding with him. On one occasion, after the separation, two witnesses testified that they saw the appellant and this sergeant entering the appellant's home in Santa Ana about 10 o'clock at night and that the sergeant had not left at 2:30 o'clock the next morning.

When the parties separated on November 15, 1943, the appellant told the respondent that she wanted him to leave. He told her that he would not leave without taking the baby with him. She objected at first, but later consented. He took the baby and went to his mother's home and his mother took care of the baby for some nine or ten months. Apparently, the appellant had the baby for a month or two immediately preceding the trial. The appellant remained in the family home in Santa Ana for some months after the separation and changed the locks on the doors so her husband could not get in. Later, she left the house vacant and removed to an apartment in Laguna Beach, for which she paid $69 a month. While she testified that she made this move because she thought the house was going to be sold other portions of her testimony strongly indicate other and more personal reasons for the change.

The court found that the appellant had been guilty of extreme cruelty and that she had wrongfully and without cause inflicted upon the respondent grievous mental cruelty. It was then found that the acts constituting extreme mental cruelty were in part as follows: that on November 15, 1943, the appellant told the respondent that she no longer loved him, would no longer live with him and wanted him to leave their home; that prior thereto she had on numerous occasions requested the respondent to live apart from her and requested him to join the army and had requested him to spend his vacation away from their home; that she secured employment at a military base and not only spent her working hours away from home but also remained away in the evenings on numerous occasions; that some months prior to November 15, 1943, she became acquainted with (the sergeant) and wrote to him and brought his picture home; that before this action was brought she accompanied this man from Santa Ana to Los Angeles and on the trip kissed him several times, all of which was known to the respondent; that at the time of requesting the respondent to leave the home the appellant consented to his taking the child with him; that the appellant remained in the home which was fully furnished for several months, and then at considerable expense moved to an apartment in Laguna Beach where it would not be as convenient to learn of her conduct as it would have been in her old home in Santa Ana, and which apartment was in a beach resort where the appellant would have more opportunity for amusement and association with other parties; that several weeks prior to November 15, 1943, the appellant told the respondent that she was going to a show with a girl friend and instead went to amusement places in Long Beach and did not return until after 2 o'clock a. m. of the following morning; that while the respondent was away the appellant went to a dance in Los Angeles and upon his return told him nothing about going to the dance; that on one occasion when they went to a dance with another couple the appellant told the respondent that she no longer wished to dance with him but continued to dance with the other man who accompanied them, and on the way home told the respondent that she did not enjoy dancing with him and did not enjoy going to parties with him; that on many occasions the appellant refused to allow the respondent to come in bed with her and if he was allowed to come she acted in a cold and distant manner, and on one occasion she told him that since the birth of the child her feeling and attitude toward him had changed; that beginning with a number of months prior to their separation the appellant engaged in a course of conduct which was designed by the appellant to cause the respondent to leave her; that on numerous occasions she told him that she no longer loved him; that for about two months prior to the separation she treated the respondent in a cold and distant manner; and that all of the acts above mentioned are but parts of a general course of conduct, all of which constituted extreme cruelty, and that said course of conduct and said acts and each of them wrongfully inflicted upon the respondent grievous mental suffering.

It was then found that the minor child of the parties was sickly in his early years and was weak at the time the appellant took work; that regardless of this fact the appellant left the child in the care of others while she was away from home at work, and at least on one occasion the child became seriously ill while in the care of others; that the appellant, prior to the bringing of this action, associated with at least one man who was not her husband; and that she is not a fit or proper person to have the care and custody of the child.

[1] The appellant contends that the court's findings of extreme cruelty are not supported by the evidence and that these findings are not sufficient to support the judgment for divorce. It is first argued that the evidence is insufficient because it does not appear that the respondent or any person in his behalf directly testified that the acts of the appellant, as shown by the evidence and as found by the court, caused him "grievous mental suffering." It does not appear that the respondent was asked any such question or that he testified directly to that effect. However, to a man of the kind which the entire evidence shows the respondent to be, the acts of the appellant were such as to inevitably cause grievous mental suffering. Not only was the court justified in drawing that inference from the evidence but no other inference

could reasonably be drawn. The respondent was before the court, the facts were fully brought out, and it would have added nothing for the respondent to have testified as to his mental suffering, a thing which clearly appeared both from his testimony and from his actions over a period of months.

[2] It is further argued in this connection that some of the findings of extreme cruelty are not supported by the evidence, and that facts appearing in the testimony but not specifically found by the court may not be taken into consideration. The court found the ultimate facts and some of the probative facts. Some of the other probative facts, although not specifically found, do furnish support for the ultimate facts found. Specifically, it is argued that the findings that the appellant told the respondent that she no longer loved him and that she would no longer live with him, and that she moved to Laguna Beach "in order to carry on certain unstated activity" are not supported by the evidence. In these, as in some other matters, the appellant relies only on her testimony, which was not accepted by the court. While there may be a slight variance with respect to the exact language used, the court having summarized the effect of portions of the evidence, these findings are fully supported by the record. The essential findings to the effect that the appellant completely changed her attitude toward the respondent sometime after the birth of the baby, that she lost her affection for him, that she told him so in words and much more so by her actions, that she grew tired of caring for the baby and the confinement of the home, that she preferred employment elsewhere, and that she continued to associate with another man in a manner entirely improper for a married woman were not only fully supported by the evidence but were, in fact and in their essence, admitted by the appellant in her own testimony. Many of the facts which were not specifically found fully support the court's ultimate findings.

[3, 4] There is no merit in the further contention that there was no corroboration of the respondent's charges of extreme cruelty. Where there is no collusion, as was the case here, the corroboration required is slight. Ungemach v. Ungemach, 61 Cal.App.2d 29, 142 P.2d 99. Aside from the many admissions of the appellant most of the facts found were corroborated by other witnesses and it could not be held that there is any lack in this regard.

[5] The appellant's further contention that the court was without power to give more of the community property to the respondent than to the appellant since no extreme cruelty was established is sufficiently answered by what we have already said. The findings, which are amply supported, sufficiently support the judgment with respect to the matter of extreme cruelty.

[6] The only other point raised is that there was no competent evidence "which tended to show any loose or immoral conduct on the part of the defendant wife, or any neglect that either injured the health or physical well-being of her own child," and that it follows that the court abused its discretion in depriving her of the custody of the child. Section 138, subd. (2) of the Civil Code provides that neither parent is entitled to the custody of a child as of right but that "other things being equal" it should be given to the mother where the child is of tender years. While that is the general rule the qualifying clause in the statute "but other things being equal" necessarily leaves a large degree of discretion with the trial court. Phillips v. Phillips, 48 Cal.App.2d 404, 119 P.2d 736; Taber v. Taber, 209 Cal. 755, 290 P. 36.

[7-9] The situation here, while an unfortunate one, was a practical one which the court had to meet. The father had been keeping the child at the home of his mother, who was 51 years old and who, as the appellant herself testified, was taking perfect care of the child. While it may be true, as the appellant argues, that there is no evidence to show that she was actually immoral or vicious it does appear that she was entirely responsible for breaking up what seems to have been an unusually good home. It seems to be the old story where a young woman not only desires to live her own life, but claims an inherent right to live it at the expense of others. While this mother may not be inherently bad it appears, beyond question, that she tired of her home life and of the work of caring for the baby and that she not only sought outside activity, including some degree of night life, but that she preferred to go around with a man other than her husband, carrying on a relationship with him

which was decidedly improper and one which, if persisted in, could have no result other than to break up this home. During the interval between the separation and the trial of the action she continued this outside relationship, and there is not the slightest evidence in the record that she was either changing her conduct or had in any degree changed her attitude toward her responsibilities in life. Under these circumstances and in the absence of any such change in her attitude, or in the conditions under which she was living, it cannot be held, as a matter of law, that the court abused its discretion in awarding custody of the child to the respondent, at least for the time being. That is a matter which not only must necessarily be in the sound discretion of the court, but it is one which is subject to change at any time when conditions warrant. However, any change with respect to the custody of this child should properly rest upon and be governed by whether or not the appellant changes her attitude toward her responsibilities and her manner of living.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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72 Cal.App.2d 452

GRAHAM-HALL SHEET METAL WORKS, Limited, v. DOUGLAS.

Civ. 7188.

District Court of Appeal, Third District, California.

Jan. 2, 1946.

1. Evidence 🔑601(4)

In suit for breach of contract by subcontractor to supply floor furnaces to contractor, evidence did not support finding that reasonable market value of furnaces was only $19 apiece, but established that value was in excess of $30 each.

2. Damages 🔑121

Where contract to install floor furnaces and plumbing in buildings, after partial performance, is abandoned by subcontractor, the aggrieved party is entitled to damages in an amount compensating him for detriment incurred thereby and ordinarily such damages would be the additional cost of materials and labor required to complete the agreement as specified in the contract. Civ.Code, § 3300.

3. Damages 🔑120(3)

On subcontractor's breach of contract to furnish floor furnaces and plumbing equipment for buildings being constructed by contractor, contractor's damages for breach of contract were not limited to the market value of the equipment, but he was entitled to recover additional cost incurred in purchasing and installing equipment of price specified in contract, and, if contractor was unable to purchase equipment because of the war, his damages might be the difference in the contract price with the owner of the building with and without the equipment. Civ.Code, §§ 3300, 3354.

4. Appeal and error 🔑1177(1)

In suit for breach of contract, where District Court of Appeal was of opinion that aggrieved party was entitled to recover, but was unable to determine proper amount of damages, cause was required to be remanded for retrial.

Appeal from Superior Court, Napa County; Harold Jacoby, Judge.

Suit by Graham-Hall Sheet Metal Works, Limited, a corporation, against A. A. Douglas for the reasonable value of floor furnaces, labor, and materials supplied, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed and cause remanded.

King, King & Ghidella, of Napa, for appellant.

Francis H. Frisch, of Napa, for respondent.

THOMPSON, Justice.

The defendant and cross-complainant, A. A. Douglas, has appealed from a judgment of $436.92, which was rendered against him in a suit for the reasonable value of floor furnaces, labor and materials supplied by the plaintiff incident to the construction of several houses.

The defendant, Douglas, was a contractor, who was constructing several houses at Napa. Plaintiff contracted in writing to supply Douglas with seventy-seven floor gas furnaces with a minimum capacity of "30,000 BTU," and other materials and labor. It furnished only twelve furnaces. The plaintiff brought suit for $1,632.37. The complaint was couched in two counts. The first count was based on a claim for the reasonable value of equipment, materials and labor supplied. The second cause was founded on an alleged open book account. The defendant, Douglas, filed an answer denying the material allegations of the complaint. He also filed a cross-complaint, asking for damages for breach of contract in the sum of $749.85, consisting chiefly of failure to supply sixty-five furnaces of the reasonable value of $30 apiece.

The cause was tried by the court sitting without a jury. It found that the written contract, set out in the cross-complaint, was executed and binding; that plaintiff breached the contract by failing to supply sixty-five furnaces, but that the reasonable value of those furnaces was only $19 apiece, instead of $30, as alleged by the defendant. There is no controversy regarding the other items of damages. The court accordingly awarded plaintiff judgment for said sum of $1,632.37, together with the further sum of $83.57, aggregating $1,715.94, from which the court deducted, as damages for breach of contract, sixty-five furnaces at $19 apiece, amounting to $1,235, together with an item of $44.02, being the cost necessarily incurred by the defendant for repairs on account of default of the plaintiff, aggregating the sum of $1,279.02. Judgment was therefore entered in favor of plaintiff for the balance amounting to $436.92. From that judgment this appeal was perfected.

It is contended the findings and judgment are not supported by the evidence for the reason that there is no competent proof that the reasonable market value of the furnaces was only $19 apiece. On the contrary, it is asserted the uncontradicted evidence shows that the market value of those furnaces was in excess of $30 each. No other issue is raised upon this appeal.

[1] We are convinced there is no competent evidence that the reasonable market value of the furnaces was only $19 apiece. The uncontradicted evidence is that they were worth in excess of $30.

The defendant, Douglas, testified that he was a contractor and builder of houses, and that he knew the market value of Atlas 30,000 BTU floor furnaces, like the ones plaintiff agreed to install in his dwelling houses in 1942 and 1943, when the default occurred. He said that the "30,000 BTU" indicated the capacity, required by the contract, of "British thermal units" and that "the price f.o.b. San Francisco was $33.60" apiece. Mr. E. C. Fanning, the Vice President of the International Sales Company, which sold the furnaces in question to plaintiff, testified that plaintiff paid his company $453.60 for the twelve furnaces which were installed in defendants' houses, which would be exactly $37.80 apiece. He explained that the check from plaintiff, dated December 29, 1942, for the sum of $227.60 was only about one-half of the amount received in payment for the twelve furnaces which plaintiff installed in defendant's houses; that his company also later received from plaintiff the further sum of $226 which made a total payment of $453.60, or $37.80 each. He testified that their catalog or listed price for such furnaces was $63, from which the Graham-Hall Company was given a discount of 40% and an additional credit of 5, 5 and 5 per cent; that when distributors buy at one time "a quantity of 100, they get a discount of 40, 20 and 10" per cent.

The foregoing testimony is very conclusive evidence that the market value of Atlas floor furnaces, like the ones provided for in the contract, when purchased by distributors, was in excess of $30 each. $37.80 was the actual price paid for them by the plaintiff. Moreover, the defendant, Douglas, was not a distributor. It does not appear that he could buy those furnaces on the market for the same discount which was allowed to plaintiff. We must presume he would have to pay more for them than the plaintiff paid.

It is true that Mr. John Graham, the President of the plaintiff corporation, testified that he received a discount of 50% from the catalog or list price. The list price, according to the undisputed evidence of Mr. Fanning, was $63. That would mean that plaintiff paid the sum of $31.50 apiece for the furnaces. Mr. Graham testified in that regard: "The Court: Q. You get a special price? A.

That is right, yes sir. * * * $37.80, less 10%, I still make a profit." The price of $37.80 less 10% would mean that he actually paid $34.02, which is in excess of $30. It is quite evident from the testimony of Mr. Fanning that Mr. Graham was mistaken when he assumed that plaintiff's check of $227.60, paid on December 29th, was the full purchase price of only $19 apiece for the twelve furnaces installed. In response to the question, "Why did you say at the last hearing this check for $227.00 was in payment of the 12 furnaces?" he replied, "Because that is the price that was quoted on carload lots and I assume that is the price that was paid, and that is the only check I could find. * * *." Mr. Fanning positively testified plaintiff subsequently paid his company another check of $226, which clearly shows, as previously stated, that plaintiff paid a total sum of $453.60 for the twelve furnaces, or $37.80 apiece. Mr. Graham only "assumed" that he paid $227.60, or $19 apiece, for the twelve furnaces because he found in his files only the one cancelled check of $227.60. Moreover, he said that was the price quoted "on carload lots." The uncontradicted evidence is that carload lots consist of 150 furnaces. No carload lots were purchased. The defendant was required to purchase only 65 furnaces to replace those which plaintiff failed to supply. Mr. Fanning testified, as previously related, that upon quantities of 100 or more furnaces his company allowed 40, 5, 5 and 5 per cent discount to distributors from the list price of $63 apiece.

In estimating damages, the value of property to the purchaser who is deprived of it, by failure to deliver it on account of a breach of contract, or otherwise, "is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase." Sec. 3354, Civil Code.

[2-4] The measure of damages for a breach of contract, or a failure to perform in whole or in part, is the amount which will compensate the party aggrieved for all the detriment proximately resulting to him thereby. Sec. 3300, Civil Code; 25 C.J.S., Damages, 563, secs. 74 and 75. When a contract to install floor furnaces and plumbing in buildings, after partial performance, is breached and abandoned by the subcontractor, the aggrieved party to the contract is entitled to damages in an amount which would compensate him for the detriment incurred thereby. Ordinarily such damages would be the additional cost of the materials and labor required to complete the agreement as specified in the contract. 25 C.J.S., Damages, § 75, p. 568. In the present case the market value of the sixty-five furnaces and plumbing which the plaintiff failed to supply according to contract would not necessarily be the measure of damages to the defendant and cross-complainant on account of that breach of contract. It would be the additional cost incurred by the cross-complainant in purchasing and installing furnaces and plumbing of the value and type specified by the contract. The court erred in allowing as damages for failure to install the furnaces the sum of $19 apiece for the sixty-five furnaces which were not installed as per contract. It is evident that if, as the record indicates, the defendant was unable to purchase furnaces on account of the government "freezing" of sales of such equipment and materials during the war, his damages for breach of contract in that regard might be the difference in his contract price with the owner of the buildings with and without the furnaces and plumbing. There is evidence of damages, but we are unable to determine the proper amount. It therefore becomes necessary to remand the case for retrial.

The judgment is reversed and the cause is remanded.

ADAMS, P. J., and PEEK, J., concur.

JACOBSON v. WIKHOLM.

Civ. 15091.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1945.

Hearing Granted Feb. 14, 1946.

1. Partnership 🔑253

The phrase "winding up the affairs" of a partnership, as used in statute providing for reasonable compensation for services of a surviving partner in winding up partnership affairs, means the administration of the assets for purpose of terminating business and discharging obligations of the partnership to its creditors and members. Civ.Code, § 2412(f).

See Words and Phrases, Permanent Edition, for all other definitions of "Winding Up Partnership Affairs".

2. Partnership 🔑253

The surviving partner in a partnership engaged in construction business, in retaining possession of partnership assets and in proceeding to execute partnership construction contract after death of other partner, acted as quasi administrator for deceased partner in winding up partnership affairs for which he was entitled to compensation under statute, and manager of construction works under the contract for which he was not entitled to compensation. Civ.Code, § 2412(f).

3. Partnership 🔑244

The relationship of a surviving partner to administrator of his deceased partner is fiduciary and as such trustee, surviving partner must exercise the highest good faith in winding up partnership affairs. Civ.Code, § 2412(f).

4. Partnership 🔑333

Where administratrix of deceased partner presented to surviving partner an intelligible balance sheet on October 31, 1944, disclosing amount of his debt to administratrix with her demand for payment thereof, administratrix was entitled to interest from that date. Civ.Code, § 3287.

5. Evidence 🔑271(18)
Partnership 🔑336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, partnership's records of estimates used in bidding for contract which was completed by defendant after death of plaintiff's decedent, to show that defendant had done a skillful job, by comparing estimated cost prices and profit with actual results, were inadmissible as irrelevant and self-serving. Civ.Code, § 2412(f).

6. Partnership 🔑336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, partnership books of account to prove amount of work done by defendant in connection with the numerous entries to which he had given his personal attention were irrelevant. Civ.Code, § 2412(f).

7. Partnership 🔑336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, evidence as to defendant's original estimate on end walls and facilities used in bidding on a post-death extra was irrelevant. Civ.Code, § 2412(f).

8. Partnership 🔑336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, evidence as to breakdown of a schedule relating to construction of squadron hangar for purpose of showing defendant's computations of costs and losses that might have been suffered by partnership on account of cancellation of that schedule was irrelevant. Civ.Code, § 2412(f).

9. Evidence 🔑314(1)
Witnesses 🔑149(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, parol proof of partnership agreement by defendant's testimony was properly rejected as hearsay and in violation of spirit of statute making a person incompetent to testify as to transaction with a deceased person in action against the decedent's estate. Code Civ.Proc. § 1880.

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* Subsequent opinion 172 P.2d 878.

10. Partnership ⚿277

After dissolution of a partnership, the right of the partner is governed by law, and the practice of partners during the partnership is immaterial.

11. Partnership ⚿336(2)

In suit by administratrix of deceased partner against the surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, defendant's offer of proof that his work at construction contract after death of plaintiff's decedent was same as that done by him in 1942 and 1943, when his average monthly earnings were $4,560, was properly rejected as irrelevant. Civ.Code, § 2412(f).

12. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership's construction contract after death of plaintiff's decedent, offer to prove that construction contract had no good will and was a detriment rather than an asset at time of death of plaintiff's decedent was properly rejected as irrelevant. Civ.Code, § 2412(f).

13. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, where defendant completed construction contract after death of plaintiff's decedent, and asserted right to compensation for conducting the construction operation to a successful conclusion, offer to prove that plaintiff's only interest in partnership was decedent's share in the equipment was properly rejected as irrelevant. Civ.Code, § 2412(f).

14. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted that he was entitled to compensation for conducting construction operations to a successful conclusion, evidence that in execution of supplemental agreement for modification of sub-depot hangar defendant used certain equipment of partnership and that such equipment had rental value of $1,615, was properly rejected as irrelevant. Civ.Code, § 2412(f).

15. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted that he was entitled to compensation for conducting the construction operation to a successful conclusion, evidence that net profits of $7,911.23 was earned by modification of the schedule for construction of sub-depot hangar was properly rejected as irrelevant. Civ.Code, §§ 2412(f), 2436; Probate Code, § 571.

16. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted right to compensation for conducting construction operations to a successful conclusion and for winding up partnership affairs, evidence that net profits were earned by construction of three units comprising the air base was properly rejected as irrelevant. Civ.Code, § 2412(f).

17. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted right to compensation for conducting the construction operations to a successful conclusion and for winding up the partnership affairs, proof of burden to defendant in caring for partnership's bulky files and records was properly rejected as irrelevant. Civ.Code, § 2412(f).

18. Partnership ⚿336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up the partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted right to compensation for conducting the construction operations to a successful conclusion and for winding up the partnership affairs, proof that plaintiff's decedent had been ill for 4½ months in 1943 while defendant worked steadily was properly excluded as immaterial. Civ.Code, § 2412(f).

19. Partnership ⚷253

In event of a partner's death, in absence of a valid contract between members of the firm providing special compensation to a surviving partner, the latter is not entitled thereto but is obligated by his fiduciary relationship to serve the interests of the decedent in good faith. Civ.Code, § 2412(f).

20. Partnership ⚷336(2)

In suit by administratrix of a deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted right to compensation for conducting the construction operation to a successful conclusion and for winding up the partnership affairs, defendant's proof that he had worked steadily 5½ days per week on the contract was properly rejected as irrelevant. Civ.Code, § 2412(f).

21. Partnership ⚷336(2)

In suit by administratrix of deceased partner against surviving partner to recover amount allegedly due upon winding up partnership affairs, where defendant completed partnership construction contract after death of plaintiff's decedent, and asserted right to compensation for conducting construction operation to a successful conclusion and for winding up the partnership affairs, proof of the breakdown of the $82,015.17 of assets on hand at death of plaintiff's decedent was immaterial. Civ. Code, § 2412(f).

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Mandie J. Jacobson, as administratrix of the estate of Alex Jacobson, deceased, against Eser Wikholm, to recover amount allegedly due upon winding up affairs of partnership between plaintiff's decedent and defendant. From adverse judgment, the defendant appeals.

Judgment reversed with instructions.

Harold D. Kraft, of Los Angeles, for appellant.

John E. McCall, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Prior to February 13, 1944, Alex Jacobson and defendant were copartners in a construction business. Mr. Jacobson having deceased on that day, Mr. Wikholm retained possession of the partnership assets and proceeded with the completion of their enterprise and the winding up of the partnership affairs. There was but one construction job then in progress, to wit, the erection at Blythe, California, of an army air base consisting of a squadron hangar, a sub-depot hangar and ammunition building for the federal government. The work had been commenced January 6, 1944, and it was finished after the passing of decedent.

The court found as follows: At the time of the death of Mr. Jacobson the assets of the firm were of the value of $82,627.31 in addition to the value of the unfinished contract; thereafter defendant continued in possession of the property and business of the partnership for the purpose of winding up its business and has settled up its affairs; all moneys due the partnership have been collected by defendant; but he refused to render plaintiff an adequate accounting or to pay her one half of the net assets; it was not necessary for defendant to carry on the partnership business after the death of his partner and he did not do so with the consent of plaintiff; but he did in fact wind up the affairs of the partnership; all of the work done at Blythe in completing the government contract was necessary in winding up the partnership affairs; the partnership's contract for the construction of the army air base at first called for the payment of $225,532.15 but by modifications of the contract it was reduced to $171,091.83; the net sum realized therefrom was $115,300.14; after distributing $66,013.16 to himself and plaintiff in equal shares he has left for equal division $49,286.98. From such facts the court concluded that defendant, having assumed the responsibility of winding up the partnership affairs, was obligated to complete his task successfully and is not entitled to any compensation for his work out of the share of plaintiff. Plaintiff was awarded judgment in the sum of $24,643.49 with interest at 7 per cent from October 31, 1944, the date of plaintiff's delivery to defendant of the balance sheet showing the result of an audit of the books.

Appellant's Contentions

Defendant contends (1) that the judgment unjustly deprived him of compensation for his services to the partnership in winding up its affairs and that such service was reasonably worth 50 per cent of the profits, and (2) that material evidence was erroneously rejected. He argues with some show of reason that since he did 80 per cent of the work he is entitled to 80 per cent of the profits; that the time he spent on the job after February 13 was worth $20,000 to that venture; that he spent a total of 175 days as against 19 by decedent; that if paid according to his customary earnings he should receive for his service there $23,920; that the achievement of the immense profit was due solely to his service and skill.

Winding Up—Defined

[1] In view of the statute providing for reasonable compensation for the services of a surviving partner in winding up the partnership affairs after the decease of a partner (Civil Code, sec. 2412(f); Sec. 18 (f), Uniform Partnership Act) we are first to determine the significance of the phrase "winding up the affairs." Bouvier defines it as "the process of liquidating the assets of a partnership or a corporation for the purposes of distribution." 2 Bouv.Law Dict., Rawle's Third Revision, p. 3471. It is the administration of the assets for the purpose of terminating the business and discharging the obligations of the partnership or corporation to its creditors and members. Rest.Conflict of Laws. The phrase embraces the entire process of settling the accounts and liquidating the assets. State v. Norman, 86 Okl. 36, 206 P. 522; State v. Quigley, 93 Okl. 296, 220 P. 918. In the case of an active partnership, ordinarily there is business to be conducted in order fairly to discharge its obligations. The conduct of such business to a conclusion is quite a different matter from that of liquidating the assets preparatory to a distribution. If A and B as partners own securities and lands worth $100,000 and A dies, B may liquidate the assets and distribute them and receive for his labors a reasonable compensation. If they have in addition to such assets a contract for the construction of three edifices which are half completed at the death of A, the survivor has something more to do than under the first suppositious situation, namely, he must supervise the completion of the building contract, collect the amounts due and pay the charges for labor, materials and subcontracts and deliver one half of the net profits to the administrator of the decedent's estate.

Defendant in Two Capacities

[2] Thus it is clear that defendant in retaining possession of the partnership assets and in proceeding to execute the partnership contract for the construction of the Blythe Air Base acted in two separate capacities, namely, (1) quasi administrator for the deceased partner and (2) manager of the works in the execution of the construction which he was obliged to carry on to completion. In deriving its findings and conclusions the trial court apparently conceived a unity of the two capacities and erroneously determined that all of defendant's services constituted a winding up of the partnership affairs, and concluded that in view of his obligation to complete the work or of the handsome profits realized in a short time he should receive no compensation for his "winding up" services.

A fair construction of the findings, however, impels the conclusion that the court intended to deny compensation to defendant for his services in supervising the construction in its final stages. That the court was not in error in such denial appears from the following facts: The work commenced on January 6 and was completed April 28. The general superintendent of construction at its commencement was continuously present to the date of completion and for two weeks thereafter. Defendant visited the air base not to exceed seven times after February 13. The last subcontract was completed April 28. The general superintendent left the job on May 12 after bringing the trucks and other equipment into the yard. On the day of Mr. Jacobson's decease the contract for the squadron hangar had been canceled; 40 per cent of the mechanical work on the sub-depot hangar had been completed and the construction of the ammunition building was half done. These facts having been established it must be held that the trial court was not arbitrary in deriving the conclusion that having assumed the task of completing the construction at Blythe defendant was obligated to do so successfully and should receive no compensation therefor.

Upon that question we are in agreement with the court below. Respondent's difficulty, however, in sustaining the judgment arises out of the court's second conclusion, towit, that defendant is not entitled to any compensation besides his share of the profits on the government contract. With respect to such work as defendant did in liquidating the partnership apart from his supervision of the construction work the parties were entitled to a finding as to the character and extent of his services and the value thereof in order that such sum might be deducted from the plaintiff's share of the net profits of the contract.

Moreover, the finding that "defendant did not carry on said partnership business and that it was not necessary for him to do so" is not borne out by the record. He performed services of value both in completing the contract and in winding up the partnership. The testimony is without contradiction that defendant was daily consulted by the general superintendent over the telephone; he visited the scene of operations seven times; he made computations for the cancellation of the contract for the squadron hangar. In addition thereto he sold assets of the partnership, paid bills and collected and disbursed moneys due and owing. Such services were essentially a winding up of the firm's business and their value, if any, should be awarded to defendant. Although he was entitled to nothing for his supervision of the construction work, yet under the statute he is entitled to be paid for all services rendered strictly for plaintiff in winding up the partnership affairs.

Prior to 1929 the common-law rule still prevailed, namely, that the services of a surviving partner in winding up the partnership are not compensable. But in that year the Uniform Partnership Act was enacted (Statutes 1929, p. 1902, Civil Code, sec. 2412(f) providing that "a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs." This principle has been supported by the courts of other states which hold that for such services to the partnership estate a survivor is entitled to special compensation for completing the partnership business (Losch v. Marcin, 251 N.Y. 402, 167 N.E. 514), to special compensation for collecting, paying, dividing the surplus and for expending time, skill and labor in carrying on the business (Bracht v. Connell, 313 Pa. 397, 170 A. 297, 300), and to reasonable compensation for his services in winding up partnership affairs. Murdock v. Murdock, 300 Pa. 280, 150 A. 599, 603. It has likewise been approved by our Supreme Court in the case of law partnerships in which the surviving partner was allowed an extra portion of fees contracted by the firm for the work he performed after his partner's decease. Griggs v. Clark, 23 Cal. 427; Little v. Caldwell, 101 Cal. 553, 36 P. 107, 40 Am. St.Rep. 89; McNutt v. Hannon, 183 Cal. 537, 191 P. 1108. It must be conceded, however, that a law partnership is so dissimilar to the ordinary commercial partnership that the rationale of those decisions may be applied only by analogy to the case of building contractors.

[3] While the court erred in not making a finding as to the value of defendant's services in "winding up the partnership affairs" as that phrase is herein defined, it is a fair interpretation of the findings and conclusions that it was the intention of the court to deny an allowance to defendant for his services in supervising and managing the construction work at Blythe after February 13 and until the completion of the government contract. Such conclusion is reasonably derived from the proof of defendant's limited activities, the superintendent's attention to the work, the use of the partnership's assets and from the fact that not to exceed 50 per cent of the construction remained for completion at the time of Mr. Jacobson's decease. It is true that the relationship of a surviving partner to the administrator of his deceased partner is fiduciary (Josephberg v. Cavallero. 262 App.Div. 1, 27 N.Y.S.2d 361), and that as such trustee he must exercise his talents and industry honestly and in the highest good faith (Grigg v. Hanna, 283 Mich. 443. 278 N.W. 125), yet that is no reason for refusing compensation to a survivor where he honestly and efficiently winds up the partnership affairs.

No Errors in Allowing Interest

[4] The contention that it was error to allow plaintiff interest on the judgment is ill-founded. Such allowance is based upon statute. Civil Code, sec. 3287. Having presented to defendant an intelligible balance sheet on October 31, 1944, disclosing the amount of his debt to plaintiff with her demand for payment thereof, she was entitled to interest from that date.

No Prejudicial Errors in Rejecting Offers of Proof

Defendant assigns as prejudicial error 15 rulings of the court excluding evidence offered. They are as follows:

[5] (1) Objection was made to the partnership's records of "Blythe Estimates" used in bidding for the original contract to show that defendant had done a skillful job, by comparing estimated cost prices and profit with actual results. The objection that they were irrelevant and self-serving was properly sustained. It was the defendant's constant duty to obtain prices on materials and subcontracts more favorable than those used in estimating the job.

[6] (2) The partnership books of account to prove the amount of work done by defendant in connection with the numerous entries to which he had given his personal attention were irrelevant. The records of partnership transactions done in the conduct of the business would not be proof of service performed in winding up the partnership.

[7] (3) For the same reason defendant's original estimate on end walls and facilities used in bidding $25,800 on this post-death extra was properly rejected. Such work was a detail in the execution of the contract undertaken by defendant.

[8] (4) The breakdown of Schedule A was offered to show defendant's computations of the costs and losses that might have been suffered by the partnership on account of the cancellation of that schedule which related to the construction of the squadron hangar. It was irrelevant. Such work was also necessarily a part of the conduct of the partnership business and not of its settlement.

[9, 10] (5) Parol proof of the partnership agreement by the testimony of defendant was properly rejected as hearsay and in violation of the spirit of section 1880, Code Civil Procedure. The practice of the partners during partnership is immaterial. After its dissolution the rights of the partners is governed by law.

[11] (6) Defendant's offer of proof that his work at Blythe after the decease of Mr. Jacobson was the same as that done by him in 1942 and 1943 when his average monthly earnings were $4,560 was irrelevant. Whatever his ability it was his duty to the government and to himself, as well as to decedent, generously to exercise both his talents and his industry to achieve the purposes of the contract.

[12] (7) The offer to prove that the Blythe job had no good-will and was a detriment rather than an asset at the time of Mr. Jacobson's decease was irrelevant to the only issue, namely, whether defendant was entitled to compensation for conducting the construction operations to a successful conclusion, and for winding up the partnership affairs.

[13] (8) The offer to prove that plaintiff's only interest in the partnership was decedent's share in the equipment of the reasonable value of $7,000 was correctly rejected. The equipment had been sold and the proceeds distributed. Neither the value of the equipment nor the money received from its sale was relevant to the issue.

[14] (9) For the same reason the court properly rejected defendant's offer to prove that in the execution of the supplemental agreement for the modification of the sub-depot hangar he used two trucks, a vibrator and tools of the partnership and that their rental value was $1,615. It was his duty to use the equipment in the conduct of partnership business.

[15] (10) Defendant's offer to prove the net profits of $7,911.23 earned by the modification of the schedule for the construction of the sub-depot hangar was properly rejected. Modification of a government contract in time of war, and especially one relating to housing for airplanes, might reasonably be calculated at the time of their execution to be subject to modification during the course of construction. With such knowledge defendant as survivor took possession of the equipment and continued with the construction work as he had the right to do (Probate Code, § 571), instead of having the value of decedent's interest ascertained (Civil Code, sec. 2436) and the partnership's interests segregated.

[16] (11) Defendant's offer of proof of the net profits earned by the construction of the three units comprising the Blythe air base was properly rejected as irrelevant. The evidence would have proved the exact source of some of the partnership moneys but would have shed no light upon the issue of defendant's right to compensation for conducting the construction to completion or of the value of his services for winding up the partnership affairs.

[17] (12) Proof of the burden to defendant in caring for the partnership's bulky files and records was appropriately rejected as irrelevant. Such burden like many others was essentially a part of his

duty in conducting the business of completing the contract.

[18, 19] (13) Proof that decedent was ill for 4½ months in 1943 while defendant worked steadily was properly excluded as immaterial. Defendant's grievances against decedent for illness or inattention were proper subjects for contract or litigation between the two partners. In the event of a partner's death, in the absence of a valid contract between members of the firm providing special compensation to a surviving partner the latter is not entitled thereto but is obligated by his fiduciary relationship to serve the interests of the decedent in good faith.

[20] (14) That defendant may have worked steadily 5½ days per week was irrelevant. The successful consummation of a vast enterprise is not to be achieved save by the expenditure of much time and energy. Diligence and perseverance are indispensable to success in any field of endeavor and they are not to be abbreviated by a builder because he has lost a partner.

[21] (15) Proof of the breakdown of the $82,015.17 of assets on hand at death was immaterial. After defendant's administration of the affairs he had on hand $49,000 of partnership funds less such deductions for his post-death service as the court might determine to be just.

It may here be observed that defendant's aim and effort to induce the court so to apportion the earnings of the government contract that plaintiff would receive only her share of the amount proportionately attributed to the "tangible asset" owned by the firm on February 13, 1944, towit, $7,293.09, cannot be ascribed to a holy concept of justice. Standing in a fiduciary relationship to decedent and to plaintiff it was his obligation to be faithful to a superlative degree in protecting decedent's interest the same as though the latter had been alive and supervising the firm's activities. Bracht v. Connell, 313 Pa. 397, 170 A. 297. He became a mere trustee and his right to possession of the partnership assets was merely to enable him to complete the contract and wind up the partnership's affairs. Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715. The profits earned on the Blythe contract were liberal, and for his services in supervising the operations he gained a generous reward in his half of such profits.

It is ordered that the judgment be and it is reversed with instructions to the trial court to ascertain the value of defendant's services to decedent's estate in winding up the partnership affairs according to the rules herein defined, and thereafter to modify the judgment for $24,643.49 by deducting therefrom the sum fixed as the value of such services.

McCOMB and WILSON, JJ., concur.

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DAVIS v. STULMAN et al.
STULMAN v. DAVIS et al.
Civ. 14820.

District Court of Appeal, Second District,
Division 2, California.
Dec. 20, 1945.

Rehearing Denied Jan. 9, 1946.
Hearing Denied Feb. 14, 1946.

1. Vendor and purchaser 🔑50

Where contracts involving realty were attached to subsequent contract made for purpose of buying out one of parties interested in realty, the attached contracts were required to be considered in determining the rights and duties of the parties under the subsequent contract.

2. Trial 🔑365(2)

Findings should be read together and so construed as to uphold, rather than defeat, judgment, and to that end findings are to be liberally construed and any inconsistency therein is to be resolved, if reasonably possible, in favor of sustaining the judgment.

3. Vendor and purchaser 🔑50, 51

Where contract did not in express terms state character of title that vendor should convey, the contract in its entirety and also documents attached thereto and escrow instructions executed for purpose of carrying out the transaction, and other circumstances surrounding parties at the time were required to be examined to determine the character of the title that was intended.

4. Vendor and purchaser 🔑80

In purchaser's action for declaratory relief, evidence sustained determination that title which vendor was to convey to purchaser was to be a clear title with only certain specific exceptions and that a mere conveyance of vendor's right, title, and interest in property in the nature of a quitclaim would not be a compliance with vendor's obligations under contract.

5. Action ⚷6

In purchaser's action for declaratory relief, evidence sustained finding that vendor was unable to deliver a valid conveyance of her interest in property, and that she did not comply with the conditions of contract.

6. Appeal and error ⚷931(1)

An appellate court must view evidence in light most favorable to the respondent, resolving all conflicts and indulging all legitimate and reasonable inferences to uphold the finding.

7. Appeal and error ⚷989

Where a finding is attacked as being unsupported, the power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the determination of the trial court.

8. Vendor and purchaser ⚷80

In purchaser's action against vendor for declaratory relief, evidence sustained finding as to binding effect of contract to convey in event escrow could not be closed.

9. Action ⚷6

In purchaser's action for declaratory relief, evidence sustained finding that contract to convey was abandoned by all parties thereto and that because of liens and other clouds on title it was at all times impossible for vendor to perform contract and escrow agreement.

10. Action ⚷6

Appeal and error ⚷1071(3)

In purchaser's action for declaratory relief, evidence sustained finding that purchaser and vendor, without waiting for close of escrow, entered into joint adventure in reference to conduct of hotel and resort business on property involved, but, even if finding was not supported by evidence, the vendor was not prejudiced where judgment only directed that joint adventure be dissolved.

11. Action ⚷6

Where contract of November 19, 1941, provided for expeditious handling of escrow so that transaction could be closed, if possible, by November 25, and thereupon agreement of July 2, 1941, shall be at an end, and contract of July 2 provided that on vesting of title to property in corporation, contract of August 27, 1940, shall come to an end, but where such event never took place and transaction contemplated by contract of November 19 was never closed, trial court was justified, in purchaser's action for declaratory relief, in finding that the earlier contracts were still in force, in absence of their having been abandoned, rescinded, or otherwise abrogated.

12. Action ⚷6

In purchaser's action against vendor for declaratory relief, refusing to permit attorney who represented purchaser and escrow holder in connection with escrow to testify regarding certain conversations with vendor's representative for purpose of showing waiver of certain requirements of escrow instructions was not error, where escrow instructions provided that no change of instructions shall be of any effect unless given in writing by all parties affected thereby and it was not shown that the attorney had been authorized by interests represented by him to agree to any modification of escrow instructions.

13. Witnesses ⚷240(2)

The allowance or exclusion of leading or suggestive questions rests almost entirely in discretion of trial court.

14. Appeal and error ⚷1008(3)

Where construction given an instrument by trial court appears to be reasonable and consistent with the true intention of the parties making it, a reviewing court will not substitute another interpretation even though it seems equally tenable.

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Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by D. A. Davis against Jennie Miller Stulman and others for declaratory relief and for determination of rights under a contract involving realty, wherein a cross-complaint was filed. From an adverse judgment, the named defendant appeals. Affirmed.

Benjamin W. Shipman, of Los Angeles, for appellant.

Lawrence M. Cahill, of Los Angeles, for respondent D. A. Davis.

Walter G. Danielson, of Los Angeles, for respondent Hollywood State Bank.

Earl Malmrose, of Los Angeles, for respondents Nathaniel A. Davis, Creela Davis, Sally A. Davis, and Estelle Davis.

FOX, Justice pro tem.

This is an appeal by defendant Jennie Miller Stulman from an adverse judgment in an action for declaratory relief.

The contract in question, dated November 19, 1941, was executed by plaintiff D. A. Davis as the first party, defendant Stulman as the second party, defendant Nathaniel A. Davis as the third party, and defendant Estelle Davis as the fourth party. Plaintiff D. A. Davis is the father of defendant Nathaniel A. Davis, and will therefore be referred to herein as the elder Davis while Nathaniel will be designated as the younger Davis. The Hollywood State Bank, which became a party to the transaction through the escrow, will be referred to as the Bank.

The subject matter of the contract was certain resort property located in Riverside County which the elder Davis was undertaking to acquire. The major portion of this property was formerly owned by the Stulman Hot Springs Corporation, which later went into bankruptcy. There was a trust deed against the property which secured two promissory notes dated February 17, 1939. One of these notes was in favor of Meyer Katz for $11,750 and the other in favor of the younger Davis for $10,316.47. The trust deed was foreclosed and at the sale in January, 1940, the younger Davis acquired 10/22nds undivided interest in the property and the Bank the remaining 12/22nds interest. Pending the foreclosure sale the Bank agreed to sell its interest to the younger Davis for $9000: $2000 in cash and the balance of $7000 represented by a note on which there was an unpaid balance of $6000 at the time the contract of November 19, 1941, was executed. Then on August 27, 1940, the younger Davis and Mrs. Stulman entered into a partnership agreement by which it was agreed, among other things, that a one-half interest in the said property and business would be conveyed to her. She was to assume one-half of the balance due on his note to the Bank; they were to be equal partners. Mrs. Stulman went into possession. A dispute then arose and ultimately the younger Davis went into possession. The net result was that Mrs. Stulman filed a suit in Riverside County for an accounting, dissolution of the partnership and partition of its assets. Before trial, however, the parties entered into a written compromise contract, dated July 2, 1941. This contract was also joined in by Estelle Davis, a sister of the younger Davis who owned an adjacent piece of land, referred to therein as parcel B, on which a hot water well was located. This contract called for the formation of a corporation to which the Hot Springs property, designated as parcel A, said parcel B and an easement and right of way over a third parcel, designated as parcel C, were to be transferred. However, title to these properties never became vested in the corporation. Then on August 1, 1941, the younger Davis assigned to his father, the plaintiff herein, his interest in the contract of July 2, 1941. This latter contract was attached to the contract of November 19, 1941, and the contract of August 27, 1940, was in turn attached to and made a part of the contract of July 2, 1941.

[1] These latter contracts must therefore be considered in determining the rights and duties of the parties under the contract of November 19, 1941, which was made for the purpose of buying out Mrs. Stulman and vesting full ownership of the property in the elder Davis subject only to certain specified encumbrances. The important provisions of that contract are: (1) The elder Davis was to pay Mrs. Stulman $18,400, evidenced by a promissory note secured by a trust deed, for "all of her right, title and interest in and to the real and personal property, the subject matter of said agreement of July 2, 1941"; (2) the trust deed to be received by Mrs. Stulman was "to be a first encumbrance upon the easement on parcel C and a second encumbrance upon the real property described as parcel A in the agreement of July 2, 1941, subject only to an obligation in the principal sum of not more than $6000 to the Hollywood State Bank, secured by a first trust deed and which the second party (the elder Davis) assumes and agrees to pay, and to tax sales and taxes for 1941–42"; (3) "immediately upon the execution hereof an escrow shall be commenced for the purpose of vesting title in and to the property described as parcel A and the easement across parcel C" in the elder Davis, and "said escrow shall be expeditiously aided by each party hereto so that the transaction may be closed, if

possible, by the 25th of November, 1941"; (4) upon the closing of the escrow the contract of July 2, 1941, was to be at an end except as otherwise provided; (5) Mrs. Stulman and the younger Davis were to deliver in the escrow "a grant deed" to parcel A; (6) a complete accounting between Mrs. Stulman and the younger Davis was acknowledged up to November 18, 1941; (7) upon receipt by Mrs. Stulman of said note of $18,400 "secured by said deed of trust" all of her claims in and to the assets and business are fully at an end and determined, except such rights as are evidenced by the deed of trust and the provisions of the contract of November 19, 1941; (8) Mrs. Stulman agreed to dismiss with prejudice her action in Riverside County; and (9) the sellers declared that so far as they knew there were no obligations, claims, or charges against the Hot Springs business or premises other than those which were set forth in an attached schedule. This schedule contained two items of taxes, one for $250 and the other for $385.

In keeping with the provisions of the contract of November 19, 1941, the escrow was opened in the Bank that same day. As the Bank was the record owner of an undivided 12/22nds interest in the property and was to receive from the elder Davis a note for $6000 secured by a first trust deed on the entire premises, it became a party to the escrow. Its instruction, dated November 19, 1941, provided that the grant deed it was depositing in the escrow conveying its 12/22nds interest to the elder Davis could be used only when the escrow could cause to be issued "a Beneficiary's Policy of Title Insurance" showing the deed of trust for $6000 to be "a first record lien on said property," except certain taxes. In accordance with said instruction the Bank deposited in said escrow such a grant deed and the elder Davis and wife deposited therein their $6000 note and trust deed dated November 19, 1941. The Davises and Stulmans signed their escrow instructions on November 24, 1941. These instructions provided that the deed and other documents from the Stulmans and the younger Davis could be used only when the escrow-holder could "cause to be issued a Joint Protection Policy of Title Insurance" showing title vested in the elder Davis and his wife, "free of encumbrances" except certain taxes, conditions, etc., and a first trust deed securing a note for $6000 and a second trust deed securing the promissory note of the elder Davis in favor of Mrs. Stulman for $18,400. The grant deed deposited in the escrow by the younger Davis and the Stulmans was in accordance with this instruction and contained practically identical exceptions with those found in the deed that the Bank deposited in the escrow.

The preliminary report of the title company dated December 5, 1941, disclosed ten items which constituted defects in or clouds upon the title to various parcels of the property to be conveyed. These consisted of three tax matters, one mortgage, one defect in description, one recorded abstract of judgment, one recorded partnership agreement, and three crop mortgages. Subsequent reports were made by the title company on March 2, May 8, and September 22, all in 1942. Attempts were made to eliminate these various clouds and some were eliminated but others were added. The net result was that the defects were never cured to the point where the title company was in a position to issue its policy showing title in the elder Davis subject only to the provisions and conditions of the contract of November 19, 1941, and the escrow instructions pursuant thereto. Neither could the Bank procure such policy of title insurance. At no time was there any waiver by any of the parties of any of the specified terms or conditions of the escrow instructions. The Bank was never given any instructions other than the original ones until March 31, 1943, when the younger Davis wrote a letter to the Bank demanding withdrawal of all documents bearing his signature on the ground that Mrs. Stulman had violated her agreement with him and because of unreasonable delay and noncompliance upon her part with the terms of the escrow. The escrow was never closed and the Bank has the documents and funds deposited therein by the respective parties. In the meantime the elder Davis spent $1699.39 in payment of taxes on the property and other items appearing on the schedule attached to the contract and $1000 for repairs and improvements, or a total of $2699.36.

The judgment declares: (1) That the contract of November 19, 1941, has been abandoned by all the parties thereto and hence may not be enforced by any party; (2) that all parties to the escrow thereunder are entitled to the return of all documents deposited therein; (3) that a joint adventure in the conduct of the hotel and resort business is dissolved; (4) that the superior court of Riverside County has exclusive jurisdiction as to quieting title to the real estate and as to all matters concerning the partnership between Mrs. Stulman and the younger Davis; (5) that the contracts of August 27, 1940, and July 2, 1941, had not been abandoned or rescinded by any party thereto and remain in force; (6) that the Bank upon the cancellation of the escrow is entitled to enforce its legal rights under the trust deed held by it; (7) that because some form of accounting will be required in Riverside County, in the action there pending for the dissolution of the partnership or in such other action as may be brought, no accounting was had in this action except as to moneys plaintiff paid for taxes and other items pursuant to the contract of November 19, 1941; (8) that the plaintiff is entitled to be reimbursed from the property and not otherwise for his aforesaid expenditures in the amount of $2699.38; (9) that no lien is imposed upon the said property since such matter is within the jurisdiction of the superior court of Riverside County.

The first attack upon the judgment by Mrs. Stulman is that the findings of fact are too general, are conflicting and do not support the judgment. There is no merit in this contention. The findings take up 25 pages of the clerk's transcript. Examination reveals that they are both specific and in great detail. They appear to cover the issues made by the initial pleadings as well as those raised by the several cross-complaints and the answers thereto. It is difficult to see how more complete findings could have been drawn.

[2] It is an established rule that all the findings should be read together and so construed as to uphold rather than defeat the judgment, and to that end the findings are to be liberally construed and any inconsistency therein is to be resolved, if reasonably possible, in favor of sustaining the judgment. Hotaling v. Hotaling, 193 Cal. 368, 385, 224 P. 455, 56 A.L.R. 734; Jones v. Pleasant Valley Canal Co., 44 Cal.App. 2d 798, 806, 113 P.2d 289; Agdeppa v. Glougie, Cal.App., 162 P.2d 944. Reading the findings in light of these principles it cannot be said that there is any serious or substantial inconsistency therein.

The burden of appellant Stulman's argument is that the contract of November 19, 1941, only required her to convey her "right, title and interest" in the property to plaintiff and did not require her to give a clear title subject only to certain specific exceptions, and that the findings go no further than this. The property to be conveyed pursuant to the contract of November 19, 1941, was not specifically described in said contract nor was the interest to be conveyed by Mrs. Stulman specifically defined therein. The property to be conveyed was only described by reference to a description in the attached contract of July 2, 1941, which had attached to it and made a part thereof the contract between Mrs. Stulman and the younger Davis dated August 27, 1940. By reference to said attached contracts the description of the property to be conveyed is made certain, and it further appears therefrom that the younger Davis agreed to sell Mrs. Stulman an undivided one-half interest in said property. It is therefore clear from these contracts that it was this undivided one-half interest of Mrs. Stulman in the property that she was undertaking to sell and which the plaintiff was proposing to purchase, the younger Davis having already assigned his interest in the contract with Mrs. Stulman to the plaintiff.

[3] The contract of November 19, 1941, does not in express terms and specifically state the character of title that Mrs. Stulman must convey in order to comply therewith. The contract is not free from ambiguity on this point. It is therefore necessary not only to examine the writing in its entirety but also the documents attached thereto and the escrow instructions executed for the purpose of carrying out the transaction, and the other facts and circumstances surrounding the parties at the time, in order to determine the character of title that was intended to be conveyed. In order to ascertain the intention of the parties in this respect we naturally first examine the primary contract of November 19, 1941. We there find that the parties declare that so far as known to them "there are no obligations, claims, or charges against the Stulman-Davis Hot Springs, or the business or premises which are the subject matter of this agreement, other than those which are set forth in the schedule attached hereto" as an exhibit. This exhibit contained a list of unsecured obligations due to various workmen and material men and two items of taxes—one for $250 and the other for $385. The

court found, however, that the taxes due and unpaid on the property were at least $1000 more than those listed in said schedule. The initial title report as heretofore noted showed numerous defects in and clouds upon the title. As also indicating the character of title that was intended to be conveyed is the provision in the contract as to the character of the security that Mrs. Stulman should have for her $18,400 promissory note. The trust deed on the property was "to be a first encumbrance upon the easement on parcel 'C' and a second encumbrance upon the real property described as parcel 'A' in the agreement of July 2, 1941, subject only to an obligation in the principal sum of not more than $6000 to the Hollywood State Bank, secured by a first trust deed and which the second party assumes and agrees to pay and to tax sales and taxes for 1941–42." As previously noted the contract also provided for the immediate opening of an escrow "for the purpose of vesting title in and to the property" in plaintiff, and provided that Mrs Stulman and the younger Davis should accomplish this purpose by delivering into escrow "a grant deed." Pursuant to this provision of the contract they delivered into the escrow a grant deed with no words of limitation as to the title conveyed and subject only to certain taxes and restrictions, reservations, etc., of record.

The escrow instructions throw additional light on the character of title that was to be conveyed pursuant to the contract of November 19, 1941. The instructions between the Bank and plaintiff provided for a deed to plaintiff of the Bank's $^{19}/_{22}$nds interest in parcel A (Lot 157) in exchange for his $6000 promissory note to be secured by a trust deed which would be "a first record lien on said property" except for certain specified taxes. These instructions also provided that the Bank's deed could be used only in the event there was issued a Beneficiary's Policy of Title Insurance showing the trust deed securing said note "a first record lien." These instructions between the Bank and the plaintiff were approved by Mrs. Stulman. In the escrow instructions between the plaintiff on the one hand and Mrs. Stulman and the younger Davis on the other the plaintiff instructed the Bank to use the $18,400 note and trust deed securing the same provided there was issued a Joint Protection Policy of Title Insurance covering said parcel A (Lot 157) showing title vested in him and his wife "free of encumbrances" with the exception of certain specified taxes. Mrs. Stulman approved these instructions also.

[4] The foregoing references to the various documents in evidence, the conduct of the parties and the testimony of the plaintiff lend substantial evidentiary support to the trial court's determination that the title which Mrs. Stulman was to convey to the plaintiff under the contract of November 19, 1941, was to be a clear title with only certain specific exceptions, and that a mere conveyance of her "right, title and interest" in said property in the nature of a quit-claim would not be a compliance with her obligations under said contract. The findings when read in the light of the principles heretofore stated are to this effect and consequently amply support that phase of the judgment which appellant Stulman is here attacking.

[5-7] The evidence herein referred to is also a complete answer to appellant Stulman's second contention to the effect that the evidence is insufficient to support the finding that she did not perform for many months certain conditions of the contract of November 19, 1941, and that she was unable to deliver a valid conveyance of her interest in said property. The title reports, the correspondence, and the oral testimony furnish abundant support for the finding that Mrs. Stulman did not comply with the conditions of said contract and that she was unable to deliver the kind of a title that the contract and escrow instructions called for and that the parties to the transaction contemplated and intended. In this connection there are two rules that must not be overlooked: (1) An appellate court must view the evidence in the light most favorable to the respondent, resolving all conflicts and indulging all legitimate and reasonable inferences to uphold the finding (Estate of Isenberg, 63 Cal.App.2d 214, 146 P.2d 424; Pewitt v. Riley, Cal.Sup., 163 P.2d 873); and (2) when a finding is attacked as being unsupported the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the determination of the trial court. Crawford v. Sou. Pac. Co., 3 Cal. 2d 427, 45 P.2d 183; Peri v. L. A. Junction Ry., 22 Cal.2d 111, 137 P.2d 441.

[8] Appellant's third point is that the court erred in finding that it was the purpose of the parties that the contract of November 19, 1941, should not be binding in the event the escrow could not be closed. The answer to this contention is to be found in the contract itself. It will be recalled that the contract provided for the opening of an escrow "for the purpose of vesting title" to the property in the plaintiff and that the transaction was to be expedited by all the parties to the end that the escrow would be closed on November 25, 1941, if possible, and that upon the closing of said escrow the contract of July 2, 1941, would "be at an end" except as therein otherwise provided. The November 19th contract also provided in effect that neither the contract of July 2nd nor the partnership contract between Mrs. Stulman and the younger Davis should be at an end as to the claims of the parties thereto against each other and to the property described therein, until the receipt by Mrs. Stulman of the $18,400 promissory note secured by the said trust deed. From these provisions of the contract and the oral testimony the trial court could reasonably infer that it was the intention of the parties that the escrow would be closed within six days or at least within a reasonable time thereafter, that Mrs. Stulman would receive the said $18,400 promissory note and trust deed with a $25,000 policy of title insurance showing said deed of trust to be an encumbrance second only to the Bank's $6000 encumbrance and certain taxes, and that the contract of July 2, 1941 (as to which plaintiff was not a party) would be at an end, but that in the event said escrow was not closed the contract of July 2, 1941, would still be in full force and effect.

[9] Appellant's fourth contention is that even if there were some obligation on her part to convey clear title and there were certain liens and encumbrances on the property, this would not justify abrogating or rescinding the contract. In making this argument she misconceives the effect of the conclusions arrived at by the trial court. They are not based upon the theory that the contract of November 19, 1941, was abrogated but that it was abandoned by all parties thereto and that because of the liens and other clouds upon the title it was at all times impossible for the appellant to perform said contract and escrow. In this connection, however, appellant argues that there was no default or failure of compliance on her part. On this point it is sufficient to say that the trial court's determination of that question finds ample support in the testimony of Mr. Poggione, who was the Bank's escrow officer and who testified with reference to the title company's reports of December 5, 1941, March 5, 1942, and September 22, 1942.

[10] Appellant's fifth point is that the court erred in finding that on or about November 25, 1941, the plaintiff, appellant and the younger Davis, without waiting for the close of said escrow, entered into a joint adventure in reference to the conduct of said hotel and resort business. While the parties were waiting for the title to be cleared and the escrow to be closed intermittent attempts were made to conduct said business but without financial success. These efforts, however, ceased about September 15, 1942. In view of the entire picture of this complicated and extended transaction it cannot be said as a matter of law that such designation of this interim operation of the business was without sufficient evidentiary and legal foundation. In any event it does not appear that appellant is prejudiced by such finding since the judgment only directs that the joint adventure be dissolved. If such adventure existed it was proper that it be dissolved; if it did not exist no prejudice can result from a declaration that a nonexistent joint adventure is dissolved.

[11] Appellant's sixth point is that the trial court erred in holding that the contracts of July 2, 1941, and August 27, 1940, are still in effect and binding on the parties thereto. The contract of November 19, 1941, provided for the expeditious handling of the escrow so that the transaction could be closed, if possible, by November 25, 1941, "and thereupon the agreement of July 2, 1941, shall be at an end except as herein otherwise provided." The clear implication of this provision is that if the transaction under the contract of November 19, 1941, is not closed then the contract of July 2, 1941, is not at an end. The contract of November 19, 1941, recited that a corporation had been organized pursuant to the provisions of the contract of July 2nd for the purpose of acquiring the property in question, but said property had not been transferred to it. Examination, however, of the contract of July 2nd

discloses that upon the vesting of title to the property in the corporation then the contract of August 27, 1940, "shall come to an end and be of no further force and effect." Since this event never took place and since the transaction contemplated by the contract of November 19, 1941, was never closed, the trial court was amply justified in concluding that the two earlier contracts were still in force and effect in the absence of their not having been abandoned, rescinded or otherwise abrogated, which the court found was not the case.

[12] Appellant's seventh contention is that the court erred in refusing to permit Attorney Danielson, who represented the Davises and the Bank in connection with the escrow, to testify regarding certain conversations with Mrs. Stulman's attorney at which Mr. Poggione was also present. This testimony was apparently offered for the purpose of showing a waiver of the specific requirements of the escrow instructions covering chattel and crop mortgages and taxes. This was not error for two reasons: (1) Mr. Danielson does not appear to have been authorized by the interests represented by him to agree to any change or modification of the escrow instructions which had been executed by the parties. (2) The escrow instructions contained the following provision: "No notice, demand or changes of instructions shall be of any effect in this escrow or recognized by said Bank unless given in writing by all parties affected thereby." In view of this provision the offered testimony would have been immaterial and ineffective for the purpose of showing that the escrow was ready to be closed, for the Bank as escrow-holder could not have been expected or compelled to act upon merely an oral waiver. Carlsen v. Security Trust etc. Bank, 205 Cal. 302, 271 P. 104.

Appellant's eighth point is that the court erred in ordering a lien to be imposed on the Riverside County property to secure plaintiff's claim for moneys paid out for taxes and improvements. The complete answer to this point is that no lien was imposed upon said property. The court determined that the plaintiff was entitled to be reimbursed for his expenditures from the said property but expressly determined that "no lien is hereby imposed upon said property in favor of D. A. Davis in any sum or at all, and the imposing of such a lien as well as other matters concerning the disposition of the real property described in plaintiff's complaint herein * * * are hereby declared to be subject to the exclusive jurisdiction of the Superior Court * * * in and for the County of Riverside. * * *"

[13] Appellant's final contention is that the court erred in permitting leading and suggestive questions. There is no merit in this contention. "The allowance or exclusion of such questions rests almost entirely in the discretion of the trial court." Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660, 661. No abuse of such discretion appears.

[14] As previously pointed out the contract of November 19, 1941, is not free from ambiguity. Fifteen days were consumed in the trial of this case, some 85 exhibits were introduced in evidence and more than 800 pages of oral testimony taken in an effort to correctly interpret the contract and thus determine and declare the rights and duties of the various parties thereunder. In our view of the entire record it cannot be said that the contract is not reasonably susceptible of the interpretation placed upon it by the trial court. In such circumstances it is a well established principle of law that when the construction given an instrument by the trial court appears to be reasonable and consistent with the true intention of the parties making it, a reviewing court will not substitute another interpretation even though it seems equally tenable. Manley v. Pacific Mill & Timber Co., 79 Cal.App. 641, 648, 250 P. 710; Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 224, 270 P. 668; Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 582, 300 P. 34; Coviello v. Moco Fruit Co., Inc., 42 Cal.App.2d 637, 640, 109 P.2d 765; Medico-Dental, etc., Co. v. Horton and Converse, 21 Cal.2d 411, 430, 132 P.2d 457.

Several incidental arguments have been made by appellant in support of her main propositions which we have not specifically adverted to in this opinion. These arguments, however, have been considered. But their impotency to change the result is so apparent it is not deemed necessary to unduly extend this opinion in order to dissect and analyze them.

The judgment is affirmed.

McCOMB, Acting P. J., and WILSON, J., concur.

Hearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.

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DOLTON v. GREEN et al.

Civ. 14867.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1945.

Rehearing Denied Jan. 21, 1946.

1. Railroads 🔑324(1)

The rules of caution governing conduct of vehicle operators approaching tracks of interurban electric system laid upon private right of way, rather than upon city streets, are the same as the rules applied to steam railroad crossings in testing negligence of party whose conduct is in question.

2. Railroads 🔑347(1)

In action for injuries sustained when plaintiff's truck in making left turn on city boulevard was struck by interurban electric car operated upon private right of way, admission of ordinance limited in scope to operation of streetcars was error, since such car was not a "streetcar," and fact that private right of way was intersected at intervals by public highways where track was laid flush with the street did not convert such part of track into a street railway track.

See Words and Phrases, Permanent Edition, for all other definitions of "Streetcar".

3. Appeal and error 🔑237(2)

Where evidence is apparently admissible and no motion is made to strike it out, objection to its admissibility is waived; but, where challenged evidence is obviously inadmissible at time it is offered and appropriate objection is made to its introduction, subsequent motion to strike it out is not necessary to preserve the error on appeal.

4. Appeal and error 🔑1054(1)

In action for injuries sustained when plaintiff's truck in making left turn on city boulevard was struck by interurban electric car, operated on private right of way, error in admission of ordinance limited in scope to operation of street cars required reversal of judgment for plaintiff because appellate court could not determine what weight and influence improper evidence had on trial court, sitting without jury, in framing its findings of fact.

5. Railroads 🔑324(1)

In determining whether motorist struck by interurban car, operated on private right of way, while making left turn on city boulevard across the interurban tracks was negligent, the motorist's actions must be viewed in light of standard of conduct required of person operating vehicles at railroad crossing.

6. Railroads 🔑301

Motorist approaching track of electric railway being operated under conditions similar to a railroad must give way to the electric railway car, if necessary, to avoid a collision.

7. Railroads 🔑348(8)

Evidence disclosing that motorist never looked toward approaching interurban electric car, operated on private right of way, from time when motorist was in a position of safety as he made a left hand turn 85 feet from crossing until he was compelled to stop on track when vehicle in front of him suddenly stopped to permit passing of traffic, established that motorist was guilty of contributory negligence as a matter of law and precluded recovery for damages sustained in collision.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Thomas F. Dolton against D. C. Green and another to recover damages for personal injuries and property damage allegedly sustained as a result of a collision between plaintiff's truck and an interurban car operated by defendant Green. From a judgment for plaintiff, defendant appeals.

Reversed and remanded with directions to enter judgment for defendants.

Prior opinion, 162 P.2d 700.

Frank Karr, C. W. Cornell, O. O. Collins, and Malcolm Archbald, all of Los Angeles, for appellants.

Claude A. Watson, Bernard Brennan, and Montgomery G. Rice, all of Los Angeles, for respondent.

WHITE, Justice.

A rehearing was granted in this case in order that we might give further consideration to appellants' contention that respondent was as a matter of law guilty of contributory negligence proximately contributing to the injuries sustained by him. We therefore adopt as part of our decision that portion of our previous opinion reading as follows:

"This action was instituted by plaintiff to recover damages for personal injuries and property damage allegedly sustained as the result of a collision between a Chevrolet pick-up truck driven by plaintiff and an interurban electric car of the defendant Railway Corporation, which was being operated by defendant D. C. Green.

"By his complaint, plaintiff alleges general negligence in the operation of the electric car. Defendants' answer denies any negligence in the manner in which the electric car was operated and, as an affirmative defense, pleads contributory negligence on the part of the plaintiff.

"The cause proceeded to trial before the court sitting without a jury. By its findings of fact the court determined that plaintiff was free from negligence and that the proximate cause of the accident was the negligence of defendants in the operation of the electric car. Accordingly, judgment was entered in favor of plaintiff against both defendants. A motion for a new trial was denied. From the judgment, defendants prosecute this appeal.

"The accident in question happened about eight o'clock on the morning of March 26, 1942, at the intersection of Venice and National Boulevards, in the City of Los Angeles.

"The record reflects that National Boulevard is a paved street extending north and south of Venice Boulevard. The latter is also a paved street, extending east and west and is a divided highway, the north and south pavements thereof being separated by the right-of-way of the defendant Railway Company. The property of the private right-of-way is 50 feet wide. Two sets of tracks extend along this right-of-way, the northerly tracks being used by westbound and the southerly tracks by eastbound trains.

"By a written stipulation of fact, the nature of the rail operations conducted by defendant Railway Company was thus described: The electric car involved in the accident was engaged in interurban passenger service between Los Angeles and Santa Monica. The rails upon which this operation was conducted extended a distance of 17 miles between the aforesaid points. For about 11½ miles of this total distance, the rails were laid upon a private right-of-way of defendant Railway Company, which was constructed with T rails extending their full height above the ties, the tops of which were level with the ground. Attached to the stipulation is a sketch, from which it appears that for a distance of several miles, both east and west from National Boulevard where the accident occurred, the trains run over a private right-of-way of the Railway Company. Photographs looking along the tracks, both to the east and to the west from National Boulevard, show that the right-of-way extends straight in both directions as far as the eye can see and that there is no obstruction to the view of a motorist looking for approaching trains.

"The paved portions of Venice Boulevard and the right-of-way are separated by cement curbings so that vehicular traffic is excluded from the track area except at road crossings, where the pavement of the road is laid flush with the tops of the rails.

"Venice Boulevard consists of two separate roadways, which lie on each side of the right-of-way. For convenience, they will be hereinafter referred to as the North and South Roadways of Venice Boulevard. Vehicular traffic moves both east and west on each of these roadways. As a result of this construction, there are six entrances to the intersection of Venice and National Boulevards: two from National and four from Venice. Each of these entrances is posted with a standard boulevard stop sign. A railroad cross arm is located in the southeast corner of the intersection of the right-of-way and National Boulevard, while a standard automatic signalling device, commonly referred to as a wig-wag, is located on a pole at the northwest corner of the intersection of the right-of-way and National Boulevard.

"Concerning the circumstances surrounding the collision, plaintiff testified that he had been over this crossing several times prior to the day of the accident and was cognizant of the fact that trains were operated along the tracks. That about eight o'clock on the morning of March 26, 1942, he drove his Chevrolet pick-up truck west on the North Roadway of Venice Boulevard toward National Boulevard. He stopped at the stop sign at National Boulevard and then made a 'broad left-hand turn into National Boulevard across the Pacific

Electric tracks'. In making this left turn, he pulled in behind a brown sedan which was going south on National and followed it at a distance of about 15 feet and at a speed of about 10 miles an hour. Plaintiff testified he continued to follow this brown sedan at the same speed until it suddenly stopped for traffic proceeding east and west along the South roadway of Venice Boulevard. Plaintiff stopped his vehicle about five feet behind the sedan, at which time he was right in the middle of the tracks on which the accident occurred. He further testified that when he stopped on the tracks he looked and observed the electric car which he estimated was then 200 feet away. He further testified that he looked around to see if he could back up but saw an automobile five feet behind him.

"Plaintiff further testified that when he saw the electric car approximately 200 feet away, he formed no opinions as to its speed. The automobile in front of plaintiff remained in the same position up to the time of the collision. Plaintiff testified that the oncoming electric car 'hit me broadside in the center of the right-hand side of my automobile'. Regarding the observations made by him of the approaching electric car, plaintiff testified: 'I saw the train approaching when I made the boulevard stop at the north of stop sign. The train was then beyond the next street which was the average length of a city block west of National Boulevard'. It was stipulated that the average city block is four to five hundred feet in length. After giving a visible sign of his intention to make a left-hand turn when he was 58 feet from the tracks on which the train was traveling, plaintiff observed it coming toward him. He testified he could stop his truck within 10 to 12 feet and as he was approaching the tracks of defendant Railway Company, he observed traffic moving west on the south side of Venice Boulevard. As we read plaintiff's testimony, it appears that, from the time he observed the electric car when he was stopped on the tracks and the car was some 200 feet distant, he never again looked at it, up to the time of the impact, nor did he at any time form an estimate as to the speed of the approaching car.

"Mrs. Thelma Russell, called as a witness by plaintiff, testified that she was walking south on the west side of National Boulevard some two or three hundred feet north of the tracks. She first observed the Pacific Electric car when it was three or four hundred feet west of National Boulevard. She continued to observe it and estimated that the car was traveling about 50 miles an hour from the time she first saw it until it struck the plaintiff's truck. When this witness first saw plaintiff's vehicle it was 'right on the tracks' at the point where the accident occurred. She testified that when she first observed plaintiff's automobile it was proceeding very slowly and suddenly came to a stop; that there was an automobile in front of plaintiff's which was also stopped and an automobile behind him.

"Another witness, J. M. Lee, called as a witness for plaintiff, testified he was riding in a truck which was being driven by another man. The vehicle was headed north on National Boulevard, came to a stop at the stop sign for the South Roadway of Venice Boulevard. When this witness first observed plaintiff's truck it was half way across the set of tracks north of the tracks on which the accident occurred. He first observed the electric car when it was approximately from five to six hundred feet away from the intersection and traveling at a speed of from forty to fifty miles an hour up to the time of the collision. He testified as to the place where the electric car stopped after the collision and it was stipulated the distance was 500 feet east of National Boulevard. This witness denied that any automobile was stopped in front of that of the plaintiff and testified that plaintiff's automobile was moving at the time of the accident. This witness was asked 'To be sure there is no mistake about it, there wasn't any traffic in front of Mr. Dolton that stopped at all?' to which he answered, 'No, they were going this way' (indicating). He was then asked: 'You are indicating that they turned to the right to go west on the south half of Venice?' He answered 'yes'. This witness further testified that he saw only three automobiles going across the tracks, that of plaintiff and two others that were preceding him; that at the time of the accident, the first of the three automobiles had passed the corner and the one immediately in front of plaintiff was just going to turn west and had not quite proceeded on to Venice Boulevard.

"Another witness, Ernest Edward Hall, called by plaintiff, testified that he was the driver of the vehicle in which the preceding witness was riding. He first saw the truck involved in the accident when it was coming south across the northerly set of tracks and when he first saw the electric car it was about 150 feet from the intersection. His estimate of the speed of the car was 50 to 55 miles an hour and he further stated that its speed did not change from the time he first saw it until the impact. He also testified that from the time he first saw the electric car and plaintiff's truck, traffic was going both ways on the South Roadway of Venice Boulevard; that there was an automobile in front of plaintiff's truck which checked its speed because of an automobile making a left turn from the South Roadway of Venice Boulevard into National Boulevard. This witness further testified that there was an automobile following that of plaintiff, but it had not reached the north set of tracks. This witness testified positively that when plaintiff started onto the south tracks where the accident occurred the electric car was about 50 feet away, that plaintiff did not stop on the tracks but merely checked his speed.

"The defendants produced as a witness David Wallace who operated a service station at the northwest corner of Venice and National Boulevards. He testified that his attention was called to the electric car by its whistle, that when he glanced up and observed the car it was 100 to 150 feet west of the intersection; that the whistle ceased for approximately a second and then started blowing in sharp and sudden blasts, at which time he glanced over to the intersection and observed plaintiff's truck just about the moment of the impact.

"John R. Stevenson testified he was the conductor of the electric car, but being on the inside thereof did not see plaintiff's truck before the accident. He testified that as the car was approaching the crossing, he heard two long and two short blasts of the whistle and that thereafter the motorman continued blowing several short blasts of the whistle. He testified the car had been traveling about 35 miles an hour; that it was slowed down about 300 feet from the crossing to a speed of about 20 or 25 miles an hour by an ordinary service application of the brakes.

"E. A. Knoller, another passenger on the electric car, was seated just behind the motorman in the front seat. He first saw plaintiff's truck going west on Venice Boulevard before it turned left; at that time, the electric car was four or five hundred feet from the intersection; that he saw the truck enter the intersection; that it turned left and continued to move onto the tracks at a speed of eight or ten miles an hour. This witness testified that there was no traffic in the intersection other than plaintiff's car. He also testified that the speed of the electric car was reduced to 25 or 30 miles an hour when it was 150 feet from the crossing and that he heard the whistle of the car start to blow when it was about 200 feet from the crossing.

"Wayne H. Gillette, another passenger, seated on the second seat from the front on the right-hand side of the car, testified that when he first saw the truck it was headed toward the tracks. That the electric car was about 200 feet from the intersection moving approximately 25 to 30 miles an hour. He continued to watch the truck until it disappeared in front of the train just before the impact; that plaintiff's truck was continuously in motion and going slowly, probably 25, or 30 miles an hour. This witness testified he did not observe any traffic in front of the truck. He heard the whistle of the electric car when the latter was about 200 feet from the crossing and that it continued to blow until the car was a very short distance from the intersection. This witness testified that when the truck drove onto the tracks on which the accident occurred, the electric car was about 40 or 50 feet from the intersection. That he felt a sharp application of the brakes of the train about 50 feet before the impact occurred.

"Claude Green, the motorman of the electric car involved in the accident, testified he first observed the truck when the car was about 200 feet from the intersection. He testified he watched the truck from the time he first saw it until the impact; that it was moving at about 10 or 12 miles an hour when he first saw it, but slowed down slightly when it got near the west-bound tracks. He testified that when he was about 50 feet from the point of the impact, he concluded the truck was not going to stop; that the train was then traveling about 25 miles an hour, at which time he applied the emergency. He further testified 'I tooted the whistle quick in short snappy blows of the whistle. At the time I applied the emergency brakes the train was traveling approximately 25 miles an hour. I would estimate that the speed of the train was retarded to about 20 miles an hour at the time of the accident'. This witness also testified that he had operated a car of the type involved in the accident for about three years prior thereto; that the grade of the tracks immediately east and west of National Boulevard is just about level; that 'going at a speed of 50 miles an hour on that track I could stop the electric car in about 500 feet by an application of emergency air, at a speed of 35 miles an hour I could stop it in about 350 feet, and at a speed of 25 miles an hour I could stop it between 225 and 250 feet'. The motorman testified that when the impact occurred, 'something hit me and knocked me out. When I came to, the train was coasting. The brakes are applied and released on the train by an instrument known as the air valve handle. When I came to, this handle was in a released position and I immediately applied brakes into emergency a second time.'

[1] "The rules of caution which govern the conduct of vehicle operators approaching the tracks of an electric interurban system where such tracks are constructed as they were at the point of the accident here in question are the same as the rules which are applied to steam railroad crossings in testing negligence of the party whose conduct is in question. Such was the holding of our Supreme Court in the recent case of Lund v. Pacific Electric Railway Co., 25 Cal.2d 287, 153 P.2d 705, in which case, with relation to the highways involved, the construction of the tracks was identical to the physical conditions prevailing in the case now before us. In the cited case, 25 Cal.2d at page 296, 153 P.2d 709, the Supreme Court held: 'The law of this state has already been settled adversely to plaintiffs' position. Here the defendant's cars were operated in interurban service upon tracks laid upon a private right of way, rather than upon city streets. Under such circumstances the rules governing their operation, including the traversing of street intersections, are those pertaining generally to steam or commercial railroads and not those applicable peculiarly to streetcars which use the city streets in common with other traffic. See Simoneau v. Pacific Electric Ry. Co., 1911, 159 Cal. 494, 496–501, 115 P. 320, 329; Riney v. Pacific Electric Ry. Co., 1919, 45 Cal. App. 145, 148, 187 P. 50; Cash v. Los Angeles Ry. Corporation, 1935, 6 Cal.App.2d 738, 740, 45 P.2d 280.'

"In defining the rights and obligations of vehicle drivers under the conditions with which we are here confronted, it was held in Billig v. Southern Pacific Co., 192 Cal. 357, 362, 219 P. 992, 994, as follows: 'In the foregoing cases and in others yet to be cited the rule is that it is the duty of a person approaching the crossing of a suburban railroad being operated outside of the limits of cities, whether the same are steam or electric railroads or are railroads upon which motor cars propelled by gasoline are being used, to stop and look and listen for such approaching trains or cars and to yield the right of way to such trains or cars. Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 P. 926; Murray v. Southern Pac. Co., 177 Cal. 1, 169 P. 675; Herbert v. Southern Pac. Co., 121 Cal. 227, 53 P. 651; Griffin v. San Pedro L. A. & S. L. R. Co., 170 Cal. 772 (151 P. 282, L.R.A.1916A, 842); Thompson v. Southern Pac. Co., 31 Cal.App. 567, 161 P. 21; Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359; Simoneau v. Pacific Elec. Co., 159 Cal. 494, 15 P. 320; Loftus v. Pacific Elec. Ry. Co., 166 Cal. 464, 137 P. 34; Heitman v. Pacific Elec. Ry. Co., 10 Cal.App. 397, 102 P. 15; Baker v. Southern Pac. Co., 184 Cal. 357, 93 P. 765; Young v. Southern Pac. Co., 189 Cal. 746, 210 P. 259, 262. In the case last above cited the court in applying the foregoing rule to the facts of that case said: "The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track to look and listen for a possible approaching train. And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent"; and upon a former appeal of the same case this court, upon the same facts, held that such a person would be negligent as a matter of law. Young v. Southern Pac. Co., 182 Cal. 369, 190 P. 36.'

"'Turning from the right and duty of persons approaching upon a highway at its intersection with a suburban railroad to the right and duty of the engineer or motorman in charge of such suburban train or car in approaching such intersection, this court has held in numerous and uniform cases that such engineer and motorman has the right to presume that a person thus approaching the crossing of a suburban railway will perform the duty which the law imposes upon him under the foregoing authorities, and in the reasonable exercise of his faculties of observation and caution will not essay such crossing until the danger due to the approaching train or car has passed, *and it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard.'* (Emphasis added.)

"Relying upon the foregoing rules and the authorities supporting them, appellants first contend that the trial court committed prejudicial error in receiving into evidence over their objection certain sections of an ordinance of the City of Los Angeles which regulated operators of streetcars with respect to speed and stopping in obedience to boulevard stop signs.

"The sections of the aforesaid ordinance, which is numbered 77,000 of the Municipal Code of the City of Los Angeles, read as follows:

"Section 80.21: '(a) The Commissioners are hereby authorized to determine those streets and intersections at which traffic is hazardous or dangerous to life or property by reason of the volume of traffic upon such streets or at such intersections, or the lack of visibility of the drivers of vehicles approaching said streets or intersections, or because of the numerous reported accidents or the possibility thereof, or by reason of other physical conditions likely to render any such street or intersection dangerous or hazardous to life or property.

" '(b) When the Commissioners have determined that a street or intersection is dangerous or hazardous to life or property, they are authorized and empowered to place and maintain, subject to the approval of the Council, stop signs at or near such of the entrances to said streets or intersections as they shall designate.

" '(c) Every such stop sign shall conform to the requirements of the Vehicle Code.'

"Section 80.22: 'When stop signs are erected and maintained pursuant to Section 80.21 or pursuant to any former ordinance or resolution at the entrance to any intersection, every driver of a vehicle and every operator of a street car shall stop at every such stop sign before entering the intersection, except when directed to proceed by a police officer or traffic control signal.'

"Section 80.43: '(a) The operator of any street car shall not drive said street car at a speed exceeding the following:

" '1. Fifteen (15) miles per hour when traversing another street car crossing or a highway crossing or when turning upon curves, in either event when the operator does not have an unobstructed view along such intersecting rails or highway or around such curve within a distance of two hundred (200) feet; also when passing schools while persons are entering or leaving the grounds thereof.

" '2. Twenty (20) miles per hour in business districts.

" '3. Twenty-five (25) miles per hour in residence districts.

" '4. Forty-five (45) miles per hour in all other places.

" '(b) The provisions of this section shall not apply when a street car is being operated upon a private right of way which is effectively protected from vehicular traffic.'

"Appellants objected to the introduction of sections 80.21 and 80.22 on the ground, among others not here pertinent, that said sections were 'incompetent, irrelevant and immaterial, having no bearing upon the operation of interurban cars on tracks on a private right-of-way; that if construed as applying to such operation, said sections would be unconstitutional'.

"To the introduction of section 80.43 of the ordinance, appellants objected on the ground that said section was 'wholly immaterial, having no bearing on the facts at issue for the reason that said section was not applicable to the operation of electric trains upon a right-of-way such as was involved in the case at bar'.

[2] "The objections were overruled and each of the foregoing sections of the ordinance was received in evidence. The ruling was erroneous. The provisions of the ordinance are limited in scope to the operation of street cars. A street car is defined in Webster's New International Dictionary, second edition, as 'a car, usually a passenger car, running through the public streets'. The same authority defines a street railway as 'a street car line'. In Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 62 S.E. 52, 58, the court states: ' "Street cars", accurately

speaking, are cars which traverse the streets of a town or city, and carry passengers, who get on and off at various points along the line. They have been considered as vehicles of street travel, * * *.'

"It is therefore the nature and location of the tracks rather than the character of the particular car that is running upon the tracks that determines the applicability of the ordinance. Respondent directs our attention to the fact that the car here in question is 'of the type which customarily functions in local traffic'; 'would stop at any corner on signal'; but, as pointed out in Simoneau v. Pacific Electric R. Co., 159 Cal. 494, 501, 115 P. 320, if the test were not the location and nature of the tracks rather than the character of the particular car, very little protection would be afforded the public by these safety ordinances, because interurban trains would be exempt from the ordinance when operating upon tracks which are laid upon public streets, that is to say, streets from the use of which as a public highway the public is not excluded. There can, therefore, be no doubt, applying the foregoing test, that in so far as the track was laid along the private right-of-way in such manner as to exclude the general public from the use of any part of the right-of-way, such track was not a street railway track and the car operated over such right-of-way was not a 'street car' in contemplation of the ordinance. Nor does the fact that the private right-of-way was intersected at intervals by public highways devoted to vehicular traffic, at which intersections the track is laid flush with the street so that vehicles might cross the track on such street, convert this part of the track into a street railway track. As was said in Simoneau v. Pacific Electric R., supra, 159 Cal. at page 500, 115 P. at page 324: 'The respondent draws attention to the fact that, for the width of 38th Street the track was laid flush with the surface so that passengers and vehicles might cross on the street. It cannot be said that this part of the track was thereby converted into a street-railway track. A street-railway, as we have seen, is one running along a public street, not across one. To adopt the contention of the respondent in this regard would mean that the track of every commercial or steam railroad which, in entering the city of Los Angeles crossed any street, became to the extent of the width of such street a street-railway track. This is obviously not the intent of the ordinance.'

[3, 4] "Upon the authority of Simoneau v. Pacific Electric Railway, supra, and Lund v. Pacific Electric Railway Co., supra, it must be held that when the ordinance speaks of street cars it has reference to cars operated on rails along and upon the streets of the City of Los Angeles and not to cars or trains of cars operated on a private right-of-way which at intervals merely cross a street. Had the drafters of the ordinance intended otherwise, it would have been easy and simple to so provide. Lund v. Pacific Electric Railway Company, supra, 25 Cal.2d at page 296, 153 P.2d at page 709. To us it is clear from the record that, at the time and place with which we are here concerned, the electric car was being operated as part of an interurban rapid transit system between Los Angeles and Santa Monica and not as a street car. Hence, the admission of the aforesaid ordinance into evidence was error. Respondent urges that appellants cannot now complain of the introduction of the ordinance into evidence because they failed to make a motion to strike the same. It is only where the evidence is apparently admissible and no motion is made to strike it when the contrary is shown that an objection to its admissibility is deemed to have been waived, but where, as here, the challenged evidence was obviously inadmissible at the time it was offered and appropriate objection was made to its introduction, a subsequent motion to strike is not necessary to preserve the error on appeal. Ballos v. Natural, 93 Cal.App. 601, 608, 269 P. 972; Nakamura v. Los Angeles Gas & Electric Corporation, 137 Cal.App. 487, 490, 30 P.2d 1022. The error complained of requires a reversal of the judgment because we cannot say what weight and influence the improper evidence had upon the trial court in framing its findings of fact wherein it determined that respondent was free from negligence and that appellant motorman was guilty of negligence which proximately contributed to respondent's injuries. Davis v. Robinson, 50 Cal.App.2d 700, 705, 123 P.2d 894."

[5] Finally appellants contend that respondent must be held guilty of negligence as a matter of law. In that regard, respondent's actions must be viewed in the light of the standard of conduct required of persons operating vehicles at railroad

crossings. In numerous cases it has been held to be the duty of a motorist approaching a railroad crossing not only to stop, look and listen, but when, having done so, he actually sees the approaching danger it then becomes his duty to note the speed at which the train or car is approaching, and if the latter is within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, it is negligence on the part of the driver to attempt to make the crossing.

Respondent testified that he stopped at the stop sign at National Boulevard, where he observed the approaching car, which was then from four to 500 feet distant. He then made a "broad left-hand turn into National Boulevard across the Pacific Electric tracks". Respondent testified that he again saw the oncoming electric car as he was making his left turn some 58 feet from the point of the accident. The spot at which respondent made the left turn was designated as "D–2" on the map at the trial. That he never again looked for the car from the time he made his left-hand turn 58 feet from the crossing until he had stopped on the tracks, is shown by the following testimony given by him:

"Q. And the train was still moving when you saw it at D–2, wasn't it? A. Yes.

"Q. Did you estimate then how fast it was traveling? A. No, sir.

"Q. Did you try to form any opinion as to how fast that train was coming? A. No, sir.

"Q. Did you see the car again from the point D–2 until, as you say, you had stopped on the track? I mean the train. A. No, sir.

"Q. You never did look at it again?

"Q. You answered 'No'; is that right? A. Yes."

It must be conceded, under the law enunciated in countless cases, that respondent was remiss in his duty in not observing the approaching danger at any time during the last 58 feet of his approach to the tracks. According to respondent's testimony, the next time he observed the train was when he stopped on the track. In that regard he testified as follows:

"Q. Where was your car when you next definitely observed the Pacific Electric car? A. After I got over onto the other track, and I was stopped, it was still 200 feet down the track, fully 200 feet."

Respondent also testified that during the time he was moving from point D–2, 58 feet from the tracks, up to the point of the accident, he noticed that traffic was proceeding west across National Boulevard on the south side of Venice Boulevard; that as he approached the tracks from point D–2 he was traveling at a speed of ten to twelve miles per hour "and could stop the pickup within ten or twelve feet with a good application of the brakes."

As respondent made his left-hand turn into National Boulevard some 58 feet from the tracks, he was behind another vehicle described by him as "a big brown sedan". He "followed right along behind it at a speed of about ten miles an hour. It did not change its speed at any time until it made a sudden stop in front of me." Respondent testified that when the brown sedan suddenly stopped in front of him, he "stopped, to keep from running into the back end." At that time respondent was "right in the middle" of the track upon which the accident occurred. From the testimony it appears that the vehicle in front of respondent stopped suddenly to permit the passing of traffic moving in both directions on the south roadway of Venice Boulevard. Concerning his conduct when he stopped upon the railroad tracks respondent testified: "There was an automobile following me at the time I stopped on the tracks. I first observed the automobile following me when I saw I was right on the track. I looked and saw the street car 200 feet away, and I looked back to see if I could back off, and there was an automobile stopped about five feet behind me. I don't know if it backed up or moved before I was struck, and I did not observe where this automobile came from. The first time I saw it was when I turned around to see if I could back off the tracks."

[6] In support of his claim that he was free from negligence respondent urges that when he entered the intersection "every such vehicle which thereafter entered from any one of the five possible approaches to the intersection must wait until he had cleared its proposed path before it could proceed. He had a complete right to rely upon this rule and to rely upon the probability that every driver or motorman would expect him to rely upon the rule. * * * He had a right to assume that the motorman, even if he did not stop at that other intersection, would so control his car as to

afford intersection priority to cars then actually in this intersection." This argument, however, overlooks the fact that under the rule with respect to the duty of a person approaching the track of an electric railway being operated under conditions similar to a railroad, he must upon approaching the crossing give way to the car, if necessary, to avoid a collision. Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798. The rule is thus stated in New York L. Oil Co. v. United Railroads, 191 Cal. 96, 101, 215 P. 72, 74: "It was the duty of the driver of the truck to note the speed at which the electric car was approaching the crossing, and if, when the driver of the truck last looked at the approaching car, it was within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, it was undoubtedly negligence on the part of the driver to attempt to make the crossing. Martz v. Pacific Electric Ry. Co., supra [31 Cal.App. 592, 161 P. 16]."

[7] In the instant case, as heretofore noted, respondent testified that he never looked toward the approaching electric car from the time when he was in a position of safety as he made his left-hand turn 58 feet from the crossing until he had stopped on the tracks. Thus the conclusion seems inescapable, from the uncontradicted evidence as just outlined, that the driver of the pickup truck, although fully aware of the approaching car when 58 feet away from the tracks, closed his eyes to the danger necessarily involved in any attempt to cross the tracks and continued to drive his truck into the path of the oncoming car.

Respondent, however, contends that when he made his left-hand turn 58 feet from the tracks he entered a line of moving traffic behind a brown sedan which was following another vehicle, and both of which stopped, thereby depriving him of freedom of action, in that he could not go forward without crashing into the automobile ahead of him and could not go backward because of the presence of another vehicle to his rear. While it is true that respondent could not go backward because of the presence of another vehicle "about five feet behind me," he could nevertheless have stopped his truck at any time before he went upon the tracks. He was traveling at a rate of speed of from ten to twelve miles per hour and, according to his own testimony, could have stopped his vehicle within 10 or 12 feet. The situation here presented is not one where without negligence on his part a vehicle driver finds himself in a position where the circumstances suddenly confronting him may excuse his failure to follow the law and wherein what a reasonable person might do under similar circumstances is not so clear but that reasonable minds might differ on the question. In the case with which we are here concerned the physical facts shown by the undisputed evidence raise the inevitable inference that respondent admittedly not only could see but did see the electric car approaching when he was in a position of safety 58 feet from the tracks; that he failed to again look in the direction of the approaching danger or pay any attention thereto before he reached a hazardous position on the track; that at any time before he drove on to the tracks he could have stopped his truck within a distance of 10 or 12 feet; that he was also aware of the traffic proceeding east and west on the south side of Venice Boulevard and that such westbound traffic might, as it did, cause the vehicles in front of him to stop. The evidence shows that although respondent had an unobstructed view of the tracks and the car approaching thereon for the last 58 feet, he still continued to drive up to and upon the tracks in the face of the approaching car, and that during the time just mentioned he neither judged the speed of the car nor looked toward it to see what effect its approach to the intersection might have upon his safety. With this picture, respondent must be held as a matter of law to be guilty of contributory negligence, unless we would disregard and overrule a long line of California cases involving accidents at railway crossings. New York L. Co. v. United Railroads, supra; Gundry v. Atchison, T. & S. F. R. Co., 104 Cal.App. 753, 286 P. 718; Martz v. Pacific Elec. R. Co., 31 Cal.App. 592, 161 P. 16; Dull v. Atchison, T. & S. F. R. Co., 27 Cal.App.2d 473, 81 P.2d 158; Argo v. Southern Pac. Co., 39 Cal.App.2d 706, 104 P.2d 77; Glickman v. Pacific Elec. R. Co., 54 Cal.App.2d 454, 129 P.2d 132.

For the reasons herein stated, the judgment is reversed and the cause remanded with directions to the court below to enter judgment for defendants.

YORK, P. J., and DORAN, J., concur.

72 Cal.App.2d 375

BIXBY v. HOTCHKIS (two cases).

HOTCHKIS v. BIXBY et al. (two cases).

Civ. 14859, 14860.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Rehearing Denied Jan. 22, 1946.

Hearing Denied Feb. 25, 1946.

1. Trusts ⚷227, 315(3)

The superior court's allowances of $1,500 to trustee and $21,300 to her attorneys for services in successfully resisting appeals from judgments, determining validity of trust and approving trustee's accounts of assets worth about $1,000,000 and receipts of over $29,000 during period of over 19 months, and trustor-beneficiary's applications for recall of appellate court's remittitur and transfer of causes to Supreme Court, were reasonable.

2. Appeal and error ⚷1145

Affirmance of superior court's judgments, determining validity of trust, approving trustee's accounts, and providing for filing of supplemental account, trustee's discharge on approval thereof and transfer of trust property to successor trustee, by District Court of Appeal and Supreme Court, left superior court without jurisdiction to do anything more than give effect to judgments and precluded retrial of issues as to validity of trust and ownership of trust assets. Civ.Code, § 776; Code Civ. Proc. § 663.

3. Trusts ⚷305

The superior court did not err in ordering that trust company, appointed to succeed resigned trustee, be made party to trustor-beneficiary's proceeding for settlement of trustee's account, as plaintiff could not have been prejudiced by such procedure.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Fred H. Bixby, Jr., against Katharine Bixby Hotchkis to recover shares of a corporation's stock, placed in trust with defendant by and for plaintiff, and dividends received by defendant, who filed a cross-complaint against plaintiff, his wife, and the Title Insurance & Trust Company, a corporation, for determination of plaintiff's claim that the trust instrument was invalid, appointment of cross-defendant corporation as successor trustee and settlement of defendant's account. From an order settling defendant's supplemental report and account and allowing compensation for defendant's and her attorneys' services, plaintiff and cross-defendants Bixby appeal.

Affirmed.

See, also, 164 P.2d 808.

A. Brigham Rose, of Los Angeles, for appellants.

Murphey & Davis, of Los Angeles, for respondent Title Insurance & Trust Co.

Sherman Anderson, Newlin, Holley, Sandmeyer & Coleman, and Newlin & Ashburn, all of Los Angeles, for respondent Katharine Bixby Hotchkis.

SHINN, Justice.

We have before us an appeal by Fred H. Bixby, Jr., as beneficiary of a trust in which he placed shares of the capital stock of the Bixby Company owned by him and which was to be irrevocable for 20 years from and after the date of its execution June 8, 1934, from an order of the superior court settling a supplemental report and account of Katharine Bixby Hotchkis, trustee, and allowing $1,500 as compensation for her services as trustee, and $21,300 for legal services rendered to her as trustee.

There was no conflict in the evidence as to the nature and extent of the services nor was there opinion evidence on behalf of the trustee or of appellant herein as to the value thereof. The amounts were fixed by the court from a consideration of the evidence, which fully described and explained the services which had been rendered. The period over which the accounting was had and the services extended commenced November 25, 1941, and ended July 9, 1943, when the trust assets were transferred to a successor trustee. The supplemental report and account which were approved were filed as the final act required of the trustee by the terms of judgments which were rendered November 25, 1941, in the present actions, which were instituted by appellant herein and are numbered 458012 and 458013 in the superior court. In one of the actions he sought to recover from Katharine Bixby Hotchkis the shares of stock which he had placed in trust and, in the other, dividends on the same stock alleged to have been received by Mrs. Hotchkis. In each action Mrs. Hotchkis filed a cross-complaint, alleging the execution of the trust instrument, that the trust had not been terminated, and that she held the stock and the dividends as trustee thereunder. She also sought a determination of the claim of plaintiff herein that the trust instrument was invalid, which claim he also asserted by his answers to the cross-complaints. Mrs. Hotchkis presented to the court with her cross-complaints her resignation as trustee, asking that it be accepted and that, pursuant to the trust declaration, Title Insurance and Trust Company be appointed as her successor. She presented her accounts and asked that they be settled and approved and that she be ordered to turn over the trust estate to her successor, who, it was alleged, would not accept appointment until her accounts had been finally settled. After an extended trial, the court determined the trust to be valid and subsisting and approved the accounts. At the time the judgments were rendered in the superior court there was a third action pending and untried which had been instituted by plaintiff, numbered 463102, for conversion of plaintiff's stock, and the judgment in 458013 recited that Title Insurance and Trust Company "is willing to accept the said trust and to act as successor trustee immediately after the judgments herein and in said cause number 458012 have become final." Mr. Bixby appealed from the judgments and they were affirmed. Bixby v. Hotchkis, 1943, 58 Cal.App.2d 445, 136 P.2d 597. A hearing was denied by the Supreme Court. The judgments provided that Mrs. Hotchkis should file a supplemental account after said judgments had become final and that upon approval of her account and transfer of the trust property to the successor trustee she should be discharged. They also provided that the assets of the trust be impressed with a lien for the amount of necessary expenses, including trustee's fees and attorney's fees, in and pertaining to the defense of said cause number 463102 and in and pertaining to the defense of the trust in the actions 458012 and 458013, the present ones, and jurisdiction was reserved for the purpose of fixing, determining and awarding Mrs. Hotchkis her proper trustee's fees, attorney's fees, and other expenses in the premises. In June, 1943, the judgments having become final, Title Insurance and Trust Company accepted appointment and the trust assets were transferred to it. It was then that Mrs. Hotchkis filed her supplemental report and account as a resigned trustee, and the order of approval was made which is now before us for review.

[1] The position of appellant, as shown by his objections at the hearing, was, and it still is, that no allowance should be made to the trustee for her services or the services of her attorneys. The objections were placed upon claimed legal grounds and not upon the ground that the services were without value or of little value. There was no specific objection to any item of the report or account. In appellant's brief we find no attempt to evaluate the services for which compensation was awarded; only a protest that any compensation was allowed. Under these circumstances it will suffice to give a brief general statement of the services for which compensation was allowed. The trustee, in accordance with her duty, resisted the appeals in the District Court of Appeal and upon application for hearing in the Supreme Court. Mr. Bixby filed a petition in the Supreme Court and one in the District Court of Appeal for the recall of the remittitur of the District Court of Appeal, upon the asserted ground that the judgment of the latter court had not disposed of appeals from motions to vacate the judgments under section 663 of the Code of Civil Procedure. There was a later petition for transfer of the causes from the District Court of Appeal to the Supreme Court. These applications were resisted by counsel for the trustee and were denied. Proceedings were had in the superior court for the disposition of cause number 463102, and it was disposed of by judgment which declared that the matters involved were res judicata. There were other matters of minor importance which required the attention of the trustee. The trust assets have a large value claimed by appellant to approximate one million dollars; the receipts accounted for during the period amounted to more than $29,000. The amount allowed to the trustee for these services, a total of $1,500, was modest compensation. The amount allowed as compensation for services of the attorneys was reasonable in view of the evidence as to the time and effort expended. The court was fully advised in the premises and followed accepted procedure in the exercise of judgment based upon the facts in evidence as to the nature and extent of the services. County of Riverside v. Brown, 1939, 30 Cal.App.2d 747, 87 P.2d 60; People v. Thompson, 1935, 5 Cal.App.2d 668, 672, 43 P.2d 606; In re Estate of Duffill, 1922,

188 Cal. 536, 552, 206 P. 42; Zimmer v. Kilborn, 1913, 165 Cal. 523, 525, 132 P. 1026, Ann.Cas.1914D, 368; Spencer v. Collins, 1909, 156 Cal. 298, 307, 104 P. 320, 20 Ann.Cas. 49.

A fact which is worthy of mention, for the reason that the trial judge no doubt gave consideration to it, is that the litigation was conducted in an unfortunate atmosphere of bitterness and animosity on the part of appellant toward the members of his family which placed an excessive burden of labor upon the court and counsel and resulted in an extravagant expenditure of time.

[2] We have alluded to the fact that no specific objections were made to the items of the report or account. The efforts of appellant were and are devoted to an attempt to retry the issues which had been determined by the former judgments and which had been finally determined by the decisions of the District Court of Appeal and of the Supreme Court. Appellant's opening brief concludes with the following statement: "It is respectfully submitted that the remittiturs heretofore sued out of Division 2 of this court should be recalled, and all former judgments and orders annulled and set aside, and the entire proceedings remanded to the trial court with direction to proceed in accordance with the laws of the United States and State of California and not diametrically contrary thereto." The arguments of appellant are answered seriatim in the brief of respondents, but in final analysis the appeal, as presented, involves no more than a consideration and proper application of the doctrine of res judicata. The contentions are stated in the opening brief as follows: "1. That appellant has never had a trial of his actions at law. 2. That the reputed cross-complaints for declaratory judgments are untenable as a matter of law. 3. The allowance of trustee's fees and attorney's fees in the proceedings heretofore had are in excess of and without jurisdiction and each and every of said decrees and judgments heretofore entered and made by the Honorable Judge Caryl M. Sheldon and the Honorable Joseph W. Vickers are null and void. [Judge Sheldon rendered the judgments of November 25, 1941; Judge Vickers made the order settling the final account, from which the instant appeal is taken.] 4. The trial court erroneously denied plaintiff his demand for a trial by jury. (As to the above specified contentions, the points and authorities heretofore referred to, as well as the authorities set forth in pages 12–29 of Exhibit 62 are submitted in support of said contentions.) 5. Appellant was the trustor and sole beneficiary of the 'trust indenture.' His 'heirs' at law had no contingent interest, but only a mere expectancy. (See authorities Exhibit 62, pp. 30–36.) 6. Where the trustor is the sole beneficiary, he may terminate the trust at any time, in spite of a provision in the trust that the trust is irrevocable. (See authorities Exhibit 62, pp. 37–39.) 7. The trust indenture is void on its face and violates the provisions of section 776 of the Civil Code. (See authorities Exhibit 62, pp. 40–44.) 8. A resigned trustee cannot burden the trust estate with trustee's fees and attorney's fees by provoking litigation for the purpose of keeping the trust estate from the possession of its trustor and sole beneficiary. (See authorities cited in Exhibit No. 62, pp. 45–49.) 9. That the decision heretofore rendered by Division 2 of this honorable court [reported in 58 Cal.App.2d p. 445 et seq., 136 P.2d 597] is based upon an arbitrary assumption of facts unsupportable in the record and composed in the main of obiter dicta in disregard of the points, contentions and issues actually submitted to it for decision. 10. That the honorable District Court of Appeal, Division 2, has in fact arbitrarily refused to determine the two appeals submitted to it from the orders entered on the motions made pursuant to the provisos of section 663, C.C.P." (The Exhibit 62 referred to is a brief filed by appellant herein upon the former appeals wherein the same contentions were made as those relied upon here. All of them were embraced within the determinations made upon the former appeals and the applications to the District Court of Appeal and the Supreme Court to which reference has been made. The validity of the trust was established, as was the right of the trustee to be compensated for the services of herself and her attorney. Affirmance of the judgments necessarily gave finality to the provisions which required the trustee to file a supplemental account and adjudged her to be entitled to a lien upon the trust estate for the amount of her proper disbursements, trustee's and attorney's fees. Points numbered 9 and 10, which are the only ones not covered by appellant's briefs on the former appeals, were, as we say, determined adversely to the present conten-

tions by the order of the District Court of Appeal refusing to recall the remittitur and by the refusal of the Supreme Court to order the remittitur recalled or to take over the case for decision. The order of the District Court of Appeal made September 23, 1943, reads as follows: "By the Court: Motions for the recall of the remittiturs, for orders vacating the decisions and for the resubmission of the appeals presented and argued by Edward M. Raskin on behalf of appellant, and by A. W. Ashburn on behalf of respondents. It appearing to the court that ground for recall of the remittiturs does not exist, that appellant has been guilty of laches, and that the judgments of this court have long since become final, the motions are denied in each cause." In the instant proceeding the court found that the matters relied upon and sought to be relitigated by plaintiff were res judicata. It was specifically found that the two appeals taken from plaintiff's motion to vacate judgment and enter another and different judgment pursuant to the provisions of section 663 of the Code of Civil Procedure were necessarily and actually decided adversely to plaintiff by the affirmance of the judgments and by the orders of the District Court of Appeal and the Supreme Court in denying motions to recall the remittiturs.

Plaintiff's arguments, except to a minor extent, are founded upon an erroneous conception of the doctrine of res judicata and of its applicability in the instant proceeding. He chooses to discuss the rule of the law of the case as if it were the only one to be considered. Upon this assumption he quotes from England v. Hospital of Good Samaritan, 1939, 14 Cal.2d 791, 795, 97 P.2d 813, 814, as follows: "The doctrine of the law of the case * * * should not be adhered to when the application of it results in a manifestly unjust decision. * * * But a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former appeal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before." He then cites many other cases which treat of the rule of the law of the case. In all of these cases there had been either a retrial after a reversal of an earlier judgment or after affirmance of an order granting a new trial. It would be idle to discuss the principles of the law of the case rule with respect to issues originally presented but which have not been the subject of final determination. No such issues remained in the present litigation. When the former judgments were affirmed in their entirety, the superior court had nothing to do other than to give effect to the judgments as affirmed, that is, to take such steps as might be necessary for the settlement of the final account of the trustee, to appoint a successor trustee, and to see to the transfer of the trust assets to the new trustee. The court was without jurisdiction to do anything more than this. 2 Cal. Jur., sec. 625, p. 1051; Oldfield v. Superior Court, 1933, 217 Cal. 581, 20 P.2d 671. If a court could retry issues which had been determined by its former judgments and which had become final, there would be no end to litigation. The record of the earlier proceedings in the instant actions in the trial court and upon appeal were before the court and they established the conclusiveness of the adjudication as to the validity of the trust and ownership of the stock, leaving open only those matters which pertained to the winding up of the trusteeship of Mrs. Hotchkis.

[3] The court did not err in making an order bringing in the Title Insurance and Trust Company as a party to the proceeding for settlement of the account. No prejudice could have resulted to appellant from this procedure.

The order is affirmed.

DESMOND, P. J., and WOOD, J., concur.

72 Cal.App.2d 368

BIXBY v. HOTCHKIS et al.

Civ. 14823.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

As Corrected Jan. 15, 1946.
Rehearing Denied Jan. 22, 1946.
Hearing Denied Feb. 25, 1946.

1. Judgment ⇨715(2)

Judgments, establishing validity of trust in shares of corporation's stock and determining that one suing trustee for recovery of stock and dividends thereon had no interest in stock except as trust beneficiary, but that trustee held title thereto and had not converted it to her own use, constituted conclusive adjudications that stock was not converted by trustee and were res judicata in beneficiary's subsequent action against trustee, corporation and another for conversion of stock. Code Civ.Proc. § 597.

2. Continuance ⇨20(3)

Where attorney for plaintiff in superior court action for conversion of corporation stock made no attempt to obtain continuance of or leave to absent himself from municipal court trial, in which he was engaged, in order to appear in superior court on day fixed for trial of such action, and only law issue of res judicata was to be determined in such action, superior court judge did not abuse his discretion in denying continuance. Code Civ. Proc. § 597.

3. Judgment ⇨366, 379(1)

Where plaintiff, moving to vacate judgment for defendant on ground of absence of plaintiff's counsel from trial, failed to show that plaintiff had meritorious defense to defendant's plea of res judicata or that plaintiff's rights were prejudiced by reason of such counsel's absence, motion was properly denied. Code Civ. Proc. § 473.

4. Judges ⇨51(1)

Notice to parties of time and place when special judge designated by judicial council will consider and decide question of regular superior court judge's disqualification to rule on motion for new trial is unnecessary, as proceeding to disqualify judge is summary, steps prescribed by statute must be taken within periods specified by statutes, and evidence must be considered ex parte, in absence of statutory provision for receipt of other evidence than verified statement and answer or for formal presentation by motion with or without argument. Code Civ.Proc. §§ 170, 187.

5. Jury ⇨25(2)

Appellant's assertion that he was refused a jury trial presents no error, in absence of demand for jury.

6. Jury ⇨14(5)

A trust beneficiary was not entitled to jury trial of his action against trustee and others for conversion of shares of corporation's stock held in trust.

7. Appeal and error ⇨110

An appeal may not ordinarily be taken from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Myron Westover and Emmet H. Wilson, Judges.

Action by Fred H. Bixby, Jr., against Katharine Bixby Hotchkis, individually and as alleged trustee, and others for conversion of shares of the capital stock of a corporation. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Sherman Anderson, Newlin, Holley, Sandmeyer & Coleman, and Newlin & Ashburn, all of Los Angeles, for respondents.

SHINN, Justice.

[1] The present action was one for the conversion of 10,703¾ shares of the capital stock of Fred H. Bixby Company. The action, numbered 463102 in the superior court, was instituted April 11, 1941, and at that time there were on trial two other actions brought by plaintiff, numbered 458012 and 458013, the history of which, so far as pertinent here, is stated in our decision, 164 P.2d 804, this day filed, and in the opinion in Bixby v. Hotchkis, reported in 58 Cal.App.2d 445, 136 P.2d 597. One of those actions was for the recovery from Katharine Bixby Hotchkis of the shares of stock in the Bixby Company which, by the complaint in the instant action, were alleged to have been con-

verted by said defendant. The other action was for the recovery of dividends on the stock which had come into the hands of Mrs. Hotchkis as trustee. After the institution of the present action Mrs. Hotchkis filed an amendment and supplement to cross-complaint in the two actions which were then on trial, in which the institution of the present action was alleged, together with the fact that said action raised the same issues as the cross-complaints of Mrs. Hotchkis and the answers of Fred H. Bixby, Jr., thereto which were then on trial. As appears from the opinion upon the other appeal, this day filed, the judgments in superior court actions 458012 and 458013 established the validity of the trust, under which Mrs. Hotchkis held title to the stock as trustee. The question was properly before the court in the actions that were tried, as to whether Fred H. Bixby, Jr., had any interest in the stock other than as the beneficiary of the trust, and the judgments determined that he had no other interest. That determination, that Mrs. Hotchkis held title as trustee, necessarily defeated plaintiff's claims that he was entitled to the possession of the stock and the dividends thereon and the claim asserted in the instant action that the stock had been converted by Mrs. Hotchkis. The court found: "It is not true that cross-complainant has converted to her own use or at all the whole or any of said 10,703¾ shares of stock or the certificates representing same." It was further found that Mrs. Hotchkis had not taken or withheld or detained all or any of said shares of capital stock at any time or in any manner except as trustee of said trust. Those judgments were affirmed (Bixby v. Hotchkis, 1943, 58 Cal.App.2d 445, 136 P.2d 597) and became final. They were therefore a conclusive adjudication adverse to plaintiff herein of his asserted claim that the stock had been converted by Mrs. Hotchkis. After the judgments had become final, the plea of res judicata was interposed by amendment and supplement to answer of Mrs. Hotchkis and of defendants Fred H. Bixby Company and Sherman Anderson in the present action. The latter two parties were defendants in action 458012, Mrs. Hotchkis a defendant in both former actions. The case was tried upon the issue of res judicata pursuant to section 597 of the Code of Civil Procedure. The special defense was sustained by findings and judgment, and plaintiff has appealed from the judgment.

Although the appeal from the judgment is upon the judgment roll, and the evidence is not before us, we have taken notice of the judgment rolls in the former actions, because the judgments in those actions are set out in the amended and supplemental answer of Mrs. Hotchkis and it is conceded in the briefs that the judgment rolls were in evidence upon the trial of the plea of res judicata. The judgment rolls themselves conclusively sustain the decision. If there were any question about that, we would have to assume that there was sufficient evidence to sustain the plea, since the judgment recites that proof was made to the satisfaction of the court, and appellant has taken no steps to bring up the evidence. The identical question in issue in the present case, namely, the alleged conversion of the stock by Mrs. Hotchkis, having been determined adversely to plaintiff by final judgments between the same parties litigating in the same capacity, was not subject to re-examination and redetermination. 15 Cal.Jur. 97. The plea of res judicata was properly sustained.

[2] A claim of error is predicated upon the denial of a continuance of the trial. The ground for continuance which was advanced was that on October 20, 1943, when the case was called for trial, plaintiff's attorney was engaged in the trial of a case in the municipal court which had been commenced October 19. Notices of trial were served October 4 and October 13, 1943. On October 20, plaintiff's attorney was represented by another attorney for the purpose of requesting a continuance and the trial judge, Honorable Emmet H. Wilson, ruled that the trial could proceed immediately or, if the attorneys for defendants and cross-complainants preferred, would be continued until 2 p. m. of the same day. The attorneys elected to proceed at the later hour and did so proceed. Mr. Angelillo, who was the representative of plaintiff's attorney, Mr. Rose, had been advised upon the 19th that defendants' counsel would oppose any continuance. It appeared from the affidavits that Mr. Rose made no attempt to obtain a continuance of the municipal court trial or to obtain leave to absent himself therefrom in order to appear before Judge Wilson. It was stated in an affidavit of Honorable Arthur Guerin, Judge of the municipal court, that

when he learned that Judge Wilson had been inquiring for Mr. Rose, he telephoned Judge Wilson and informed him that the trial in the municipal court would probably be concluded before noon of that day, and it further appears from the affidavit that Judge Guerin stated to Mr. Rose that, "In view of the circumstances, I would be inclined to cooperate in the case on trial," but that Mr. Rose said, in substance, "No, we will go ahead in this case," and that the trial thereupon proceeded. Judge Wilson no doubt believed, from an examination of the record which was before him on the motion, that only a question of law would be presented at the trial. While the facts alleged as the basis of the plea of res judicata were deemed to be denied, the fact that plaintiff would have had an opportunity to prove that the pleaded judgments had not been rendered, as alleged, or that they had not become final, did not mean that he would attempt to do so. There was, in fact, only the issue of res judicata to be determined. There was no abuse of discretion in denying the continuance. Miller v. Miller, 1945, Cal.Sup., 156 P.2d 931; People v. Maddox, 1944, 65 Cal.App.2d 45, 149 P.2d 739; Flynn v. Fink, 1923, 60 Cal.App. 670, 213 P. 716.

[3] Appellant made a motion to vacate Judge Wilson's judgment, pursuant to section 473 of the Code of Civil Procedure, and this was denied by Judge Bartlett. Appellant has had certain of the proceedings on this motion incorporated in the record and the remainder was called for by respondents. It does not appear from that record that plaintiff herein had a meritorious defense to the plea of res judicata. There was no showing made on the motion to vacate the judgment that plaintiff's rights were prejudiced by reason of the absence of his counsel from the trial.

[4] The next point for consideration arises out of a proceeding to have Judge Wilson disqualified to rule on a motion for new trial. The judgment was entered October 25, 1943. Notice of entry of judgment was served on plaintiff's attorney October 27. On November 6 plaintiff filed his notice of intention to move for a new trial. The hearing on the motion was set for December 8, and on that day plaintiff filed an affidavit which purported to state grounds of disqualification of Judge Wilson to rule upon the motion. Judge Wilson filed an answering affidavit on December 13 and Honorable Myron Westover was designated by the Judicial Council to hear and decide the question of Judge Wilson's alleged disqualification. Judge Westover made an order holding Judge Wilson not to be disqualified to rule upon the motion, and Judge Wilson subsequently denied the motion. An appeal was taken by plaintiff from the order of Judge Westover and is before us for decision. The ground urged for reversal of that order is that Judge Westover considered and ruled upon the charge of disqualification in the absence of, and without notice to, plaintiff's attorney. It does not appear from the record that notice of the time and place when Judge Westover would hear and rule upon the matter was not given. While this, in itself, would be a sufficient ground for affirming the order, Armstead v. Jackson, 1929, 100 Cal.App. 725, 280 P. 1028, we do not adopt it, for the reason that to do so would imply that notice is necessary. We are of the opinion that it was not necessary that the parties have notice of the time and place when Judge Westover would consider and decide the matter of the alleged disqualification or that appellant be given an opportunity to offer further evidence or argument in the matter. It is incumbent upon one who challenges the qualification of a judge in an action or proceeding to "present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge." Code of Civil Procedure, sec. 170. The judge may then within five days file either his consent in writing that the action or proceeding be tried before another judge, or his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualification. The statement and also the answer must be verified by oath in the manner prescribed for the verification of pleadings. Section 170 provides that the question of disqualification "shall be heard and determined" by some other judge, if one is agreed upon, or by one requested to act by the chairman of the Judicial Council if the parties fail to agree. The judge selected by the parties or appointed by the chairman of the Judicial Council has only to decide the question

of disqualification and the manner in which he goes about it is left to his discretion. No form of trial or other formal procedure is directed and none is to be implied. It is a summary proceeding in which the several steps must be taken within the brief periods specified therefor. The evidence to be considered is recorded before the judge is selected, and consists of the verified statement and the answer. Since there is no provision in the statute for the receipt of other evidence or for a formal presentation by motion, with or without argument, an ex parte consideration of the evidence is indicated as the proper procedure. If the course of proceeding be not specifically pointed out by code or statute for the exercise of jurisdiction, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code. Code of Civil Procedure, sec. 187. The proceedings to be taken in the matter of alleged disqualification are clearly intended to be such as will avoid unnecessary formality and delay. The cases relied upon by appellant which relate to the giving of notice are not in point. They dealt with situations in which there had been failure to comply with specific statutory requirements for notice.

Respondents also rely upon other grounds for affirmance of the order. One of these is that plaintiff's verified statement did not state facts sufficient to show that Judge Wilson was disqualified to rule upon the motion. There appears to be merit in this contention. The statement consists largely of conclusions and deductions drawn by plaintiff from adverse rulings which the judge had made. The answer of Judge Wilson contained general and specific denials of the existence of prejudice and of all facts from which prejudice could reasonably be inferred. There was ample evidence before Judge Westover to support his finding that Judge Wilson was not disqualified. It is therefore unnecessary to pass upon the legal sufficiency of plaintiff's statement or to discuss the other points urged in support of the correctness of the order.

[5, 6] Appellant's assertion that he was refused a jury trial is without merit for the reasons (1) he did not demand a jury, and (2) he was not entitled to one.

[7] The judgment and the order holding that Judge Wilson was not disqualified, and the order denying motion for new trial, from which an appeal, ordinarily, may not be taken, are affirmed.

DESMOND, P. J., and WOOD, J., concur.

72 Cal.App.2d 287

WEST COAST HOME IMPROVEMENT CO., Inc., v. CONTRACTORS' STATE LICENSE BOARD OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS.

Civ. 14805.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1945.

Hearing Denied Feb. 21, 1946.

1. Mandamus 🔑173

In mandamus proceeding to review action of Contractors' State License Board in revoking contractor's license, petitioner was not entitled to unqualified trial de novo to which a litigant is entitled in the superior court on appeal from a justice's court on questions of fact or on questions of both law and fact. Code Civ.Proc. § 976; St. 1939, p. 391, § 7099.

2. Mandamus 🔑164(4)

In mandamus proceeding to review action of an administrative board, neither party is bound in all particulars by the record before the board, and trial court is not confined to such record nor bound by the findings and determination of the board.

3. Mandamus 🔑168(3)

In mandamus proceeding to review action of an administrative board, if incompetent evidence has been received by the board, petitioner should not be foreclosed from objecting on the trial to its admissibility, and, if board has improperly refused to entertain admissible evidence, petitioner should not be foreclosed from offering it at the trial.

4. Mandamus 🔑168(3)

In mandamus proceeding to review action of administrative board, if credibility of witnesses before the board is brought in question the opportunity should be afforded for further examination or to contradict or impeach the testimony.

5. Mandamus ⚷154(4)

In mandamus proceeding to review action of administrative board, petitioner must set forth in his petition for the writ his objections to the proceedings had before the board if such proceedings are to be questioned.

6. Mandamus ⚷187(7)

In mandamus proceeding to review order of contractors' license board revoking contractor's license, record failed to show either that trial court refused to consider admissible evidence which board refused to entertain or that it foreclosed petitioner from objecting to any incompetent evidence received by the board. St.1939, p. 391, § 7099.

7. Mandamus ⚷168(4)

Evidence failed to show that petitioner had been deprived of a fair trial before Contractors' License Board in proceeding for revocation of its contractor's license because hearing officer of board was prejudiced against petitioner. St.1939, p. 391, § 7099.

8. Witnesses ⚷292

An officer of a corporation as such has no constitutional privilege to refuse to testify. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 5.

9. Licenses ⚷38

The object of establishing the Contractors' State License Board and vesting disciplinary power in registrar of contractors is for protection of the contracting business as well as the public by removing from the conduct of a contractor's business a licensee whose method of doing business indicates lack of integrity, and punishment of the individual contractor is incidental.

10. Witnesses ⚷293½, 302

Officer of corporate licensee could not complain that he was called to give testimony in proceedings before Contractors' License Board to revoke contractor's license of corporate licensee without being admonished as to his constitutional right not to be compelled to be a witness against himself, since even an individual licensee could not refuse to testify on sole ground that he was an accused in a disciplinary proceeding. St.1939, pp. 384, 394, §§ 7030, 7114; Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 5.

11. Mandamus ⚷87
Witnesses ⚷302

Where president of corporate licensee had been advised of his right to procure counsel in proceedings before Contractors' License Board for revocation of contractor's license of the corporation and had declined to do so, and had been present when several witnesses were advised of their constitutional right to refuse to testify, hearing officer was not guilty of prejudicial misconduct because of calling president to witness stand without admonishing him as to his right not to testify. St.1939, pp. 384, 394, §§ 7030, 7114; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 5.

12. Licenses ⚷38

Evidence that corporate licensee in sale of house siding misled prospective customers into believing that they were getting a special discount by reason that their house had been selected for display purposes, and further misled customers into believing that all underpinning of house would be thoroughly sprayed to prevent termite infestation, justified revocation of contractor's license of the corporation. St.1939, pp. 393, 394, §§ 7109, 7111, 7114–7118.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by West Coast Home Improvement Company, Inc., against Contractors' State License Board of the Department of Professional and Vocational Standards for a writ of mandate directing the respondent Board to set aside its order revoking the contractor's license of petitioner, to restore the license to petitioner, and to dismiss the complaint and proceedings thereon pending before respondent board. From a judgment denying the peremptory writ of mandate, the petitioner appeals.

Affirmed.

Prior opinion 155 P.2d 863.

See also 164 P.2d 820.

Jerry Giesler and Robert A. Neeb, Jr., both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Petitioner and appellant (hereinafter designated as petitioner) filed in the superior court a petition for a writ of mandate directing the defendant and respondent (hereinafter referred to as respondent) to set aside its order and decision revoking the contractor's license of petitioner, to restore said license to petitioner, and to dismiss the complaint and proceedings thereon pending before respondent board. From a judgment denying the peremptory writ of mandate prayed for petitioner prosecutes this appeal.

For a number of years prior to the entry of the judgment herein petitioner had been licensed as a contractor and was carrying on such business in Los Angeles County. On or about August 23, 1943, a complaint was filed with respondent board wherein petitioner was charged with violating the provisions of sections 7109, 7111, 7114, 7115, 7116, 7117, and 7118 of the Business and Professions Code, St.1939, pp. 393, 394. Within the time provided by law petitioner filed with respondent board a written answer to the charges set forth in said complaint. Thereafter a hearing was had as provided by law before a duly appointed, qualified and acting deputy registrar of contractors. The proceedings at such hearing were taken down in shorthand and later transcribed. At the conclusion of the hearing the deputy registrar presiding thereat made and signed written findings and recommendations. Subsequently, on December 7, 1943, the Registrar of Contractors made, signed and filed a decision in said proceeding finding the petitioner guilty of violating the aforesaid provisions of the Business and Professions Code and revoking its license to engage in the contracting business in the State of California. On December 21, 1943, petitioner filed a petition for rehearing, which was denied by the Registrar of Contractors on January 18, 1944.

Thereafter petitioner, pursuant to the provisions of section 7099 of the Business and Professions Code, St.1939, p. 391, filed in the Superior Court of Los Angeles County a petition for a writ of mandate wherein it was asserted that the deputy registrar who conducted the hearing before the State Board was biased and prejudiced. Said court issued an alternative writ of mandate, and upon a hearing had thereon considered the entire record of the evidence introduced at the proceeding had before the State Board. Thereafter said superior court made comprehensive findings and concluded that "the petitioner was afforded a full and fair hearing before the respondent (State Board); that there is adequate competent evidence to sustain the findings, decision and order revoking the petitioner's license, and that the order of the respondent was not arbitrary, capricious, illegal and fraudulent; that petitioner has not sustained the burden resting on it to plead and prove that the respondent acted contrary to the weight of the evidence or that he acted arbitrarily, capriciously, fraudulently or illegally, or in abuse of the discretion or without due regard to the rights of petitioner; the court finds no reason for annulling the order of the respondent (State Board) and on the contrary finds that the order should be sustained." The superior court thereupon entered its judgment discharging the alternative writ of mandate and denying a peremptory writ.

The complaint lodged against petitioner before the State Board charged it with willful departure from or disregard of plans and specifications in material respects, sec. 7109; failure to make and keep records in accordance with the provisions of section 7111; aiding and abetting an unlicensed person to evade the provisions of Chapter 9 of the Business and Professions Code (sec. 7114); failure to comply in a material respect with the provisions of Chapter 9 of the Business and Professions Code (sec. 7115); the doing of willful and fraudulent acts as a contractor in consequence of which substantial injury was caused to others (sec. 7116); acting in the capacity of a contractor in violation of the terms of section 7117; and knowingly entering into contracts with a contractor while such contractor was not licensed as provided by Chapter 9 of the Business and Professions Code (sec. 7118).

Petitioner's method of doing business which was challenged by the complaint filed against it before the State Board may be epitomized by the testimony of Mrs. Emma Moedl, one of some fourteen people who entered into contracts with petitioner for the improvement of their properties. This witness was first contacted by a Mrs. Morrison and a "Dr." Kossis, representatives of petitioner. This witness was asked by them if "she would be interested in having siding put on our house," to which she replied, "We had thought quite a bit about it." The witness was informed by petitioner's representatives that they would put asbestos siding on her home and that they would do a "spray job" for termites. It was also represented to Mrs. Moedl and her husband that their home was selected as a "model" or "display" house; that pictures would be taken of the same; that only one such "model" or "display" house would be selected in each district; that the pictures would be used as an advertising medium; that petitioner's salesmen would be permitted to "show our home to any prospective purchasers of asbestos siding"; that when any sales were made to prospective purchasers whose names were furnished to petitioner by the Moedl's or as a direct result of "using our home" as described above, the sum of twenty dollars would be paid to the house owner, thereby decreasing the amount of the contract price for the siding and termite spray job. The entire job, including the spraying, was to cost $400 and was to be put on a three-year contract with the Bank of America. The Moedl's advised Dr. Kossis, one of petitioner's representatives, that they had found one corner of the front room where the termites were just starting to come through, and that they would not contract for the work unless the house was completely sprayed for the elimination of termites. According to Mrs. Moedl, she and her husband signed "some papers" and Mr. Moedl signed a National Housing Agency form 60—5, which was an application for exemption from Regulation "W" governing the remodeling and rehabilitation of properties in order to maintain housing facilities in private war housing priority localities. The National Housing Agency form was introduced in evidence, but was not filled in at the time it was signed. This form contained the question, "Will the housing accommodation become uninhabitable (meaning a definite hazard to the health or safety of the occupants, not merely an inconvenience) if each item of the repair listed under Section B is not performed in ninety (90) days after the date of this application?" In order that the improvements might be made it was required that this question be answered in the affirmative. In this regard a letter was introduced in evidence, written by William A. Pirsig, a contractor employed by petitioner to make inspections of houses upon which petitioner had contracted to do work. In his letter Mr. Pirsig stated that the siding on the Moedl house was "very badly warped and checked and has several large pieces broken entirely out. The paint is also in a very deplorable condition, being badly scaled and peeled, and also very badly weather-beaten." In his letter Mr. Pirsig further stated: "It is my opinion that to prevent the ruination of the interior plaster which would soon be caused by the penetration of the elements through the above-mentioned holes and cracks, and also to protect the health of the tenants, this house should definitely be repaired at once, and it is my belief that the best and most economical method of repair is to re-side all exterior walls with some good grade of pre-finished insulated siding." There was testimony that the house had been painted yellow, trimmed with brown, approximately fifteen months before the siding was put on, and that the paint was in good condition and not badly scaled, peeled or weather-beaten. It is true the testimony does show that the french windows were not as tight as they should have been and did not have weather-stripping on them. No pictures were ever taken of the premises, Mrs. Moedl did not receive any bonus, although she did not send in any cards, although one man did come to look at the house. Apparently the contract was substantially performed except for the spraying of the underpinning. A truck driver unloaded the shingles and paint and took off a machine for spraying. This did not take over fifteen minutes. Mrs. Moedl asked him if he was through spraying and he replied that he was, stating that the jet he was using would "shoot forty to fifty feet in a few minutes". From the testimony it also appears that in putting on the siding petitioner partially covered up part of the vent.

With reference to the alleged violation of section 7109, there was evidence to support the finding of the hearing officer and the court that "the petitioner did depart from the specifications in a material respect in that in ten out of fourteen written contracts admitted in evidence said contracts provided that petitioner should spray all underpinning; the evidence shows that the petitioner did spray some of the underpinning on five of said ten jobs and the evidence conclusively shows that on the remaining five jobs the amount of spraying that was done was inconsequential; the petitioner contended that the term, 'spray all underpinning,' meant merely to spray the mudsills; but the petitioner corporation is under the close joint control of its two officers, one of whom is an experienced contractor, and the term 'underpinning' is well known in the contracting business and does not mean 'mudsills'; the petitioner in attempting to secure jobs from home owners contended that the spray work constituted a valuable service to the building as a termite cure and preventive; said home owners relied upon such representation with respect to spray work and awarded said contract to petitioner in the belief that the spray work constituted a substantial part of the entire value of the work to be done; the work done by the petitioner in spraying was inconsequential and in many instances entirely valueless."

With reference to the alleged violation of section 7111, there was testimony to support the court's finding that "the evidence is clear and convincing that it did make and keep records of a sort, but such records were not clearly decipherable even by the officers of the petitioner."

There was also substantial evidence to support the finding that petitioner violated sections 7114, 7117 and 7118, in that it did "aid salesmen and solicitors and representatives named in the complaint to evade the provisions of the Business and Professions Code relating to contractors; said salesmen were not licensed as contractors; the petitioner knowingly combined and conspired with said unlicensed persons and allowed his license to be used by said unlicensed persons and acted as an agent and a partner of such persons to evade the provisions of said chapter of the Business and Professions Code; the petitioner's business is solely based upon contracts secured by his salesmen, who are usually preceded by a so-called 'bird dog' to make the original contact and to open negotiations; the salesmen are paid by the petitioner, not on a salary or a straight commission basis, but by a somewhat involved formula which constitutes a division of the profits; if the salesman secures the contracts upon which there is more than normal or average amount of profit, the salesman's percentage in that job is increased, but if the salesman makes an error and underestimates the size of the job and thereby the profit is less than expected, the salesman loses because of his error; the salesman has absolute authority to enter into contracts in the name of the petitioner without the petitioner becoming aware of or approving the transaction; the salesmen are sent out into the field armed with blank contracts printed with petitioner's name and given no instructions or methods to be used in securing contracts other than that the petitioner prefers the salesmen not to secure contracts based upon a price exceeding a certain maximum per unit of exterior surface to be shingled; the petitioner did not have the normal employer-employee control of his salesmen or representatives; the petitioner denies all responsibility for his salesmen's actions, and contends they operate 'independently as sales representatives on a commission basis'; the petitioner further alleges by his answer that 'these individuals are privileged to take orders for various essential repairs to any authorized contractor capable of furnishing the required material as necessary' for completing these specifications set forth in the various orders'; the salesmen's employment by the petitioner is not considered by the petitioner to come within the scope of the Social Security laws or the withholding provisions of the Federal Income Tax Laws; the salesmen are contractors operating under the license of the petitioner and said salesmen are not licensed as contractors; they secure contracts which they and the petitioner jointly execute with the petitioner actually doing or having most of the work done; stated differently, the petitioner attends to the construction end of the business, with some exceptions, and the various salesmen attend to the selling, and after the payment of the petitioner for his work and costs, the profits are divided."

The evidence supports the finding that petitioner violated section 7116, in that it represented that the spray job was "equal in value and effect to a complete termite treatment under the houses, but knowing in fact it was only going to cover the mudsills, and that that was not a successful treatment to eradicate termites throughout the underpinning as a whole.

"It was represented that the regular price of this product was greatly reduced due to allowing the homes to be used as 'models,' when in truth and in fact the usual prices charged by the petitioner was about $39.00 to $42.00 per square, whereas the normal price was only $22.50 per square, and that $22.50 is a fair and equitable price per square for such produce in the locality.

"It was further represented that pictures were to be taken before and after applying the siding, and that he would show these places, and their owners would receive bonuses from all subsequent jobs in that district, which would greatly offset their contract and loan payments, the petitioner did not at that time or any other time intend to comply with such representations and he did not comply with such representations."

"The petitioner's method in selling 'model house' or 'bonus transactions,' which method was used in all cases herein, was to lead the owner to believe that a bonus would be paid for every job done in that general neighborhood, and that the house would actually be advertised by 'before and after' pictures; the procedure set up for the payment of bonuses and the advertising of houses, in so far as the actual contractual documents are concerned, did not bind the petitioner to pay any bonuses unless the owner personally secured the prospect; nor did the petitioner bind himself to take pictures or to advertise the house; by securing the permission from the owner to advertise the house, the petitioner led the owner to believe that such would be done, which would lead to the payment of bonuses to the owner; in almost every instance the owner was misled as to the intentions of the petitioner; and the court finds that the petitioner purposely so conducted the conversations and negotiations that the wrong impression was left with the owner; the sales talk of all of the salesmen and solicitors was so similar as to indicate a concerted program, and the similarities were not either accidental or a mere coincidence."

"That he influenced property owners to sign National Housing Administration Form 60—5 on jobs for a loan of more than twelve months, and the petitioner signed such forms himself to the effect that these particular houses were in need of repair; that in 10 contracts out of 14 which were admitted in evidence the 36-month loan under the jurisdiction of National Housing Administration was secured; in each instance in order to secure such a loan it was necessary to answer the following questions in the affirmative: 'Will the housing accommodations become uninhabitable (meaning a definite hazard to the health or safety of the occupants, not merely an inconvenience) if each item of repair listed under question V is not performed in ninety (90) days after the date of this application?'; that in every case it absolutely was unnecessary for the work to be done in order to keep the accommodations from being uninhabitable within ninety days; it is true that the work to be done did constitute some improvements to the building which might, by using great imagination, be slightly connected to protection of health, but the work only remedied a condition which had existed for a long time during which the building had been inhabited, and there was no evidence that the condition in any instance had become critical; for the most part the work constituted mere beautification or luxury repairs; these National Housing Administration applications were signed in blank by the owner, but were actually filled out by some member of the petitioner's personnel who later described the work to be done and the necessity for it; the petitioner took steps to keep from knowing whether or not the statements as to the necessity of the work were true; the petitioner employed a licensed contractor as an 'inspector' upon a basis which permits petitioner to call him an independent agent, since he was paid $5.00 for each inspection; this contractor inspected the premises and then filed with the petitioner a written statement describing the condition of the building and outlined what work should be done; upon the basis of this letter, the petitioner then completed the application which had been signed in blank by the owner; the application was then filed with the bank which automatically extended a 36 months credit to the owner; this inspection was ordinarily made after the material was dumped on the job; the statements made by the contractor in his inspection reports were largely false and extorted and in most instances had no resemblance whatever to the truth; this contractor, in addition to performing the services related hereinabove, was also employed by the petitioner in another capacity and paid wages for said services; the owners who signed such application blanks were not shown what they had signed and on the contrary they were kept from knowing the full purport of the document they had signed but they were informed that it was merely a request for priority."

[1-5] As a first ground of appeal petitioner contends that although in its pleadings a trial de novo was demanded the same was refused by the court. Under the law, the petitioner was not entitled to an "unqualified and unlimited trial de novo to which a litigant is entitled in the superior court on appeal from a justice court on

questions of fact or on questions of both law and fact, Code Civ.Proc. § 976, where, justifiably or not, he may present a 'skeleton' case in the lower court and reserve the real showing on the merits for the trial in the superior court." Dare v. Board of Medical Examiners, 21 Cal.2d 790, 795, 136 P.2d 304; Russell v. Miller, 21 Cal.2d 817, 819, 136 P.2d 318. As was said by this court in denying a writ of supersedeas in the instant case, West Coast etc. Co. v. Contractors' State License Board, Cal.App., 155 P.2d 863, 867: "while neither party to a mandamus proceeding is bound in all particulars by the record before the Board and the trial court in such a proceeding is not confined to such record, nor bound by the findings and determination of the Board, nevertheless, in order to introduce further and additional evidence there must be a showing, for instance, that from the record it appears 'that incompetent evidence had been received by the board' in which event 'the complaining party should not be foreclosed from objecting on the trial to its admissibility. Also if the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial. If additional evidence not included in either category be sought to be introduced by a party, the court has the right to receive it upon a showing that, in the exercise of reasonable diligence, it could not have been introduced before the board. If the credibility of witnesses before the board be brought in question in the mandamus proceeding the opportunity should be afforded for further examination or to contradict or impeach their testimony under well recognized rules of evidence and procedure.' Dare v. Board of Medical Examiners, supra, 21 Cal.2d pages 799, 800, 136 P.2d [304]. In the case just cited, it is further held that it is the duty of the petitioner to set forth in his petition for the writ his objections to the proceedings had before the board, if such proceedings are to be questioned."

No reporter's transcript has been presented as part of the record on this appeal and the clerk's minutes of proceedings had upon hearing of the petition for a writ of mandate are not contained in the clerk's transcript. Nowhere in the record before us does it appear that at the trial petitioner produced any witnesses or made any offer of proof with reference to any evidence which it was claimed the administrative board refused to entertain, nor was any evidence offered in addition to that received at the board hearing. In its amendment to the petition for the writ in the trial court petitioner set forth some sixty specifications of claimed error on the part of the hearing officer in admitting allegedly erroneous evidence. A record of the proceedings had before the board was filed in the trial court and by reference thereto in the pleadings was made available for consideration by the court for a proper determination of the questions presented by the pleadings. With reference thereto there appears in the findings the following:

"The court carefully considered the entire record of the evidence introduced and the proceedings had before the respondent, together with the complaint filed with respondent and the findings and order made, and evaluated the evidence and gave consideration only to the legally admissible evidence and therefrom made its independent findings and conclusions; * * *"

It is noteworthy that in connection with the charge made against petitioner wherein it was accused of violating the building ordinances of the cities of Los Angeles, Gardena and Redondo Beach, the court held that the evidence offered in substantiation thereof was inadmissible and disregarded the same in its entirety.

[6] The record before us reflects no showing to bring this case within the doctrine enunciated in Dare v. Board of Medical Examiners, supra, or Russell v. Miller, supra, which would entitle petitioner to present evidence in addition to that offered before the board. The trial court was not advised, nor is this court apprised, of any admissible evidence which the board refused to entertain, nor is any showing made as to any additional evidence which petitioner sought to introduce before the trial court. In the absence of a reporter's transcript, we must assume from the findings that the petitioner was not foreclosed in the trial court from objecting to any incompetent evidence received by the board: but on the contrary, as heretofore pointed out, the trial court rejected certain evidence presented to the board and sustained objections to its competency.

If petitioner contends that he was entitled to an unlimited trial de novo and that the witnesses produced at the board hearing should again be called and re-examined as to facts about which they testified before the hearing officer, the petitioner is in error, as to his rights, for as held in Dare v. Board of Medical Examiners, supra, 21 Cal. 2d at page 799, 136 P.2d 304, it was never contemplated that the evidence presented to the board and contained in the record of its proceedings should be reiterated before the court.

[7] Petitioner next asserts that the hearing officer was biased and prejudiced against it by reason of which it was denied a fair and impartial trial. A review by us of the proceedings had before the state board leads us to concur with that portion of the court's findings wherein it was said: "The court finds from the remarks and the language in the reporter's transcript that some of the questions framed by the hearing officer were framed in such a way they might indicate the hearing officer did not show impartiality; the attitude of the hearing officer has caused the court to scrutinize the record more closely than would otherwise have been necessary in order to determine whether or not the record sustains the order revoking petitioner's license; the hearing officer did warn some of the witnesses on their constitutional rights to refuse to testify; said admonition in every instance was stated in the presence and the hearing of the petitioner; the hearing officer, however, did not admonish the officers of the petitioner corporation of any constitutional rights to refuse to testify."

After thus carefully scrutinizing the record, the court made the findings hereinbefore narrated, and as heretofore stated by us, there was competent and substantial evidence in the record to sustain such findings. While we are not prepared to negative petitioner's claim that the attitude of the hearing officer toward Jacob Johnson, its president, was brusque, and we may say, manifested toward him a feeling of considerable displeasure which does not appear to have been warranted and of which we do not approve, the hearing officer was also abrupt, curt and brusque on occasions with the representative of the state board who was prosecuting the charges made against petitioner. However, the fact that the hearing officer may have exceeded the bounds of propriety does not entitle petitioner to have the decision of the administrative board annulled when competent and admissible evidence sustains the findings and order made by such board.

Finally, petitioner challenges the validity of the state board's order on the ground that it was deprived of a constitutional right in that petitioner corporation's president, Jacob Johnson, was called to and did testify under section 2055 of the Code of Civil Procedure in the absence of any admonition by the hearing officer of Mr. Johnson's right not to be compelled to be a witness against himself. 5th Amendment, Const. U.S.; sec. 13, Art. I, Const.Calif. It is petitioner's contention that the charge made against it under section 7114 of the Business and Professions Code is denounced as a misdemeanor by section 7030 of the same code, St.1939, p. 384, by reason of which, petitioner argues, Mr. Johnson should have been advised of his right to refuse to testify if his testimony would tend to incriminate him. While it is true that the hearing officer did not warn Mr. Johnson of his constitutional right, it is nevertheless a fact that some of the other witnesses were advised of their rights in this regard and in every instance the admonition was given in the presence and hearing of petitioner's president. At the start of the hearing Mr. Johnson and his associate, Mr. Katz, were fully advised of their right to be represented by counsel, but they expressed their desire to proceed with the hearing without the aid of counsel.

[8] It is clear from the record that petitioner as a corporation was owned and controlled by its president, Johnson, and vice-president, Katz. It is established law that there is no constitutional privilege for an officer of a corporation as such to refuse to testify. U. S. v. White, 322 U.S. 694, 699, 64 S.Ct. 1248, 88 L.Ed. 1542, 152 A.L.R. 1202; Wilson v. U. S., 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann.Cas.1912D. 558. Furthermore, despite early cases which speak in general terms of the analogy between administrative proceedings for the revocation of a professional or business license and a criminal prosecution, a veritable forest of cases have rejected the contention that such administrative proceedings "are to be governed by criminal law theories on matters of evidence." Webster v. Board of Dental Examiners, 17 Cal. 2d 534, 537, 538, 110 P.2d 992, 995.

[9] The object of establishing the Contractors' State License Board and vest-

ing in the Registrar of Contractors disciplinary powers is for the protection of the public. The law is intended primarily to keep the contracting business clean and wholesome, to the end that it may merit the respect and confidence of the public in general and in particular those who have recourse to contractors in the construction or improvement of their properties. Therefore, the purpose of a disciplinary proceeding such as the one with which we are here concerned is to determine the fitness of a licensed contractor to continue in that capacity. It is not intended for the punishment of the individual contractor, but for the protection of the contracting business as well as the public by removing, in proper cases, either permanently or temporarily, from the conduct of a contractor's business a licensee whose method of doing business indicates a lack of integrity upon his part or a tendency to impose upon those who deal with him. A disciplinary proceeding such as the one in the instant case is comparable to such a proceeding under the State Bar Act, St.1939, p. 347, § 6000 et seq. In the case of Fish v. State Bar, 214 Cal. 215, 222, 4 P.2d 937, the supreme court, in disposing of the claim that it was error to call the accused attorney to the stand and compel him to testify, quoted with approval from In re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858, as follows [214 Cal. 215, 4 P.2d 940]:

" 'It is insisted by appellant that the court erred in allowing him to be called to the stand and compelled to testify over his objection. He contends the disbarment proceedings are in the nature of a criminal action, and that the accused in such a case should be accorded the same right to refuse to testify as is a defendant charged with the commission of a crime. This position cannot be maintained. Although it has been held that an accusation is in the nature of a criminal charge, Matter of Haymond, 121 Cal. 385, 53 P. 899, and that a proceeding on such a charge is a quasi-criminal action, In re McCowan, 177 Cal. 93, 170 P. 1100, "this court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the Code sections specifically covering them." Matter of Danford, 157 Cal. 425, 108 P. 322. The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual but for the protection of the courts and the legal profession. Ex parte Finley, 97 S.C. 37, 81 S.E. 279.' "

The court further quoted from the same case as follows:

" 'This is a special proceeding of a civil nature, and the rules applicable to criminal cases do not apply. In re Wellcome, 23 Mont. 259, 58 P. 711; In re Randel, 158 N.Y. 216, 52 N.E. 1106. If the accused is not guilty, nothing would have been easier than for him to deny all knowledge of the charges laid at his door. His having failed to testify in his own defense, when he should do so, and deny the statements of Whiteside and Clark, not only justifies, but irresistibly impels, this court, upon the evidence before it, which is credible, to the conclusion that he is guilty. In our opinion, in view of these considerations, this is not such a criminal prosecution against appellant as would entitle him to decline to testify on the ground that he cannot be compelled "to be a witness against himself" (Const. art. 1, § 13), but he may be called and examined for the information of the court, without, of course, infringing his right to decline to answer questions propounded to him on the ground that his testimony would tend to incriminate him.' "

See also Johnson v. State Bar, 4 Cal.2d 744, 752, 52 P.2d 928.

[10, 11] Thus it becomes apparent that if an individual licensee could not refuse to testify upon the sole ground that he is an accused in a disciplinary proceeding, the officer of a corporate licensee certainly cannot complain that he was called to give testimony. The president of petitioner corporation, having been advised of his right to procure counsel and having declined so to do, and having been present when several witnesses were advised of their constitutional right to refuse to testify, it cannot be held that in calling him to the witness stand the hearing officer was guilty of prejudicial misconduct which requires a reversal of the judgment here appealed from.

[12] There is in the record substantial testimony that petitioner sold siding on a "model house deal" whereby an owner was led to believe that his was the first house in the district upon which siding would

be applied and that such house would be used for display purposes, and that thereafter such customer would receive a bonus from future sales of siding in that district, and which bonus would be substantial. There is also evidence that the customers were led to believe that they were getting a special discount by reason of the fact that their house had been selected for display purposes. The evidence also supports the finding of the trial court that these representations were false. There is further testimony that the aforesaid representations were apparently made to all prospective customers, regardless of whether or not petitioner had previously applied siding to houses in the immediate neighborhood. The finding of the court that these representations were made with no intention to use the house for display purposes, to take pictures of the same or to advertise it, is also supported by the evidence.

In support of the claim that some, if not most, of the customers were substantially injured through representations made by petitioner's agents, there is in the record evidence that petitioner's customers were led to believe that they were getting a special discount, although they were in fact paying a high price. In fact, petitioner's president testified that his base price was $22.50 per square. This was broken down to amount to $9 for material, $4 for labor to apply the siding, $5 for overhead and $4.50 salesman's commission. He also testified that he could not do business on that basis. The testimony showed that the amount paid by most of the customers was between $35 and $40 per square, which price was considerably higher than the prevailing price. There is also testimony to support the finding of the trial court that petitioner represented that all underpinning of a customer's house would be thoroughly sprayed, and that such spraying would be a very effective means of eradicating termites or preventing termite infestation, when in truth and in fact the spraying actually done was worthless and only a very small area of each house was in fact sprayed.

From the foregoing, it must be held that the evidence supports the findings and the findings support the judgment, and that no prejudicial error appears in the record.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

72 Cal.App.2d 304

WEST COAST HOME IMPROVEMENT CO., Inc., v. CONTRACTORS' STATE LICENSE BOARD OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS.

Civ. 14806.

District Court of Appeal, Second District,
Division 1, California.

Dec. 26, 1945.

Hearing Denied Feb. 21, 1946.

1. Mandamus ⚿173

In mandamus proceeding to review action of Contractors' State License Board in revoking contractor's license, petitioner was not entitled to an unqualified trial de novo to which a litigant is entitled in the superior court on appeal from a justice's court on questions of fact or on questions of both law and fact. Code Civ.Proc. § 976; St.1939, p. 391, § 7099.

2. Appeal and error ⚿1010(1)

District Court of Appeal cannot interfere with conclusions arrived at by triers of fact when there is substantial evidence, however sharply controverted, which supports the findings.

3. Licenses ⚿38

Evidence that corporate licensee willfully made fraudulent representations for purpose of obtaining contracts for sale of product known as "Asbesto Seal", and that persons to whom such representations were made were materially injured, justified revocation of contractor's license of the corporation. St.1939, pp. 391, 394, §§ 7099, 7116.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by West Coast Home Improvement Company, Inc., against Contractors' State License Board of the Department of Professional and Vocational Standards, for a writ of mandate commanding respondent board to restore to petitioner its license to carry on the business of a contractor and to dismiss the proceeding which resulted in an order revoking the license. From a judgment discharging the alternative writ theretofore issued and denying a peremptory writ, the petitioner appeals.

Affirmed.

Prior opinion 155 P.2d 868.

Jerry Giesler and Robert A. Neeb, Jr., both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In a complaint filed with respondent Contractor's State License Board, appellant was charged with a violation of sections 7114, 7115, 7116, 7117 and 7118 of the Business and Professions Code, St.1939, p. 394. Following a hearing before a duly appointed, and qualified deputy Registrar of Contractors, appellant was found guilty of violating section 7116 of the above mentioned code and not guilty of all other charges made against it. Subsequently, and pursuant to the provisions of section 7099 of the Business and Professions Code, St.1939, p. 391, appellant filed in the Superior Court of Los Angeles County a petition for a writ of mandate commanding respondent board to restore to appellant its license to carry on the business of a contractor and to dismiss the proceedings which resulted in an order revoking said license. When the mandamus proceeding came on for hearing in the superior court the matter was submitted on the entire record of the proceedings had before respondent board, which included a reporter's transcript of said hearing. From a judgment discharging the alternative writ theretofore issued and denying a peremptory writ, appellant prosecutes this appeal.

[1] As a first ground for reversal, it is asserted by appellant that the court erred in not granting to it a trial de novo. This claim is based upon the identical grounds urged by appellant in the companion case of West Coast Home Improvement Co., Inc., v. Contractors' State License Board, Cal.App., 164 P.2d 811, this day decided. Upon the authority and for the reasons stated in the cited case, appellant's contention in this regard must be held to be without merit.

Section 7116 of the Business and Professions Code, for a violation of which appellant was adjudged guilty, provides for disciplinary measures when as a consequence of any willful or fraudulent act on the part of a licensee as a contractor substantial injury ensues to any person. The trial court found that representatives of appellant, for the purpose of obtaining contracts for the sale of a product known as "Asbesto Seal," made misleading, false and fraudulent representations; that under the terms of said contracts the above named product was to be applied by appellant to the dwelling houses of the parties mentioned in the complaint against appellant; that the following representations made by appellant were relied upon by the persons to whom they were made and were untrue:

"1. 'Asbesto Seal' is a plastic.

"2. 'Asbesto Seal' is an insulator.

"3. 'Asbesto Seal' prevents stucco from cracking.

"4. The life expectancy of 'Asbesto Seal' is as great as fifteen years and even for the lifetime of the house.

"5. 'Asbesto Seal' is a water-proofing material.

"6. 'Asbesto Seal' is a weather-proofing material.

"7. 'Asbesto Seal' is an elastic product.

"8. 'Asbesto Seal' is a product that will not crack, chip or peel.

"9. That in respect to the foregoing alleged qualities ascribed to 'Asbesto Seal' they were present in much greater degree than found in ordinary types of paint or elsewhere were found exclusively in 'Asbesto Seal.'"

The court further found that the foregoing representations were made willfully and that the persons to whom they were made were materially injured, in that it was shown that "in practically all instances * * * the exterior coverings of the houses were in better condition prior to the application of the Asbesto Seal than they were after the application; it was impossible to determine the actual amount of injury suffered by the respective owners; but the extent of the damage in each case amounts to the actual cash outlay by each person, said 'Asbesto Seal' being a complete loss; and that in addition thereto, there is the further cost of placing each building in proper condition by removing said 'Asbesto Seal' in order that suitable materials can thereafter be applied."

In view of appellant's contention that the record is totally devoid of evidence showing any willful or fraudulent act or a substantial injury as a consequence of any such act, it becomes necessary to here set forth an epitome of the testimony given before the hearing officer and considered by the trial court. In that regard, the reporter's transcript reflects that Kenneth C.

Hicks testified that he signed a contract with appellant to paint his house. One of appellant's salesmen talked with Mr. and Mrs. Hicks, stating that the material to be applied to the house would waterproof and fireproof it. The salesman further represented that the material in question would keep the house warm in the winter and cool in the summer months; that no further painting job would be required because the paint to be applied would last a lifetime. It was represented that the material was a plastic paint and would seal the cracks. From the record it appears that at the time in question the house was about eight months old and in good condition, but at the hearing which occurred some nine months after completion of the contract the paint was chipping off, the stucco was also chipping and around the bottom was "full of cracks"; and the paint on the windowsills was coming off. There was also testimony that within nine months after appellant had painted the house it needed repainting. Other house owners, some six in number, gave similar testimony as to representations made to them and consequent results which ensued to their property. One witness testified that "you could lift the paint off just like you could lift off a piece of paper." Another witness testified that at the time of the hearing the paint and stucco on his house was cracking, while the paint itself was washing off the house. Suffice it to say that there is in the record substantial evidence to support the foregoing finding of the trial court that appellant made untrue representations as to the material known as "Asbesto Seal"; that prospective purchasers were induced to sign contracts with appellant which they would not have signed except for the misleading statements made of and concerning the aforesaid material; and that "in practically all instances it was shown that the exterior coverings of the houses were in better condition prior to the application of the 'Asbesto Seal' than they were after the application"; that it was necessary to remove the "Asbesto Seal" in order that suitable materials can thereafter be applied to the respective houses. In other words, there is evidence that the material did not possess the qualities it was represented to have. That the customers relied upon appellant's representations in signing the contracts with it is amply supported by substantial evidence.

Appellant's contention that the customers signed notices of completion notwithstanding that there was printed on such notices in large type the admonition, "Do not sign this certificate until the work is satisfactorily completed," is not impressive, because the record shows that such notices were signed upon the solicitation of appellant in order that the latter might secure payment from the bank upon the loan made to finance the work. Furthermore, the effects of appellant's misleading representations were not apparent at the time when the notices of completion were signed, which was more or less contemporaneous with the time when the work was finished.

[2] While there was evidence in conflict with some of the foregoing, under the long established rule this court cannot interfere with the conclusions arrived at by the triers of fact when there is substantial evidence, however sharply controverted, which supports the findings of the trial court.

[3] By reason of the foregoing, and upon the authority as well as for the reasons stated in West Coast Home Improvement Co. v. Contractors' State License Board, supra, this day decided, the judgment from which this appeal is taken is affirmed.

YORK, P. J., and DORAN, J., concur.

72 Cal.App.2d 344

POWIS v. MOORE MACHINERY CO.

Civ. 14721.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Rehearing Denied Jan. 23, 1946.

Hearing Denied Feb. 25, 1946.

1. Master and servant 🔑6

In action for declaratory relief under employment contract which provided that salesman would receive his commissions when goods were delivered and paid for and that, if salesman ceased to be employed for any reason except for good cause, salesman's commissions would be reduced to one-half, evidence did not support finding that contract was signed by salesman under duress.

2. Damages ⚿77

An agreement that salesman would receive his commissions when goods were delivered and paid for, and that, if salesman ceased to be employed for any reason except illness, death, or discharge for good cause before goods were delivered and paid for, salesman's commissions would be reduced by one-half, was not void on theory that provision was for liquidated damages, notwithstanding employer paid salesman's commissions before goods were delivered, and employer's motive was to create incentive for salesman to remain with employer.

3. Pleading ⚿354(2)

In salesman's action for declaratory relief under employment contract, striking cross-complaint which sought reformation of contract on ground of omission by mutual mistake of a provision and recovery of damages under contract as reformed was error even if evidence might disclose no mutual mistake, where answer contained no prayer for reformation or general relief, and cross-complaint did not tend merely to diminish or defeat salesman's recovery.

4. Action ⚿6
Master and servant ⚿80(7)

In salesman's action for declaratory relief and for commissions under employment contract, where employer's defenses were that salesman was entitled to no commission because he had violated contract provision, omitted by mutual mistake, providing for forfeiture of commissions by committing acts "against the best interests" of employer, and because salesman violated his implied duty of loyalty, rejection of testimony to prove such defenses was error.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Henry A. Powis against the Moore Machinery Company for declaratory relief and for money due as commissions, wherein defendant filed a counterclaim and a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed.

Keyes & Erskine, of San Francisco, and Meserve, Mumper & Hughes, of Los Angeles, for appellant.

Manley C. Davidson, of Hollywood, and Rex B. Goodcell, of Los Angeles, for respondent.

WOOD, Justice.

This is an action for declaratory relief and for money due as commissions. Defendant appeals from the judgment in favor of plaintiff.

Defendant was engaged in the business of selling machinery, tools and equipment for various manufacturers upon a commission basis. The goods were shipped to the customers direct from the manufacturer and after they were delivered the defendant invoiced the customers for the selling price. Plaintiff was employed by defendant as a salesman in March, 1938, and he continued as such until January 15, 1942. The employment agreement was not for a specified time but could be terminated by either party at any time. From March, 1938, until September, 1938, the agreed compensation for the services of plaintiff was $400 a month without any commissions. From September until December, 1938, his agreed compensation was a salary of $100 a month, his traveling expenses, certain bonuses dependent upon the amount of sales, and a commission of 2% on the basis of the "converted sales prices" of goods sold by him and delivered, such commission to be paid upon delivery of the goods. In December, 1938, their agreement was modified only to the extent that he should be paid a salary of $150 a month instead of $100 a month. As so modified that agreement continued in effect until July 1, 1940, when the agreement which is the essential basis of this action was made. That agreement was in the form of a letter written by defendant to plaintiff and accepted by him. It was as follows:

"July 1, 1940

"H. A. Powis

"As you well know, we pay you commissions not only for your work in securing an order but also for your work in connection with contacting the customer between the time the order is taken and delivery of the merchandise is made, for supervising the installation of the equipment, instructing the customer concerning its use, rendering such engineering service as is generally provided by a company such as ours, and if necessary your help when required in collection of the account.

"In order to straighten out a condition which has come into being by the unusual conditions now existing, please be advised that one of the terms of your employment is that you are to receive commissions hereafter when and if the goods are actually delivered to the customer, when they have been invoiced and paid for in full; when goods are sold on a conditional sale contract and the company has received a down payment and protection against loss, commissions will be paid; and if for any reason except those hereinafter stated you should cease to be employed by this company before the goods are so invoiced, delivered and paid for, you shall be entitled to only one-half of the regular commission.

"In case of a prolonged illness or death while on the company payroll, commissions will be paid in full upon delivery, etc. as above outlined. Should you be discharged from the employ of the company for any reason other than some act or actions of yours which we deem against the best interests of this company, full commission will be paid. (We deem 'actions against the best interests of our company' such as ones on which we could recover from the bonding company, solicitation or negotiation for manufacturer's accounts while in our employ, conducting another business while in our employ, or being interested in a competitive business while in our employ, etc.)

"By mutual agreement this plan is to be effective as of July 1, 1940.

"Please indicate that your understanding is the same as ours by signing the memorandum at the foot of this letter in the space provided.

"Sincerely yours
"Moore Machinery Co.
"J. D. Germain
"Manager.

"The above states my understanding and is hereby agreed to.

"H. A. Powis"

After the agreement was made, plaintiff continued in defendant's employ until January 15, 1942, when he sent a letter of resignation to defendant stating in part: "For purely personal reasons I hereby tender my resignation * * *. In taking this step I do so with a certain reluctance * * * my action is occasioned by no trace of dissatisfaction with working conditions nor remuneration, but rather because present events indicate it the wisest course." Defendant replied on January 17 by letter accepting the resignation and stating in part: "We are attaching hereto complete list of your undelivered business now on file as of Saturday noon, January 17, 1942. Commission will be paid you on this business as per agreement dated July 1, 1940. We shall consider the attached backlog correct unless discrepancies are called to our attention within one week." Plaintiff replied to that letter on January 21 stating that the list of undelivered business mentioned in defendant's letter of January 17 did not accompany the letter; that he took exception to the condition expressed in defendant's letter regarding the "back-log" to the effect that it would be considered as correct unless discrepancies were called to their attention within one week; that, instead of that condition, any discrepancies would be pointed out as soon as discovered; and that "This does not introduce any new conditions to the agreement of July 1, 1940."

The expression "converted sales prices," used in the agreement, meant, according to the understanding of both parties, the actual sales prices computed on a margin of profit to the defendant of 15% or more. The following is an illustration of the manner in which the "converted sales prices" were determined: If plaintiff sold machinery on a margin of profit to the defendant of 10%, which would be ⅔ of a 15% margin of profit, the converted sales price upon the basis of which plaintiff's commission would be paid would be ⅔ of the actual sales price. The parties herein stipulated at the trial that the amount of the converted sales price, of undelivered and unpaid for goods at the time plaintiff resigned, upon which the commission of plaintiff, if any, should be computed is $868,373.64. It was stipulated also as to the amount of interest plaintiff should receive, if he was entitled to a commission of 2%

Stated briefly, the controversy was as to whether plaintiff, having voluntarily quit his employment, was entitled to 2% commission or to 1% commission; or whether plaintiff while so employed committed an act "against the best interests" of the company, in violation of the agreement and in violation of his implied duty of loyalty to defendant, by negotiating for and obtaining for himself one of defendant's principal "accounts" and therefore was not entitled to any commission at all.

The complaint alleged in part that defendant did not employ plaintiff for any definite period of time; that the character of defendant's business was such that as long as plaintiff continued in said employment he would have "large backlogs of orders obtained by him" but undelivered; that on July 1, 1940, the defendant for the declared purpose of restraining plaintiff from terminating his employment with defendant and engaging in a competitive business "required Plaintiff to, and Plaintiff did against his will, execute" the agreement of July 1, 1940; that plaintiff resigned on January 15, 1942; that thereafter he offered to, and at all times has been ready, willing and able to perform all the services mentioned in the agreement, other than taking orders, to complete the orders taken by him; that an actual controversy relating to the rights and duties of the parties exists concerning the construction and validity of the agreement of July 1, 1940; that defendant asserts that it is a valid agreement and defendant is only required to pay a commission of 1% of the converted sales price of orders obtained by plaintiff and undelivered when plaintiff resigned; that plaintiff asserts that the agreement is invalid and void and plaintiff is entitled to a commission of 2% on said orders; that the recitals in the agreement relating to services for which commissions were paid were false and were inserted in the agreement to give pretense to the forfeiture of ½ of plaintiff's commissions; that the effect of the agreement was to deprive plaintiff of his liberty, and therefore it was void as against public policy in that it compelled him to render services for an indefinite term, determinable only at the will of defendant, or it compelled him to forfeit ½ of his commissions on undelivered orders; that it was impossible for plaintiff to terminate his employment without forfeiting ½ of his regular commissions, even though he offered to perform the follow-up services; that from the time the agreement was made the defendant disregarded the terms of said agreement in that it continued to pay plaintiff, as it had done prior to making the agreement, full commissions of 2% on all orders on the 5th day of each month for all shipments made in the preceding month; that the agreement provides for a penalty and not for liquidated damages, and is unreasonable and oppressive in that it provides for a forfeiture without reference to the extent of the injury which defendant might suffer and regardless of the extent and value of the services of plaintiff rendered between the time of obtaining the orders and the time of resigning; that defendant suffered no loss by reason of plaintiff's failure to perform the follow-up services; and that there was no consideration for the agreement. The prayer of the complaint was for a declaration of the rights of the parties to the agreement, for a decree that the agreement was invalid, and for a full commission of 2% of the converted sales price of all orders obtained by plaintiff.

The answer denies that defendant required plaintiff to, and that plaintiff did against his will, execute the agreement of July 1, 1940. It admits that defendant did not employ plaintiff for any definite period of time, and admits that there is a controversy between the parties with respect to the agreement. The answer alleged that the agreement is valid and that if plaintiff is entitled to any commissions, he is entitled, under the agreement, to a commission of 1% only of the converted sales price of orders obtained by him and undelivered when he resigned.

The answer also alleged as a first separate defense that when the defendant and plaintiff were discussing the agreement of July 1, 1940, it was agreed between them that the agreement should contain a provision to the effect that if plaintiff should commit any of the actions referred to in the agreement as "actions against the best interests of defendant" and if defendant should discharge plaintiff for any such acts, or if plaintiff should quit the employment of defendant after having committed any such acts, defendant would not be obliged to pay any commissions to the plaintiff on account of machinery covered by orders secured by plaintiff and thereafter delivered by defendant; and that when the plaintiff and defendant prepared the said written agreement of July 1, 1940, they by their mutual mistake failed to include the said omitted provision in the said written agreement; that while plaintiff was in defendant's employ, plaintiff "as one of the implied terms of his employment owed the defendant the duty of acting towards defendant with the utmost good faith and loyalty for the protection and advancement of defendant's interest"; that on or about October 1, 1941, plaintiff in violation of the written agreement and in violation of his duty of loyalty, entered into negotiations with the Farnham Manufacturing Company, which was one of the manufacturers represented by defendant, in order to induce it to take its line of products from defendant and give it to plaintiff; that plaintiff thereafter continued such negotiations until the first part of January, 1942; that as a result of said negotiations that company on or about January 17, 1942 terminated defendant's right to sell its products and entered into an agreement with plaintiff whereby plaintiff was employed as its representative to sell its products; that since that date plaintiff, as the representative of that company, has been selling its products; and that plaintiff is not entitled to commissions on orders obtained by him prior to his resignation and undelivered at the time he resigned.

The answer also alleged as a second separate defense and by way of counterclaim that if the contract between defendant and the Farnham Manufacturing Company had not been terminated, but had continued in existence for another year, the defendant would have realized profits on account of the products of that company it would have sold during such year of not less than $25,000, and that defendant had been damaged in that amount by the acts of plaintiff in violating the agreement and in violating his duty of loyalty.

The defendant also filed a cross-complaint in which it incorporated the allegations of its first and second separate defenses by reference thereto, and prayed that the written agreement of July 1, 1940, be reformed to include the said omitted provision and that it have judgment against the cross-defendant for $25,000.

The court found in part that plaintiff's employment was upon a day to day basis and could be terminated at any time by defendant; that plaintiff signed the letter of July 1, 1940, "under duress, to wit, by reason of the threat of defendant expressed to plaintiff, that plaintiff would lose his employment as such salesman if he should refuse to sign said letter of July 1, 1940"; that certain officers of defendant said to plaintiff that the purpose of the agreement was "to prevent plaintiff quitting his employment to enter the employment of a competitor financed by backlog earned with the defendant"; that the recitals in paragraph 1 of the agreement relating to follow-up services were false and were inserted in the agreement as a subterfuge in order to justify the forfeiture of ½ of the commissions earned by plaintiff should he voluntarily quit his employment, and in order to restrain plaintiff from terminating his employment and engaging in competitive business; that at no time prior to or subsequent to the making of the agreement was plaintiff ever called upon to render any of the follow-up services mentioned in paragraph 1 of the agreement, and he did not render any such services, "except in one or two very insignificant matters" plaintiff did render services to customers after having obtained an order from them, but the rendering of the services was in order to keep the good will of the customers in the hope that he might obtain future sales from them; that the provisions of paragraph 2 of the agreement (that if plaintiff ceased to be employed by defendant for any reason, except illness, death or discharge for cause, his commissions would be reduced to ½) were intended as a penalty and forfeiture and were designed to restrain plaintiff from terminating his employment; that paragraph 2 was not intended to provide a means by which defendant might pay others to perform any of the follow-up services, nor to provide compensation to defendant for damages; that defendant maintained a service department, consisting of others than the plaintiff, which rendered the follow-up services; that plaintiff's customers were large aircraft companies, and no help was ever required in the collection of accounts; that from September, 1938, to January 20, 1942, commissions of 2% were paid to plaintiff monthly between the 1st and 5th days of each month for goods sold the preceding month without regard to whether the goods had been delivered to or paid for by the customers; that it was never intended by either plaintiff or defendant that the commissions payable to plaintiff after the agreement was signed should be deferred until the goods were actually delivered and paid for in full; that at all times it was not impractical or extremely difficult to fix the actual damages, if any, that defendant would suffer by reason of plaintiff's ceasing to be employed after an order was obtained and before the goods were delivered and paid for; that at no time "were the services of plaintiff, subsequent to obtaining an order, in connection with said order," of any value to defendant; that the amount of ½ of plaintiff's earned regular commissions did not at any time bear any relation to the damages, if any, which defendant might suffer in the event plaintiff should cease to be employed before the goods were delivered and paid for; and that defendant suffered no damage by reason of plaintiff's ceasing to be employed by defendant before the goods were delivered and paid for. The court also found that the allegations of the first and second separate defenses were not true. Upon motion of plaintiff, made in another department of the court before the action came on for trial, the cross-complaint was stricken out.

The judgment provided that an actual controversy relating to the legal rights and duties of the parties exists concerning the construction and validity of the letter of July 1, 1940; that the letter provides for a penalty and forfeiture and the same is void and invalid; and that plaintiff is entitled to commissions of 2%, of the converted sales prices on all orders obtained by plaintiff, amounting to $17,367.47, and interest in the sum of $1947, aggregating $19,470.51.

Appellant asserts that the finding that the agreement was signed under duress was not supported by the evidence. The duress, as stated in the finding, was by reason of the threat by defendant that plaintiff would lose his employment if he did not sign. Plaintiff testified that he did not have anything to do with the preparation of the agreement and had no discussion with respect to it before it was handed to him by Mr. Germain, the manager of defendant's Los Angeles office; that he signed it three to five days after he first saw it; that Mr. Moore, the president of defendant, called him into his office to discuss the agreement, and plaintiff told him, in the presence of Mr. Germain, that he was not satisfied with it, that he did not like it because it took away his freedom in choosing the kind of work he wanted to do, that if he signed it he would have to forfeit half the money he had earned in selling machinery that had not been delivered and paid for, and that he thought it was penalizing him in order to keep him from leaving the company; that Mr. Moore replied that that was the purpose of it, that he had no intention of having any more of his men go into a competing business and finance it from a backlog of orders taken while with defendant, that everyone in the company was going to sign the agreement and that was a condition under which they would continue to be employed by the company. He testified further that he signed the agreement after the conversation with Mr. Moore, and that he did not say to Mr. Moore or Mr. Germain that the recitals in the first paragraph of the letter were untrue. Mr. Germain, who was present when plaintiff and Mr. Moore had a conversation, testified in substance the same as plaintiff concering the conversation. He testified also that plaintiff objected to signing the agreement, saying that if he were to quit he would lose half of his commissions; that "we told him that if he lost half of his commissions that it was because only half of the jobs were done."

[1] The agreement which was in effect while the parties were considering the proposed contract of July 1, 1940, was one that could be terminated by either party at any time. Plaintiff and defendant were negotiating concerning plaintiff's employment. The defendant offered to continue plaintiff's employment upon the terms stated in the letter. He was free to accept it or to reject it. When defendant was seeking to prove the allegations of its separate defenses it offered to prove that defendant paid plaintiff commissions in 1941 aggregating $41,000. It may be that he chose to accept the terms of employment offered to him because he knew that, even under those terms to which he had objections, his income would be very large. The evidence was not sufficient to support the finding that the agreement was signed under duress.

Appellant asserts that the finding that the recitals of paragraph 1 of the agreement, relating to the follow-up services, were false is not supported by the evidence. In the view we take of the case this finding was immaterial.

[2] The agreement was not invalid and void. The provision therein to the effect that if plaintiff should quit voluntarily he should be paid 1% as commission on goods which were undelivered and unpaid for was not a provision for liquidated damages. Plaintiff would not thereby be deprived of any sums which he had already earned since it related to services to be performed in the future. The agreement could be terminated at any time by either party without breaching the contract. There would be no damages to fix. It was not illegal to provide that commissions would be paid when and if the goods were delivered and paid for. The fact that the defendant was generous with plaintiff, while he was its employee, and paid his commissions before the goods were delivered, rather than adhering strictly to the provision of the contract that payments of commissions would be made only when the goods had been delivered and paid for, is not a sufficient basis to justify a conclusion that the con-

tract is invalid and void. Undoubtedly, it was a motive of defendant in placing that provision in the contract to create an incentive for plaintiff to remain with the company, but such a motive did not make the contract illegal. The provision was not one whereby earned commissions were to be withheld in the event plaintiff resigned. It was a provision stating as one of the terms of employment that plaintiff would receive his commissions when the goods were delivered and paid for, and reciting in clear language that if plaintiff should for any reason cease to be employed by defendant, except by reason of illness, death, or discharge for good cause, before the goods were delivered and paid for, he would be entitled to only one-half of the regular commission. Plaintiff was free to accept or reject the proposed terms of payment. The evidence as to conversations at the time he signed the contract shows that he understood that provision. In the letter defendant sent to him accepting his resignation, reference was made to undelivered orders and it was stated therein that he would be paid "on this business as per agreement dated July 1, 1940." In his reply thereto he did not take exception to that statement, but he took exception to the suggested method of determining whether the list of undelivered orders was correct. With full knowledge of the agreement as to when and how much he was to be paid for his services, including particularly when and how much he was to be paid if he voluntarily resigned, he accepted the agreement. At most, if he was entitled to any commissions, he was entitled to commissions of 1% of the converted sales prices of goods which were undelivered and unpaid for.

[3] Appellant contends that the court erred in striking out its cross-complaint. As above stated, the cross-complaint was stricken out, upon motion of plaintiff, in another department of the court before the action came on for trial. Although the cross-complaint incorporated therein the allegations of the separate defenses by reference thereto, the cross-complainant sought to have the agreement reformed by including therein a provision allegedly omitted therefrom (hereinabove mentioned) by mutual mistake of the parties, and then to recover damages under the agreement as reformed. The answer did not contain a prayer for reformation of the agreement or for general relief. The cross-complaint did not tend merely to diminish or defeat plaintiff's recovery. Even though it might appear from the evidence that there was not a mutual mistake, it was error to strike out the cross-complaint.

[4] Appellant asserts that the court erred in rejecting testimony offered by defendant (appellant) to prove its first and second separate defenses. The separate defenses were, as above stated, that plaintiff was not entitled to any commissions because he had violated his agreement by committing acts "against the best interests of this company" as defined in the agreement, and by violating his implied duty of loyalty to his employer. Defendant's counsel, while proceeding with his defense and in an effort to show that the alleged omitted provision had been omitted by mutual mistake, asked Mr. Germain what he had said in response to a certain statement made by plaintiff at the time the proposed agreement was being considered. An objection by the plaintiff that the question had been asked and answered was sustained. Then counsel for defendant made an offer of proof, and made an argument in support thereof wherein he said that the defendant should be permitted to show what the omitted provision was. The court then said it would overrule the objection. Counsel for defendant asked Mr. Germain if it was his intention to specifically state in the agreement that if plaintiff committed any act detrimental to the company as therein recited he would receive no commission. The witness replied that it was. Counsel for defendant then introduced evidence showing that prior to 1942 the Farnham Manufacturing Company (hereinafter referred to as Farnham) was represented by defendant and that plaintiff as a salesman for defendant had been selling its products. Counsel for defendant then asked Mr. Germain whether he had received a letter dated January 8, 1942, from Farnham. When he replied that he had, counsel for defendant offered the letter in evidence. Counsel for plaintiff objected to the offer on the ground that it was an attempt to vary the terms of a written contract, and on the ground that the proper foundation had not been laid, in that, defendant had not proved that plaintiff entered into any negotiations with Farnham, that it was not proved that he violated the contract, that all that had been proved was that he resigned—"they are getting at it backwards." The court said: "I am inclined to agree with you. It seems to me before this evidence comes in there

should be evidence of a statement or admission or something that could give rise to it as a foundation for it." Thereupon the court sustained the objection, stating that "it is pretty clear that there was not a mutual mistake, that it was a mistake on the part of Mr. Germain." Counsel for defendant then offered to prove that defendant was the representative of Farnham; that by letter of January 8, 1942, Farnham asked defendant to reduce its commission from 15% to 10%; that "on protest of that" defendant received notice under date of January 17, 1942, that defendant's contract with Farnham was ended; that under date of February 10, 1942, defendant received notice that plaintiff (who had resigned on January 15) had been appointed sales agent for Farnham in this area and that he had so acted during 1942; that a substantial amount of Farnham products had been sold to Douglas Aircraft Company on which plaintiff received commissions substantially in excess of his previous year's earnings, while he was with defendant, when he received more than $40,000. The court sustained the objection to the offer, the defendant rested its case. The matter as to whether plaintiff had violated the agreement and his duty of loyalty to his employer, as alleged in the separate defenses, was not dependent upon whether there was a mutual mistake by the parties in omitting a provision of their agreement. It was error to reject testimony offered by defendant to prove its separate defenses.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.

PEOPLE v. JERMAN.*

Cr. 3905.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1945.

Hearing Granted Jan. 24, 1946.

1. Criminal law 🔑386

In prosecution for bookmaking, evidence of telephonic conversation between arresting officers and those who called defendant's house with reference to their bets was competent for purpose of establishing that room was being occupied for placing bets on horse races. Pen.Code, § 337a, subds. 2, 4.

2. Criminal law 🔑784(1)

Where a case is one of circumstantial evidence and admits of a theory either of guilt or innocence, defendant is entitled to an adequate instruction embodying the rule that, to justify a conviction, circumstances must not only be consistent with theory of guilt, but must be inconsistent with any other rational conclusion.

3. Gaming 🔑101

Where defendant in prosecution for bookmaking admitted that he occupied room in question and also that various bookmaking paraphernalia therein found belonged to him, but explained that such occupancy and presence of paraphernalia was innocent because defendant was conducting a legitimate business of teaching betting systems and did not accept bets, and prosecution was forced to rely upon circumstantial evidence, truth of the matter was for jury. Pen.Code, § 337a, subds. 2, 4.

4. Criminal law 🔑1173(2)

In bookmaking prosecution, where people relied upon circumstantial evidence and defendant claimed that his occupancy of room in question and possession of bookmaking paraphernalia was innocent and jury could reasonably have reconciled all established circumstances with theory of defendant's innocence, and a conviction might not have occurred under proper instructions, refusal to charge that circumstances, to justify a conviction, must have been consistent with theory of guilt and inconsistent with innocence resulted in miscarriage of justice and required reversal. Pen.Code, § 337a, subds. 2, 4.

DORAN, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Thomas M. Jerman was convicted of unlawfully occupying a room for the purpose of bookmaking, and of unlawfully recording and registering bets on horse races, and from the judgments of conviction and from the order denying his motion for a new trial, he appeals.

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* Subsequent opinion 173 P.2d 805.

Reversed.

A. H. McConnell, of Long Beach, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

In an information containing two counts, defendant was charged with (1) unlawfully occupying a room for the purpose of bookmaking, and (2) unlawfully recording and registering bets on horse races, in violation of subdivisions 2 and 4 of section 337a, Penal Code. The jury found him guilty of the offenses charged in both counts and judgments of conviction were duly entered. Thereafter, defendant's motion for a new trial was denied, execution of sentences was suspended, and he was granted probation for a period of five years under certain prescribed conditions. He prosecutes this appeal from the judgments of conviction and from the order denying his motion for a new trial.

Appellant here contends (1) that the trial court erred in overruling his standing objection to the admission in evidence of certain telephonic conversations had between the arresting officers and third persons, and in denying his motion to strike such testimony from the record; (2) that the court also erred in refusing to give three instructions requested by appellant, which were based upon his theory of the cause.

On September 20, 1944, appellant, a cripple confined to his bed, was occupying with his mother and sister a dwelling house in Long Beach. At 2:10 p.m. on that day, Officer Thiele entered the front door thereof which was unlocked, and Officer Stovall gained access to the house by forcing the lock on the back door. Said officers found appellant lying in bed in his bedroom dialing a French type telephone, which was an extension of a wall telephone installed in another room. Partially over the bed was a desk attached to an arm of pipe swinging from the right and containing several compartments in which were found a filing system, pens, pencils and paper. At appellant's left was a table holding a cabinet, the center portion of which was hollow and contained a radio without a case. When Officer Stovall entered the room, the radio was in operation, reproducing the sound of race track results, but when he took the telephone from appellant and listened, the line was dead. It was then discovered that the receiver had been taken off the hook of the telephone in the hall. Shortly thereafter the telephone started buzzing and Officer Stovall answered. Said officer testified that the first call came through at 2:20 p.m., to-wit: "A male voice on the phone asked 'Tommy?' and I said 'Yes.' He said, 'Give me Bay Meadows, 22, one to place; 32, one to place; 64, one to place; did you get it?' I said, 'Yes.' And he hung up." After giving the context of three telephone conversations between himself and persons calling on appellant's phone, Officer Stovall qualified as an expert on bookmaking activities as carried on in the vicinity of Long Beach and neighboring communities, and proceeded to explain the significance of the language used by the persons calling, to-wit: "It signified to me that the person 'Tommy' to whom this conversation was directed was receiving bets over the telephone on horse racing." The witness then testified that a loudspeaker was obtained from the police car and installed in appellant's bedroom; that by placing a magnetic device around the mechanism of the telephone "it reproduces all of the conversation going over the telephone both by the phone in its immediate presence and the phone on the other end through which the conversation is being picked up. It has a volume control on it that can be turned up so that it fills the entire room with this conversation and you then get the conversation of the person in the room with you over the phone and the person at the other end of the phone. In other words, you get the whole picture through this loudspeaker arrangement."

In the room where appellant was lying, the officers found a Metropolitan Scratch Sheet and a daily racing form. They also found a black book in a closet of an adjoining room, which Officer Stovall testified was a betting record. They also found some torn sheets of paper which said witness stated were betting markers of a previous date, and some papers bearing names of race horses and the notation "No bets accepted", which said officer testified were records of bets made with appellant. Officer Stovall also testified that while he was in appellant's room, the telephone rang ten or fifteen times, and in each instance, when he answered, the person calling asked for Tommy and upon being assured that Tommy was speaking, such person placed a bet upon a horse race. Officer Stovall left appellant's apartment at 3 o'clock, leaving Officer Dyer with appellant. Officer Dyer testifying as an expert gave as his opinion that the radio, racing forms, scratch sheets, telephone and slips of paper found in appellant's room were standard bookmakers' equipment. He also testified respecting some forty-four specific calls which came in over the telephone between 2:28 and 4:32 p. m. on the day in question, giving the precise content thereof in almost every case. In four instances he asked the person making the call "Do you want to bet?" and received an affirmative answer each time.

Appellant took the stand in his own defense and stated: "I am a system analyst and also operate a handicapping system service * * * I have developed a racing system and sell it to the general public" for $200; that he used a racing form and that his customers "call in their selections every day and I check them, that is, make any corrections and errors that they might make and also to see if they have mastered the system or handicap method, whatever one I have sold them"; that he then marked down such selections on betting sheets; that "when I first teach them this system, I require them to call their selections to me on a probationary period—about 10 or 12 days—until I am sure that they have it mastered." Appellant's attention was directed to a sheaf of bookmakers' betting sheets (Exhibit 5) and other papers found in his apartment, and he explained that they were records of bets made by purchasers of his system. Appellant testified that on the day in question, Officers Stovall and Thiele came to his home about 2:10 p.m., Officer Dyer arriving at 2:20 and Mr. Sten around 2:30; that they installed a reproducing unit with a loudspeaking device and attached it to his telephone; that Officer Stovall took three calls and then turned the telephone over to Officer Dyer who remained until 5:05 p.m. Appellant admitted that he heard all of the phone calls that came in over the loudspeaker while Officer Dyer was there; that during that period he recognized the names of five or six as being clients of his; but that the "only call actually come in that afternoon that I recognized, that is, that told me that she was going to place a bet on a horse" was that of a Mrs. Hap. It was also admitted by appellant that he told a couple of his clients over the telephone on the day of his arrest that the "cops" were out there trying "to pin something" on him. Appellant also testified that while the entries made on the so-called betting sheets were records of bets made by his clients, they were not records of bets made with him or with any person known to him, and that he had no financial interest in any bet so made by his clients or recorded by him on the said betting sheets. With respect to the black book which the arresting officers found in a closet of an adjoining room, appellant explained that "It is a record of my system and handicap players"; that the entries therein contained "were phoned to me by a party who bought my handicapping method. * * * I wrote them down here just the same as they give them to me over the telephone"; and that by reference to his Metropolitan Sheet he could tell how many of his selections won; that he had a rest period from 1 to 4 p. m. each day; that he seldom had calls from his customers after 1 o'clock and he gave the black book to his sister to put away because the officers on a previous occasion "stole a book from me containing 19 systems that I had spent 12 years compiling and they never would return it." Appellant also explained that the receiver was off the hook of the main telephone in his house because "I take a treatment here every day from 1 to 2 o'clock and either they take my phone off or my mother leaves that one off in the hallway there so that I won't have to answer this phone, because, if I try to pick up that phone, I get a shock. This is an electric treatment and there is a possibility of a shock if you do so. That is charged with electricity." That a radio-therapy machine which he used for this treatment every day was in his room when the officers came.

In the recent case of People v. Radley, Cal.App., 157 P.2d 426, 427, appellant contended there, as here, "that the court erred in receiving evidence of the conversations on the telephone between the arresting officers and those who called the house in question with reference to their bets." The court held: "It is the established rule that the court may properly receive evidence of such conversations, not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races. People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901; People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564. In 6 Wigmore on Evidence, 3d Ed., Sec. 1766, p. 178, the author explains why the admission of such evidence does not do violence to the hearsay evidence rule: 'The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted.'" See, also, People v. Kelley, 22 Cal.2d 169, 176, 137 P.2d 1; People v. Klein, Cal.App., 163 P.2d 71; People v. Barnhart, 66 Cal.App.2d 714, 721, 153 P.2d 214; People v. Onofrio, 65 Cal. App.2d 584, 590, 151 P.2d 158; People v. Pruitt, 55 Cal.App.2d 272, 274, 130 P.2d 767.

[1] In accordance with the foregoing, there was no error in the admission in evidence of the telephonic messages.

In connection with his second point, appellant urges that since the evidence produced against him was entirely circumstantial, he was entitled to an instruction that where circumstantial evidence is relied upon it must be irreconcilable with the theory of innocence; therefore, the court erred in refusing to give the following instruction requested by him: "You are instructed that in order to convict upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that the defendant committed the crime charged, but it must also be shown that these circumstances taken as a whole are inconsistent with any other rational conclusion, and it is not sufficient that the circumstances proven coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis, except the single one of guilt, or you must find the defendant not guilty."

The only instructions given to the jury relating to the subject of circumstantial evidence were the following:

1. "You are instructed that in considering whether or not certain premises containing books, papers, paraphernalia or apparatus are being occupied for the purpose of recording bets, you may take into consideration all of the surrounding circumstances, including the conduct of the person when confronted by police officers, and if the conduct of such person indicates a consciousness of guilt, you have a right to take that circumstance into consideration in determining the intent with which he was occupying the room, if you find he was so occupying such premises, and the purpose for which the papers, paraphernalia or apparatus was being used, if you find such papers, paraphernalia or apparatus present in such premises. The jury has a right to take into consideration all of the surrounding circumstances which may be shown in evidence to determine the intent with which an act is done."

2. "There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of an eyewitness to a transaction, and the other is circumstantial evidence, which includes all evidence other than that of an eyewitness. Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the crime charged, or tending to connect the defendant with the commission of the crime. If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

3. "If the evidence in this case, as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt."

In People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469, it was held that a defendant is entitled to an instruction similar in import to that here requested and refused, and also that the prejudicial effect of the failure to give such instruction was not cured by the fact that the trial court gave two instructions which were practically identical with the instructions given herein numbered 2 and 3, above set forth.

It was stated in the cited case, 63 Cal. App.2d at page 152, 146 P.2d at page 473: "There was nothing inherently improbable in defendant's account of the shooting and it cannot be said from a reading of the record that the jury could not reasonably have reconciled all of the established circumstances with the theory of defendant's innocence. It is because of this state of the evidence that the instructions of the court should be subjected to a critical examination. * * * We find appropriate to our discussion the statement of the Supreme Court in People v. Newcomer, 1897, 118 Cal. 263, at page 267, 50 P. 405, at page 406, 'Under these circumstances, if the appellant was justified in killing the deceased, as he might have been, he was in the embarrassing position of one who justly kills another when there is no other witness to the homicide, when he has to admit the homicide, and depend greatly upon his own testimony to justify it. In such a case it is evident that a jury will have difficulty in determining the real facts; and in such a case it is apparent that the instructions of the court are very important, particularly when, as in the case at bar, the court instructs at great length. Under such circumstances, any instruction tending to lead the jury from the real issues in question is material, and, if erroneous, is reversible error.' * * * (63 Cal.App.2d at page 155, 146 P.2d at page 475). Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction."

[2] The rule so laid down in the Hatchett case, and followed in People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812, is stated in the syllabus thereof as follows: "Where a case is one of circumstantial evidence and admits of a theory either of guilt or innocence, the defendant is entitled to an adequate instruction embodying the rule that, to justify a conviction, the circumstances must not only be consistent with the theory of guilt but must be inconsistent with any other rational conclusion." See, also, 8 Cal.Jur. 371; People v. Dick, 32 Cal. 213; People v. McClain, 115 Cal.App. 505, 1 P.2d 1085; People v. Kinowaki, 39 Cal.App.2d 376, 103 P.2d 203. Attention is also directed to People v. Lamson, 1 Cal. 2d 648, 653, 36 P.2d 361, 363, where it is stated: "Resting its case upon circumstantial evidence, the prosecution must not only show a set of circumstances consistent with guilt, but must show a set of circumstances inconsistent with any reasonable theory of innocence."

Circumstantial evidence was defined in People v. Morrow, 60 Cal. 142, 143, as follows: "There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in a position to commit it; in short, any acts, declarations, or circumstances, admitted in evidence tending to connect the defendant with the commission of the crime. * * * In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove: but in criminal cases it must exclude every other hypothesis but that of the guilt of the party."

[3, 4] In the instant case, appellant admitted that he occupied the room in question and also that the various bookmaking paraphernalia therein found belonged to him. However, he took the stand in his own defense and explained at great length that such occupancy and the presence of the paraphernalia was innocent, because he was conducting a legitimate business. On the other hand, the prosecution necessarily was forced to rely upon circumstantial evidence in its effort to establish its case. Ordinarily, it would have been a question for the jury to determine which version was

true, because as stated in People v. Borrego, 211 Cal. 759, 765, 297 P. 17, 19, "* * * although the defendant's own story exculpates him, it is for the jury to say whether that story should be believed." There was nothing inherently improbable in appellant's story, and after an examination of the entire record, it cannot be said that "the jury could not reasonably have reconciled all of the established circumstances with the theory of [appellant's] innocence." People v. Hatchett, supra. Moreover, it is not improbable that a conviction would not have occurred except for the erroneous instruction. Viewed in this light, the refusal of the trial court to give the requested instruction resulted in a miscarriage of justice.

Finally appellant complains of error on the part of the trial court in its refusal to give two other instructions embodying his theory of the case. Because of the conclusions reached herein, it is not deemed necessary to discuss this point.

For the reasons stated, the judgments and order appealed from are, and each of them is, reversed.

WHITE, J., concurs.

DORAN, Justice (dissenting in part).

I concur in the judgment. But, I cannot agree with the conclusion that "there was no error in the admission in evidence of the telephonic messages." In my opinion, such evidence was clearly hearsay. The argument that evidence of such conversations is not received for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races, as reported in People v. Joffe, supra, does no violence to the hearsay rule, is a fallacy. Obviously, unless such conversations are assumed to be true, they constitute no proof that the room was occupied for placing bets. And, if such evidence of such conversations is admitted, as above noted, for the purpose of establishing that the room was occupied for placing bets on horse races, then it was hearsay evidence received for the purpose of proving the very offense alleged and for which defendant was on trial. The argument clearly begs the question; an argument that in logic is described as circulus in probando.

HAILS v. MARTZ et al.[*]

Civ. 14923.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Hearing Granted Feb. 25, 1946.

1. Appeal and error 🔑994(3)

The determination which statements were entitled to credence was for trial court.

2. Waters and water courses 🔑126(2)

In action for removal of embankments from defendants' lands on theory that embankments interfered with natural flow of surface waters and diverted such flow over plaintiff's land, evidence sustained findings that embankments did not interfere with natural flow.

3. Appeal and error 🔑1071(6)

Plaintiff appealing from judgment which held that defendants' embankments did not interfere with natural flow of surface waters could not claim error in trial court's failure to find that there was a drainage right of way across a defendant's land by prescription or dedication, where complaint did not allege a right of way by prescription or dedication and case was not tried upon theory that plaintiff had such right of way.

4. Trial 🔑397(3)

In action to require removal of embankments on ground that they interfered with natural flow of surface waters and diverted such flow over plaintiff's land, wherein complaint did not allege a right of way by prescription or dedication, trial court properly made no finding in that regard.

5. Appeal and error 🔑173(9)

Plaintiff appealing from judgment which held that defendants' embankments did not interfere with natural flow of surface waters could not claim that plaintiff had a right of way by way of dedication by estoppel, where plaintiff did not plead or prove facts which in law would constitute an estoppel.

6. Trial 🔑377(2)

The granting or denial of motion to reopen case for further evidence is discretionary with trial court.

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[*] Subsequent opinion 172 P.2d 52.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Raymond R. Hails against James L. Martz and others to require the removal of embankments which had been constructed on land owned by some of defendants on the ground that such embankments interfered with natural flow of surface waters and diverted such flow over plaintiff's land, wherein two of the defendants filed cross-complaints. From an adverse judgment, plaintiff appeals.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellant.

Cushman & Paul, of Los Angeles, for respondents Martz.

Frank Karr and C. W. Cornell, both of Los Angeles, for respondent Pacific Electric Ry. Co.

Robert R. Ashton, of Glendale, and George H. Emerson, of Los Angeles, for respondent Del Amo Estate Co.

WOOD, Justice.

Plaintiff brought this action to require the removal of certain embankments which had been constructed on land owned by some of the defendants, asserting that said embankments interfere with the natural flow of surface waters and divert said flow over the land of plaintiff. Plaintiff also sought to have defendants Martz maintain an embankment which stands on their land, and to have the County of Los Angeles maintain an embankment which extends along the south side of Del Amo Street, a public highway. Defendants Martz and the Del Amo Estate Company filed cross-complaints, each alleging that the natural flow of water was away from their respective lands and praying that certain cross-defendants be required to remove embankments which they alleged diverted the surface waters onto their lands.

The judgment was that plaintiff take nothing, and that cross-complainants take nothing except that cross-complainant Del Amo Estate Company was given judgment against cross-defendant County of Los Angeles requiring it to remove all embankments and piles of dirt on Del Amo Street in that vicinity, and said county was permanently enjoined from constructing or maintaining any embankments or piles of dirt along said street in that vicinity. Plaintiff appeals from that judgment.

The three parcels of land involved in this action are owned by plaintiff, the defendants Martz and the defendant Del Amo Estate Company (hereinafter referred to as the estate). The lands of plaintiff and defendants Martz are used for truck gardening, and the estate operates a nursery on the southeastern portion of its land. In January, 1943, heavy seasonal rains occurred, and plaintiff alleged that the surface waters therefrom were prevented from following their natural flow westward by embankments constructed by defendants Martz along the northern and eastern boundaries of their land; that as a result the said waters collected and stagnated upon plaintiff's land and destroyed 14 acres of crops planted thereon of the value of $12,400; and that this diversion of surface waters and injury to crops planted on plaintiff's land will continue from year to year and depreciate plaintiff's land unless defendants are required to remove certain embankments and to maintain others.

Alameda Street extends in a general northerly and southerly direction. Del Amo Street extends in an easterly and westerly direction, and intersects Alameda Street approximately at right angles. Alameda Street in this vicinity, for some distance north and south of Del Amo, is bounded on the west by a strip of land 120 feet wide which is held by the defendant Pacific Electric Railway Company (hereinafter referred to as the railway) as a right of way. The plaintiff's land, consisting of 51.87 acres, is bounded on the north by (and extends approximately 1150 feet along) Del Amo Street, is bounded on the east by the railway right of way, and on the west by the Martz land. The Martz land, consisting of 80 acres, is bounded on the north by Del Amo Street, on the east by plaintiff's land and on the west by other farm land. The estate's land, consisting of approximately 235 acres, is bounded on the south by Del Amo Street, and extends to the east as far as the eastern boundary of plaintiff's land and to the west beyond the Martz land. The land of the estate is rolling and generally higher than the lands of plaintiff and the Martzes. There is a small valley on the land of the estate, the mouth of which is directly north of plaintiff's land, the westernmost edge of the valley mouth being approximately due north of the northwest corner of plaintiff's land. In 1926 the estate granted to the Shell Oil Company a 40-foot right of way across its land, which right of way is parallel to, and about 250 feet north of, Del Amo Street. In 1927 the Shell Oil Company, in order to build a spur railroad track across the valley, constructed an embankment, about 17 feet high, extending easterly and westerly on its right of way across the valley. At the time of said construction, 2 culverts were placed under and through the embankment to carry surface waters which flowed southerly in the valley through the culverts. The Shell Oil Company sold the spur track and right of way to the defendant railway in 1931. About 1924 one Marconi, who was leasing the land now owned by plaintiff from its then owner (one Cruz), constructed an earthen embankment about 1½ feet high on Del Amo Street along the north boundary line of plaintiff's land. Marconi, about the same time, dug a ditch which extended westerly along the north side of said embankment, at the westerly end thereof, until it reached the Martz land, thence it extended southerly on the Martz land about 10 feet. At this time the Martz land was owned by W. M. Martz. The effect of said embankment and ditch was to divert the surface waters flowing from the mouth of the valley away from plaintiff's land and onto the Martz land. At a later and unknown date the county covered the westerly portion of said embankment with asphalt or macadam. It appeared also that at a later date the county increased the size of the embankment. In 1925 Marconi terminated his lease, except as to five acres in the northwest corner which he continued to hold as lessee until 1929. About January 1, 1926, Marconi became a tenant of the Martz land under a five-year lease. Following his entry upon the Martz land he constructed an embankment extending easterly and westerly across the entire Martz land, approximately 150 feet south of the north boundary line thereof. The effect of said embankment was to carry across the north end of the Martz land the surface waters diverted onto said land by the embankment and ditch which Marconi had previously constructed. W. H. Martz died in 1937, at which time his land passed to its present owners, the three defendants Martz. The land had been continuously let to tenants from 1924 to February, 1942. Plaintiff purchased his land in June, 1942. On August 1, 1942, George Woo and Woo On Tong entered into possession of plaintiff's land under a written lease. About August 21, 1942, the defendants Martz caused that part of the ditch which Marconi had built on their land to be filled. There is, and for many years had been, a well and pump on the Martz land near its east boundary line and approximately 1,375 feet south of its north boundary line. In September, 1942, defendants Martz built an irrigation ditch, with an embankment on each side, on their land along the east boundary line thereof, extending northerly from their well and pump a distance of approximately 1,200 feet. In December, 1942, the county caused a cut to be made in the embankment on Del Amo Street in order to release surface waters flowing from the valley which had accumulated on the highway on the north side of the embankment, and which threatened to inundate the southeast portion of the estate's land. As a result the surface waters flowed upon plaintiff's land, and thereafter George Woo and Woo On Tong, the tenants, constructed an embankment on plaintiff's land commencing at the north line of plaintiff's land, connecting with the Del Amo Street embankment at a point east of the cut in said embankment, thence southwesterly to the west line of plaintiff's land, thence south along the west boundary line of plaintiff's land to a point south of the well and pump located on the Martz land. In January, 1943, after heavy seasonal rains, the surface waters from the mouth of the valley flowed through the cut in the embankment on Del Amo Street, thence along the north and west sides of the embankment made by plaintiff's tenants, broke through the west bank of the Martz irrigation ditch and flowed upon the Martz land, and broke through the embankment on the west line of plaintiff's land and flowed upon plaintiff's land. Plaintiff filed a claim for damages and abatement of nuisance with the Board of Supervisors of Los Angeles County which claim was rejected.

The court found that neither the estate nor the railway has in the past or does now divert the flow of surface waters; that prior to the construction of the railway embankment, waters flowed unimpeded in a southerly direction on the easterly side of the valley in a definite natural channel; that the culverts were placed at the point of the definite natural channel, and at all times since the construction of the railroad embankment the surface waters have flowed in the same natural channel, through the culverts and south of the embankment; that the natural slope of Del Amo Street where plaintiff's and Martz' land adjoin is downward toward the east; that the northeast portion of the Martz land is higher than the northwest portion of plaintiff's land; that the natural configuration of the land is such that surface waters from the valley flowed southerly from the mouth of the valley, thence across Del Amo Street at a point east of the west boundary line of plaintiff's land, thence southeasterly across plaintiff's land to the easterly boundary line thereof, thence southerly until they reached and emptied into Compton Creek, near the southeast corner of plaintiff's land; that in their natural flow none of the waters from the mouth of the valley flowed upon or across the Martz land; that the county, in grading, paving and maintaining Del Amo Street in this vicinity, caused loose dirt to be piled at places along the north edge of the street and along the south edge of the street between the end of the street embankment and Alameda Street; that this dirt has never been removed; that at the time of heavy seasonal rains the piles of loose dirt and the embankment on the street interfere with the natural flow of surface waters from the higher land, and threaten to, and unless removed will, cause flooding and consequent damage to nursery stock, buildings and other property of the estate; that in January, 1943, when the heavy seasonal rains occurred, surface waters from the mouth of the valley flowed through the cut in the street embankment and, instead of flowing across or spreading upon plaintiff's land pursuant to the natural configuration of the land, were diverted by the embankment, constructed by the tenants of plaintiff, in a southwesterly direction and against banks of the irrigation ditch located along the east line of the Martz land, causing the banks to break; that the effect of the embankment built by plaintiff's tenants was to divert the surface waters from the valley away from plaintiff's land and against the east bank of the Martz ditch, and threatens to cause irreparable damage to the Martz land at the time of each heavy rain; and that plaintiff did not participate in, authorize or consent to the construction of the embankment by his tenants, George Woo and Woo On Tong.

Appellant's principal contention is that the evidence is insufficient to support the findings in regard to the natural configuration of the lands and the natural flow of surface waters. The findings were made upon conflicting evidence. The trial judge, with the consent of counsel for the parties and in their presence, went to the properties here involved and made observations. However, appellant asserts that the trial judge did not see the conditions of 1894, nor of 1927, but that he saw only the conditions as they existed in 1942, "and what they then were, is not in dispute." Numerous maps and photographs were received in evidence to illustrate the conditions of the properties during a period of time from 1926 until after the 1943 rains, and several witnesses testified as to conditions from 1894 to 1943.

One Eilers, a witness called on behalf of defendants, testified that he was farming land in the vicinity of plaintiff's land in 1893; that in 1898 he bought land across the street from plaintiff's land, and adjoining Alameda Street, and had lived on that land since 1903; that in 1894 he went to work for one Robinson who then owned the land now owned by plaintiff and the Martzes; that at that time there was an old wood fence along the present boundary line between the lands of plaintiff and the Martzes; that there was also a fence along the north boundary line of plaintiff's land, in which there was a gate; that the gate was near the northwest corner of plaintiff's land; that in 1894 the surface waters from the valley flowed through the gate, and sometimes east of the gate, onto plaintiff's land; that there were then two draws on the north part of plaintiff's land which came together on the east half of the property; that the water flowed in a southeasterly direction across plaintiff's land, into the draws; thence into a railway ditch along the east boundary line of plaintiff's land, and into Compton Creek near the southeast corner of plaintiff's land; that soil washing down from the swale (valley) had made a knoll on plaintiff's land which extended southerly along the west fence about 100 feet; that the knoll caused the water to flow in a southeasterly direction; that in 1895 it did not rain much and the water did not flow through the gate; that he left this employment in the fall of 1896; that after Cruz purchased plaintiff's land (in 1902) he did "lots of levelling," and Marconi (Cruz' tenant) made it almost level; that plaintiff's land was plowed by going around the field which threw the dirt against the west fence; and that the ground got high along the fence from year to year plowing.

Cruz, a witness called on behalf of plaintiff, testified that in 1902 he purchased the north 40 acres of the land now owned by plaintiff, and has lived on the property since that time; that he farmed the Martz land before W. H. Hartz purchased it (Martz purchased it about 1913), and he also farmed the estate's land at the same time; that water from the valley did not flow over the Martz land; that the witness built an east-west embankment on the northern part of the Martz land to take care of water coming from a canyon west of the valley, but it was not to take care of water from the valley; and that the county put a dike on Del Amo Street so water from the valley would flow west onto the Martz land.

Marconi, a witness called on behalf of defendants, testified that he leased the property now owned by plaintiff and commenced farming it November 1, 1919, on which date he also started farming the Martz land; that he operated a dairy on plaintiff's property, and in 1921 he built a cow corral in the northwest corner of that property; that the corral extended from the west line of the property in an easterly direction a distance of 500 or 600 feet; that several times during rainy seasons the water from the valley flooded the corral and then flowed on plaintiff's land "to about half way"; that the health inspectors threatened to condemn his dairy in 1924 or 1925, and he took some of the soil which was coming down from the hill and some from the corral and built an embankment about 1½ feet high on and along the south side of Del Amo Street north of plaintiff's property; that water coming from the valley washed the embankment away and again flooded the corral; that the witness then built another embankment in the same place which was about two feet high and extended from the northwest corner of the plaintiff's land in an easterly direction about 500 or 600 feet; that he then dug a ditch around the northwest corner of plaintiff's land and directed the water, which came from the valley, onto the Martz land; that before he dug the ditch no water ran around the northwest corner of plaintiff's property; and that the Martz land was higher than plaintiff's and during the time he was there no water ever accumulated on the Martz land.

One Scherer, called as a witness on behalf of defendants, testified that he is park superintendent for the City of Long Beach; that from 1926 to 1933 he was manager of the nursery on the estate's land, and devoted six full days a week to his duties as such manager; that there was a channel on the east side of the valley; that in 1926 the channel was about the center of the valley, but it gradually moved eastward as silt filled the channel; that the witness was present when the railway put the culverts in and he watched the entire proceeding; that the culverts were placed in the bottom of the channel; that when there were heavy rains the water flowed in the natural channel of the valley; that there was a depression 12 or 14 feet wide in Del Amo Street which was left by the natural flow of the water; that the water crossed Del Amo Street at a low point about 80 feet east of the west boundary line of plaintiff's land where it was stopped by the embankment along the south side of Del Amo Street; that it then flowed west, and then flowed around the corner of the embankment in a ditch which had been dug through high ground; that the water flowed from the valley in this manner from the time he first observed it in 1926 until he left the nursery in 1933; and that the water flowed in that manner both before and after the railway embankment was constructed.

It was stipulated that one Spencer, the engineer in charge of the survey for the Shell Oil Company spur track and who located the points at which the culverts would be placed, would testify, if present at the trial, that there was a definite channel of the stream on the easterly side of the valley "above and below" the point where the "fill" was placed and that the culverts were spaced at the location in that channel as he then found it.

One Miller, called as a witness on behalf of plaintiff, testified that he is a civil engineer; that in November, 1943, at the request of plaintiff, he made a survey of the land of plaintiff and the Martzes; that the Martz land was generally higher at its northeast corner than plaintiff's land at its northwest corner; that the land on the north side of Del Amo Street and west of the point where plaintiff's land joins that of the Martzes' is higher than the land south of Del Amo Street; and that the toe of a hill, which hill rises westward, is practically due north of the northwest corner of plaintiff's land, and the ground from the toe slopes downward toward the east.

One Widman, called as a witness on behalf of defendants, testified that he is employed by the railway as an assistant engineer; that he made a survey of this vicinity in 1937; that a map in evidence, defendants' exhibit G, depicts the profile of Del Amo Street as it was in 1927 before the highway was improved; that the map was made from notes taken by the county road department at that time (1927), and shows a low point in the street about 350 feet east of the northwest corner of plaintiff's land; that the difference between the elevation at the northwest corner of plaintiff's land and the low point is 2.4 feet; that Del Amo Street continues to rise toward the west from the low point for a distance of approximately 600 feet. He testified further that, in his opinion, based upon his study of the vicinity and certain maps in evidence, the water in 1927 flowed down the east side of the valley, across the low point in Del Amo Street and, if there was more water than the low spot could hold, it would flow across the street onto the area about 350 feet east of plaintiff's west boundary line; that the culverts in the railway embankment were placed where, in his opinion, the flow of the water was; that if the railway had no embankment and if the water flowed all across the valley, instead of in a channel, it would still come to the low point in the highway and, if there was enough water, flood the area directly south of the low point.

Plaintiff testified that there is a low point in Del Amo Street, and that (from the low point) the street begins to rise toward the west at a point about 150 feet east of the northwest corner of his land, and that "somewhat" west of the northwest corner of his land the street goes through a small hill or ridge; that he had not observed any water in the valley, but had not been there at the time of or after any rains; that he had walked across the railway embankment four or five times since he purchased his land; that he saw a ditch along the westerly side of the valley, and what appeared to be a ditch along the easterly side of the valley from which an irregular, short ditch extended and connected with one of the culverts, but he did not observe whether they were natural or artificial; that there are eucalyptus trees along the boundary line between his land and the Martz land; that the trees extend from the northwest corner of his land southerly about 75 feet; and that the trees are on ground that is higher than the ground on either side of the row of trees.

[1, 2] As above shown, the evidence was conflicting, and inconsistent statements were made by some of the witnesses. It was for the trial court to determine which statements were entitled to credence. The trial judge had the benefit of his observation of the property. He also had the benefit of certain evidence which is not before this court, for the reason that witnesses frequently indicated the locations of natural and artificial objects and conditions, referred to in testimony by such expressions as "here" and "there," by pointing to certain places on maps and photographs in evidence, without making identifying marks thereon to designate the places to which the witnesses referred. The findings of the trial court, in regard to the natural configuration of the lands and the natural flow of surface waters, are supported by the evidence.

[3-5] Appellant further contends that the trial court erred in failing to find "that there is a drainage right of way across the Martz land by prescription or dedication." The complaint does not allege a right of way by prescription or dedication, and the case was not tried upon the theory that plaintiff had such a right of way. Plaintiff asserts that it clearly appears from his complaint that he claims to be the owner of certain land free from any waters over it, and he can show any title whether it arises by prescription or otherwise. "An adverse possession or prescription, as it is termed, when applied to an easement, may, under our system of practice, be pleaded either by reference to the statute, as provided by section 458 of the Code of Civil Procedure, or by stating at length the facts showing that the user commenced and continued under a claim of right, was peaceable, without interruption, open, notorious, and exclusive, and maintained with the knowledge of the plaintiff, etc." Montgomery v. Locke, 72 Cal. 75, 77, 13 P. 401. The trial court properly made no finding in this regard. Appellant also argues that there was a dedication by estoppel. Plaintiff did not plead nor prove facts which in law would constitute an estoppel. Central C. Co. v. Stansbury C. Co., 4 Cal.App.2d 413, 417, 40 P.2d 852.

Another contention of appellant is that none of the defendants has been possessed or seized of plaintiff's land, or of an easement to overflow it with surface waters, within the past five years, and therefore their defenses are barred by the statute of limitations under the provisions of Section 319 of the Code of Civil Procedure. It is apparently appellant's theory that the findings of the trial court respecting the flow of waters were based upon a prescriptive right in defendants to have the surface waters flow over plaintiff's land. It appears, however, that the trial court based its findings upon what it found to be the natural configuration of the lands.

[6] Appellant's further contention, that the court erred in denying his motion to reopen the case for further evidence, cannot be sustained. This was a matter within the discretion of the trial court and it does not appear that the course abused its discretion.

By reason of the above conclusions, which dispose of the merits of the appeal, it is unnecessary to discuss further contentions of appellant.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

WOO et al. v. MARTZ et al.*

Civ. 14924.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Hearing Granted Feb. 25, 1946.

1. Waters and water courses 🔑126(2)

In action for removal of embankment on theory that it interfered with natural flow of surface waters and diverted such flow over plaintiffs' crops, evidence sustained findings that embankment did not interfere with the natural flow.

2. Waters and water courses 🔑126(2)

In action to require removal of embankment on defendants' land which allegedly caused surface waters to flow upon and destroy plaintiffs' crops, wherein defendants filed a cross-complaint to require plaintiffs to remove an embankment erected by them which allegedly diverted surface waters onto defendants' land, evidence sustained finding that embankment erected by plaintiffs diverted surface waters against bank of defendants' irrigation ditch causing bank of ditch to break and flooding defendants' land.

3. Waters and water courses 🔑126(2)

Evidence that manure which was washed away by flooding of land was of value in excess of $202.50, and that landowners expended some $33 for dirt with which to repair banks of their ditch, and about $75 to relevel their ground, sustained finding that landowners were damaged in sum of $310.50.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by George Woo and another against James L. Martz and others to require the removal of an embankment on defendants' land which allegedly caused surface waters to flow upon plaintiffs' crops, wherein defendants filed a cross-complaint to require plaintiffs to remove an embankment erected by them which allegedly diverted surface waters onto defendants' land. From an adverse judgment, plaintiffs appeal.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

Cushman & Paul, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs brought this action to require the removal of an embankment on defendants' land, which embankment they allege caused surface waters to flow upon and destroy plaintiffs' crops; and for damages in the sum of $12,400, which they allege was the value of the crops destroyed. Defendants filed a cross-complaint to require plaintiffs to remove an embankment erected by them which defendants allege diverted surface waters onto the land of defendants; and for damages in the sum of $822, which they allege was the value of fertilizer washed away by the waters, repair work made necessary by the waters flowing upon their land, and loss sustained as the result of delayed planting. Judgment was that plaintiffs take nothing; that cross-complainants have judgment for $310.50; and that cross-defendants remove the embankment erected by them. Plaintiffs appeal from said judgment.

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* Subsequent opinion 172 P.2d 54.

Plaintiffs are lessees of land owned by Raymond R. Hails. Hails' and defendants' lands adjoin, Hails owning the easterly and defendants the westerly tract. Both tracts of land are bounded on the north by Del Amo Street. The land north of Del Amo Street, in this vicinity, is rolling and generally higher than the land of Hails and defendants. The mouth of a valley is directly north of Hails' land, and after heavy rains surface waters from the mouth of the valley flowed in their natural course upon the lands south of Del Amo Street. About 1924, one Marconi, then a tenant of the land now owned by Hails, built an embankment on Del Amo Street and along the north boundary line of Hails' land. At the same time he dug a ditch around the west end of the embankment, thence southerly for a distance of about 10 feet upon defendants' land. The effect of said embankment and ditch was to divert the surface waters, flowing southerly from the valley, away from Hails' land and onto defendants' land.

Plaintiffs entered into possession of Hails' land on August 1, 1942, and planted said land in beets, cauliflower, cabbage, lettuce and other garden produce. About August 21, 1942, defendants caused that part of the ditch which was on their land to be filled, and in September, 1942, dug an irrigation ditch along the east boundary of their land which ditch extended from a pump and well, approximately 1,375 feet south of their north boundary line, in a northerly direction for a distance of about 1,200 feet. They constructed an embankment on each side of the irrigation ditch. In December the County of Los Angeles caused a cut to be made in the embankment on Del Amo Street to release surface waters flowing from the valley which had accumulated upon the highway on the north side of the street embankment. Thereafter, plaintiffs constructed an embankment on Hails' land, which embankment connected with the street embankment east of the cut, and then extended southwesterly to their west boundary line, and thence south along their west line to a point south of defendants' well and pump, and also south of a low place on Hails' land which appellants call a "basin." After heavy rains in January, 1943, surface waters flowed through the cut in the street embankment, thence around the embankment made by plaintiffs, and against the east bank of defendants' irrigation ditch, broke the banks of the irrigation ditch, and flowed upon defendants' land. The waters also broke the north and south portions of plaintiffs' embankment, flowed upon Hails' land, and formed a pool upon the low place on Hails' land, destroying beets and cauliflower which covered approximately 14 acres.

At the time plaintiffs filed this action, Hails also filed an action for an injunction against these defendants and certain other defendants. The causes of action were tried together, and Hails appealed from the judgment in that action. The essential facts pertaining to the present action were stated in more detail in an opinion of this court filed this day in that action, Hails v. Martz, Cal.App., 164 P.2d 834.

[1] Appellants' contention that the evidence is insufficient to support the findings in regard to the natural configuration of the lands and the natural flow of surface waters cannot be sustained for the reasons stated in Hails v. Martz, supra.

[2] Appellants contend that the evidence is insufficient to support the finding that the embankment erected by appellants diverted surface waters away from Hails' land, and against the bank of defendants' irrigation ditch, causing the banks of said ditch to break and flooding defendants' land. There was evidence that, prior to the time the embankments here involved were erected, the surface waters from the valley flowed upon and across the Hails land in a southeasterly direction, and that they flowed south on the Hails land to a low place thereon located about the "middle" of and on the west part of the Hails land, where they stood; and that they did not flow upon defendants' land. Marconi testified that he built the embankment on Del Amo Street and dug the ditch for the purpose of diverting surface waters away from Hails' land and onto defendants' land. George Woo, one of the appellants, testified that he and his partner erected the embankment on the Hails land after the cut had been made in the street embankment, and that the purpose of erect-

ing said embankment was to "carry off the water coming through that cut," and divert it to the west side of appellants' embankment and prevent it from spreading upon Hails' land. The evidence was sufficient to support the finding.

[3] Appellants further contend that the evidence was insufficient to support the finding that defendants were damaged in the sum of $310.50. The evidence shows that manure had been placed upon approximately six acres of defendants' land and had not been plowed into the soil when the rains occurred in January, 1943; that the surface waters washed about 2/3 of the manure off the land where it had been spread, and it had to be replaced by other manure; that the manure required for one acre costs approximately $65; that defendants expended approximately $33 for dirt with which to repair the banks of their ditch, and about $75 to re-level their grounds; and that said expenditures were the result of and caused by the surface waters breaking the banks of defendants' ditch and flowing upon their land. The court found that the manure which was washed away was of a value in excess of $202.50, and that the other two expenditures were reasonable sums. That finding was supported by the evidence.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

72 Cal.App.2d 383

LYTTLE v. FICKLING et al.

Civ. 14826.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Hearing Denied Feb. 25, 1946.

1. Trusts ⇨371(2)

In action for a declaration that deceased wife, in her lifetime, held realty in trust for husband, husband's allegation and proof of existence of a confidential relationship between himself and wife independently of any presumption was sufficient as against an attack on ground that parties had separated and were negotiating more or less at arm's length.

2. Trusts ⇨103(1)

Where one has voluntarily assumed a relation of personal confidence with another and receives a conveyance of the latter's property, paying no consideration therefor, and promising that property will be held for benefit of grantor and will be reconveyed upon demand, and grantor has no other purpose in transferring property, equity will decree a trust for benefit of grantor.

3. Trusts ⇨110

Evidence that wife voluntarily assumed a relation of personal confidence with husband with respect to family finances and received a conveyance of husband's interest in ranch property and paid no consideration therefor, promising that interest would be held for benefit of husband and would be reconveyed upon demand, and, after divorce, reconveyance to husband was prevented only by wife's fatal illness, and trust was repudiated by wife's administratrix, was sufficient to establish elements of constructive trust enforceable against wife's estate.

4. Evidence ⇨333(7)

The code section declaring a conclusive presumption as to "facts recited, from a recital in a written instrument between the parties thereto or their successors in interest," as applied to recital in deed by which husband conveyed to wife as her separate property his interest in joint tenancy property, did not preclude a constructive trust in such property in husband's favor, since action to declare trust did not question validity of deed and since one spouse may lawfully impress separate property with a trust in favor of other spouse. Code Civ.Proc. § 1962, subd. 2.

5. Executors and administrators ⇨453(2)

In order that estate of a decedent be bound by a judgment, an allegation must appear that decedent had died or that court had appointed a personal representative of her estate.

6. Executors and administrators ⇨453(2)

In action against estate to establish a constructive trust, mere description of defendant in title of complaint as the administratrix of decedent was insufficient as an allegation of decedent's death and appointment of administratrix so as to bind estate by judgment.

7. Executors and administrators ⟹453(2)

Recitals in complaint for declaration of constructive trust and prayer thereof concerning death of alleged trustee and status of administratrix, together with testimony of administratrix that alleged trustee died on a specified date and that administratrix was duly appointed, qualified, and acting administratrix, were sufficient to establish that judgment was binding upon estate.

8. Limitation of actions ⟹103(2)

Where record disclosed that decedent did not repudiate trust during her lifetime and that action was instituted within a few months after administratrix did repudiate trust, defense of limitations was not established, since statute did not commence to run until administratrix repudiated trust.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by James Thomas Lyttle against Ava K. Fickling, as administratrix of the estate of Lulu E. Farmer, also known as Lulu E. Lyttle, deceased, and others for the establishment of a trust, for declaratory relief and to quiet title, wherein defendants cross-complained. Judgment for plaintiff, and defendants appeal.

Affirmed.

B. J. Bradner, Gertrude R. Chamberlin, and Noel Edwards, all of Los Angeles, for appellants.

Lance D. Smith and Wm. G. Junge, both of Los Angeles, for respondent.

SHINN, Justice.

This appeal is prosecuted by defendants from a judgment which declares that defendant Ava K. Fickling, as administratrix of the estate of Lulu E. Farmer, also known as Lulu E. Lyttle, deceased, holds in trust for plaintiff an undivided one-half interest in a small ranch property situated in the town of El Monte, in Los Angeles County, and directs said defendant to convey said interest to plaintiff; it also awards plaintiff $922.41 as half of the net proceeds from the property from the inception of the trust. In the caption of the complaint Ava K. Fickling is designated as administratrix of the estate of Lulu E. Lyttle, deceased. She is also named as a defendant individually with four other persons named Farmer, and all of the individual defendants are alleged to claim some interest in the property. There was a cause of action for the establishment of a trust, one for declaratory relief, and one to quiet title, and the defendants filed a cross-complaint to quiet their title, alleging that they were the owners of the land. It was not alleged in any of the pleadings that Lulu E. Lyttle had died, nor was it alleged that the defendants Ava K. Fickling and the defendants named Farmer are the heirs at law of Mrs. Lyttle. All of the questions of title were tried under the issues raised by the cause of action for the declaration of a trust and the answers thereto.

Plaintiff and Lulu E. Lyttle were husband and wife and resided together from 1912 until 1931, when plaintiff procured a divorce. They then owned the property in question as joint tenants. In addition to orchard trees, the property was improved with buildings, consisting of a residence, a grocery store, cafe, restaurant, garage, service station and dairy barn, and it had cost in the neighborhood of $12,000.

[1] Plaintiff testified that at different times his wife had asked him to "please give her a divorce," saying: "I think you ought to give me a divorce, because we are more like brothers and sisters than we are like man and wife." Again asked to give his wife a divorce, plaintiff went to Las Vegas early in 1931 and his wife went there soon afterwards to discuss the matter of property with him and to express her satisfaction with the proceedings for divorce. Plaintiff testified as follows as to the circumstances under which he transferred his interest in the property to his wife: "She says, 'I will make a proposal and see what you think of it. Now,' she says, 'Tom, I am there on the property and will be there right along; if you will deed me the property, you deed me all the property and I will take care of it; it will always be there, and at any time that you want your half of the property back, or your half of it, you can have it.' She says, 'I don't want all the property; I don't want any of it that belongs to you;

only I would like to have it so that I could take care of it for you, because you don't know what you want to do, you don't know where you are going to be, and I am going to be right there.' She says, 'I don't think that you would mistrust me or not trust me, because I have always taken care of things as we have gone along.' I told her I didn't mistrust her whatever, it was all right; and if she would—that if she wanted me to deed her the property and her take care of it, that is, look after it, that I would always keep my end of it up. I told her, I says, 'I don't want you to take the responsibility now of taking care of it or putting out for everything, because there is a mortgage on that property yet and I want to be there to help pay my part and I am not going to throw any hardship on you.' She says, 'I know you wouldn't do that, Tom; I know you want to do the thing that is right.' She says, 'You are just too good for your own good.' Now, this was our conversation that day." Other conversations were to the same effect. On April 26, 1931, while the parties were at Las Vegas, and before the case was heard, plaintiff executed three deeds by which he conveyed his interest as joint tenant in the ranch property to his wife as her sole and separate property. Mrs. Lyttle returned to Los Angeles, while plaintiff remained at Las Vegas long enough to get his decree, after which he returned to the ranch. In July, 1931, Mrs. Lyttle conveyed to plaintiff her interest in an encumbered property in Orange County, from which plaintiff later realized the sum of $300. There was no written property settlement between the parties and no evidence that the Orange County property was transferred as a consideration for plaintiff's interest in the ranch property. Plaintiff testified that he received no consideration. The parties remained on good terms until Mrs. Lyttle's death. Plaintiff remarried and after the death of his second wife, married a third, whom he eventually brought to the ranch property to live in one of the small houses, in which they were residing at the time of the first Mrs. Lyttle's death. His testimony was that at all times after the divorce he spent a great deal of time upon the ranch, cultivating the orchard, pruning the trees, gathering the crops, and repairing and improving the buildings on the premises. Mrs. Lyttle received all the income from the property, including rentals from the buildings, managed the finances, and reduced the mortgage on the premises from $2500 to about $900. In 1943 plaintiff sold a property, which he had owned before marriage, for about $1900, and, at Mrs. Lyttle's request, he turned over to her between $900 and $1,000, with which she paid off the balance of the mortgage on the ranch. The conduct of the parties as testified to by plaintiff was entirely consistent with an understanding that plaintiff owned an interest in the property and that Mrs. Lyttle held title thereto in order to manage it for their mutual advantage. During a major part of their married life plaintiff had been a railway employee, and his wife at all times had managed the family finances. Upon the foregoing evidence, which was without substantial conflict, the court found that plaintiff reposed in his wife the fullest confidence and by reason thereof, and upon her promise and agreement that she would hold a half interest in the property in trust for him and that she would at any time in the future, upon his request or demand, reconvey said interest to him, he made and executed the deeds in question and that he received no consideration therefor. These findings were responsive to the allegations of the complaint, which alleged the existence of a confidential relationship. Defendants say there was no presumption of a confidential relationship because the parties had been separated and were negotiating more or less at arm's length, citing Hensley v. Hensley, 1918, 179 Cal. 284, 183 P. 445, and other cases. Plaintiff did not rely entirely upon the presumption either in his pleading or proof, both of which were ample. He alleged and proved by sufficient evidence the existence of a confidential relationship independently of the presumption. There was no evidence that there had been distrust or contention in the home, and the separation appears to have been without bitterness. Plaintiff testified that he requested a reconveyance of his interest shortly before Mrs. Lyttle's death, and that they were arranging a division of the property, which was delayed by the death of Mrs. Lyttle's attorney, and was prevented by her later illness and her death. There was no evidence that she ever questioned plaintiff's interest or refused to make a conveyance, and the court found that plaintiff requested a reconveyance and that Mrs. Lyttle was prevented from giving it by her illness and her death.

[2] The judgment in favor of plaintiff was in accordance with the familiar rule of law that where one has voluntarily assumed a relation of personal confidence with another and receives a conveyance of the latter's property, paying no consideration therefor, and promising that the property will be held for the benefit of the grantor and will be reconveyed upon demand, and the grantor has no other purpose in transferring the property, a court of equity will decree a trust for the benefit of the grantor. There was in this case a repudiation of the trust by the personal representative of the estate of Mrs. Lyttle. The foregoing rule was declared to be the law of California in the case of Brison v. Brison, 1888, reported in 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189, and Id., 1891, 90 Cal. 323, 27 P. 186, and it has been repeatedly adhered to down to the present date. See Robertson v. Summeril, 1940, 39 Cal.App.2d 62, 66, 102 P.2d 347; Smith v. Lombard, 1927, 201 Cal. 518, 528, 258 P. 55, and cases cited.

[3, 4] The evidence was sufficient to establish all the elements of a constructive trust enforceable against the estate of Mrs. Lyttle, as it would have been against her if she had repudiated the trust. Defendants seek to avoid the application of the equitable doctrine which we have stated, upon the ground that the deeds in question conveyed plaintiff's interest to his wife as her sole and separate property. They contend that this language in the deed is a recital which gives rise to a conclusive presumption of absolute title in the grantee, under section 1962 (2) of the Code of Civil Procedure, which is to the effect that there is a conclusive presumption as to "facts recited, from a recital in a written instrument between the parties thereto, or their successors in interest." The provision cannot be given the effect claimed for it. The action is not one to set aside the deeds; their validity is not questioned. Mrs. Lyttle undoubtedly took title to the interest conveyed as her separate property. There is no reason why a woman may not impress her separate property with a trust in favor of her husband or any other person. The relationship of the parties and the circumstances under which the deeds were given were such as to impress a trust upon the interest conveyed. In seeking to enforce the trust, plaintiff neither relies upon nor questions the effectiveness of the deeds.

[5-7] Appellants question the judgment upon the further ground that the complaint failed to state a cause of action, in that there was no allegation that Mrs. Lyttle had died or that the court had appointed a personal representative of her estate. It is of course necessary in order that the estate of a decedent be bound by a judgment that these facts be stated. Flinn v. Gouley, 1903, 139 Cal. 623, 73 P. 542. Merely describing defendant Fickling in the title of the complaint as the administratrix of the estate of Lulu E. Lyttle, deceased, was insufficient, but it does not necessarily follow that the judgment should be reversed because of this omission. The complaint alleged that "since the death of said decedent, Lulu E. Lyttle, the Administratrix of her estate has served on Plaintiff a thirty day notice to vacate and remove from said above described property where Plaintiff makes his home." The prayer was for judgment declaring "that said Lulu E. Lyttle during her life time did, and that Ava V. Fickling as Administratrix of the Estate of Lulu E. Lyttle deceased, does now hold title to Plaintiff's undivided interest in said Real Property, in trust for Plaintiff." Mrs. Fickling testified that she was the administratrix of the estate, and the court found that Lulu E. Lyttle died on or about April 11, 1943, and that Mrs. Fickling was appointed, duly qualified, and since has been and is the duly appointed, qualified, and acting administratrix of said estate. This is sufficient to show that the judgment is one which is binding upon the estate of Lulu E. Lyttle, deceased. The individual defendants offered no proof of their own title. They only sought to defeat the claims of plaintiff, and it may be presumed that they are the heirs at law of Mrs. Lyttle and the claimants to her estate.

[8] Defendants on the appeal urge the defense of the statute of limitations. Although they did not plead it, they contend that it was necessarily a defense because defendant Fickling, as administratrix, could not waive it. The defense was not established. Mrs. Lyttle did not repudiate the trust during her lifetime but her administratrix did repudiate it in 1943; the statute then commenced to run and the present action was instituted within a few months thereafter.

The accounting of profits from the property was had before Paul Valleé, a distinguished member of the bar, who was appointed referee. His findings were approved by the court and are not questioned.

The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

72 Cal.App.2d 390

TITLE INS. & TRUST CO. v. McGRAW.

Civ. 14863.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1945.

Rehearing Denied Jan. 26, 1946.

Hearing Denied Feb. 25, 1946.

1. Deeds 🔑211(2)

In action to rescind a deed, evidence sustained finding for plaintiff that plaintiff mistakenly believed agreement executed in connection with deed expressed fully conditions on which she conveyed title and that plaintiff understood that agreement provided that plaintiff could have management of property and receive proceeds from operation thereof in same manner as she had theretofor.

2. Deeds 🔑210

In action to rescind deed, conflicting evidence sustained finding that no valuable consideration was given for conveyance.

3. Trusts 🔑25(1)

No particular language is necessary in order to create a trust, and it is not necessary that the word "trust" or the word "trustee" be used. Civ.Code, §§ 2216, 2221, 2222.

4. Trusts 🔑44(1)

In action to rescind a deed executed pursuant to an agreement by which plaintiff was to continue to have management of apartment building and income therefrom and defendant was to have title, deed, agreement, and amendment thereto, together with evidence as to circumstances surrounding transaction, authorized finding for plaintiff that an express trust was created. Civ.Code, §§ 2216, 2221, 2222.

5. Trusts 🔑59(1)

Where voluntary trust created by plaintiff was not expressly made irrevocable by agreement with defendant creating it, plaintiff could revoke such trust. Civ. Code, § 2280.

6. Trusts 🔑124

One who creates a voluntary trust under which he is primary beneficiary is not a sole beneficiary if he manifests an intention to create a contingent interest in others.

7. Trusts 🔑59(1)

Where express, voluntary trust provided benefits for trustor for life and for two third persons after trustor's death, trustor was entitled to revoke trust under code section making voluntary trust revocable notwithstanding section limiting application of that particular code chapter to express trust created for benefit of another than trustor. Civ.Code, §§ 2250, 2280.

8. Trusts 🔑59(1)

Trustor of a voluntary trust may exercise statutory power to revoke trust without the consent of beneficiaries, and hence, in trustor's rescission action, beneficiaries were not necessary parties. Civ. Code, § 2280.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Elizabeth Snyder against Lily K. McGraw to rescind a deed. Judgment for plaintiff, and defendant appeals. During the pendency of the appeal, plaintiff died and Title Insurance & Trust Company, as executor of the estate of Elizabeth Snyder, deceased, was substituted as plaintiff.

Affirmed.

James S. Jarrott, of Los Angeles, for appellant.

C. E. McDowell, McIntyre Faries, and Allan M. Carson, all of Los Angeles, for respondent.

WOOD, Justice.

In this rescission action plaintiff obtained judgment, and the defendant appeals. During the pendency of the appeal, the plaintiff Elizabeth Snyder died and the Title Insurance and Trust Company, a corporation, the executor of her will, has been substituted as plaintiff. Elizabeth Snyder will be referred to herein as the plaintiff.

On April 24, 1942, plaintiff, the owner of an apartment house in Los Angeles, executed a grant deed conveying that property to defendant. At that same time and as a part of the deed transaction, the defendant executed a document as follows: "Agreement For Value Received, I, Lily K. McGraw, agree and promise to pay all money derived from the operation and management of the Palomar Apartments, 979 South Oxford Avenue, Los Angeles, California, to Elizabeth Snyder. I will furnish reports and an accounting whenever so requested by Elizabeth Snyder and I promise to operate and continue to operate the business of said apartment house until a sale of said apartment house has been consummated; and the proceeds of said sale, I promise to pay to Elizabeth Ryland Snyder. Dated: April 24, 1942. Lily K. McGraw." Also at that time and as a part of the same transaction, the defendant executed another document as follows: "Amendment to Above Agreement. I, Lily K. McGraw, for value received, promise to pay to Elizabeth Snyder, also known as Elizabeth Ryland Snyder, the sum of Three Hundred ($300.00) Dollars per month until a sale of the said Palomar Apartments has been consumated or until the death of the said Elizabeth Ryland Snyder. After the demise of the said Elizabeth Snyder, I promise to pay one quarter of the income after all expenses have been deducted to Annie Depken Heiser and Emma E. Depken, sisters, that is, one quarter of the income from the management and operation of the said Palomar Apartments. After the death of the said Elizabeth Ryland Snyder, and in the event of a sale of the said Palomar Apartments, I promise to pay one quarter of the proceeds of said sale to Annie Depken Heiser and Emma E. Depken. Dated: April 24, 1942. Lily K. McGraw."

Defendant gave no monetary consideration for the deed, but asserted that the consideration therefor was services she had rendered to plaintiff and to plaintiff's sister in taking care of them when they were ill, and for services to be rendered by her in taking care of the plaintiff.

At the time the deed was made and thereafter, the property was leased to one tenant for $300 per month. During the four months following the making of the deed there was no change in the management of the property and defendant did not go to the property, nor collect the rent, during that time. In September, 1942, and monthly thereafter until October, 1943, the tenant, at plaintiff's request, sent his check in payment of the rent to the defendant. When the rent was received by defendant she gave her check for the amount so received to plaintiff. In October, 1943, plaintiff resumed the collection of the rent. After the deed was made plaintiff paid the taxes, the monthly installments of $110 on the encumbrance against the property, and the repair bills, except two hereinafter referred to. From the time the deed was made until the controversy herein arose, a period of approximately 17 months, the plaintiff went to the property about every week, and the defendant went to the property twice.

In September, 1943, plaintiff told defendant that she, plaintiff, needed more income, that she desired to refinance the property so that she, plaintiff, would be required to pay only $75 per month instead of $110, and that she desired to borrow $2500 from a bank and to include that amount as an additional encumbrance against the property. Defendant replied that she would not comply with plaintiff's request. Thereupon the friendly relationship between the parties ended. On October 8, 1943, the present counsel for plaintiff sent a letter to defendant stating that plaintiff desired to sell the property immediately if she could not refinance it. Prior to making the deed, according to plaintiff's testimony, plaintiff and defendant had conversations relative to selling the property, and plaintiff told defendant to sell the property "when she could for not less than a certain sum."

In October, 1943, after the controversy had arisen, defendant caused repairs to be made to the exterior walls of the building and paid $750.50 therefor from her own funds. On November 5, 1943, plaintiff's counsel sent another letter to defendant stating that he desired to confer with defendant, particularly with reference to a sale of the property.

On November 12, 1943, plaintiff served a written notice of rescission upon defendant, which notice was as follows: "Notice of Rescission. To Lily K. McGraw: You will please take notice that the undersigned, Elizabeth Snyder, does hereby rescind any and all agreements heretofore made by her with you and under and by virtue of the terms of which she conveyed to you the real property known as the Palomar Apartments, 979 South Oxford Avenue, Los Angeles, California, and more particularly described as follows: [Description]. You will further take notice that the undersigned offers to restore to you everything of value which she has received under the agreement, upon condition that you do likewise. Dated this 12th day of November, 1943. Elizabeth Snyder. Faries & McDowell, By C. E. McDowell, Attorneys for Elizabeth Snyder."

In January, 1944, defendant installed a new roof on the building and paid $350 therefor from her own funds.

The property here involved was acquired by plaintiff in 1936. Plaintiff was 87 years of age when the deed to defendant was made. The deed was prepared by the attorney for plaintiff (other than present counsel) and it was signed by plaintiff in his presence. Plaintiff and defendant had been good friends for several years prior to making the deed, and defendant had the confidence of plaintiff. They visited each other frequently over a period of several years. On many occasions, including practically every Sunday for a period of approximately four years preceding the controversy herein, plaintiff, upon invitation, was at defendant's home for dinner. When plaintiff's ankle was broken in 1926 she stayed at defendant's home about three weeks. About 1940, after plaintiff had been injured as a result of a fall, she went to defendant's home and remained there, under the care of defendant, about seven weeks. Plaintiff had lent money to defendant on several occasions in various amounts. The loans were repaid by defendant, except the last one of $150 which plaintiff declined to receive when defendant offered to pay it. According to plaintiff's testimony there had been reciprocal kindnesses between them, and the matter of assistance "was not all one-sided." Plaintiff's sister lived at defendant's home for 18 months, during which time defendant rendered services in taking care of the sister. According to defendant's testimony such services were rendered at plaintiff's request. Plaintiff testified that she did not make such request. Although defendant testified that the sister owed her "plenty" at the time of the sister's death, she also testified that she owed the sister $72 which amount she paid to plaintiff after the death of the sister.

Defendant testified further, at the trial, that plaintiff said, at the time the agreement was made, "I want to do just like I have been doing with the house," and that she wanted to keep "managing the payments" on the house as she had done before. In her deposition, defendant testified that, at said time, plaintiff said she wanted the "management" of the property just as she had had before the deed was made. At the trial defendant said that the word "management" should not have been in the deposition, but it should have been that she would continue to pay the bills because she was receiving the income. Defendant also testified that she had not been willing to sell the property at any time, because plaintiff had told her when plaintiff gave the property to her that she wanted her to keep it for a home; and that plaintiff told her many times that she was going to give the apartment house to defendant.

Plaintiff testified that defendant told her on many occasions that a certain man, a friend with whom plaintiff had had real estate transactions, would try to get her property after her death, and that the way to keep him from getting it would be "a transfer to get it out of my name only, and not out of my jurisdiction—I do not know whether I should call it jurisdiction—but not out of my name." Plaintiff testified further that defendant had made so many disparaging remarks about the moral character of that man that she (plaintiff) did not want any of her property to go to a person of that kind; that she made the deed to prevent that man, and others who had been trying to get her property, from getting it; that she never told defendant that she would give the property to her; and that in addition to the provision in the agreement that her cousins (the Depken sisters) should get one-fourth of the property, she provided in her will that they should have the residue of her estate.

It was alleged in the complaint, among other things, that at and before the time the deed was made, plaintiff had great confidence in defendant; that defendant, for the purpose of persuading plaintiff to convey the property to her, represented that another friend would attempt to obtain title to the property upon the death of plaintiff; that plaintiff thereupon, upon the advice of defendant, for the purpose of preventing such other person obtaining her property, and by reason of her trust and confidence in defendant, did convey the property to defendant without any consideration therefor; that at the same time and as a part of the same transaction defendant executed the certain writing (hereinabove referred to as the agreement and the amendment thereto); that at said time plaintiff was unable to read said writing and believed that it fully expressed the conditions on which she conveyed title to defendant; that plaintiff understood that the agreement provided she should have the management of the property thereafter in the same manner as she had theretofore had, and should she desire to sell the property it would be sold and the proceeds delivered to her, but if she did not sell it that, upon her death it would be held by defendant as the trustee for the purpose set forth in the agreement; that plaintiff desired and proposed to sell the property, but defendant refused to permit plaintiff to sell it and denied plaintiff's right to sell it; and that by reason of the refusal of defendant to comply with the terms of the agreement, the plaintiff rescinded any and all agreements theretofore had by her with defendant and served the notice of rescission (hereinbefore quoted) upon defendant.

The answer denied any trust relationship or representation as alleged in the complaint, and alleged that the deed was given for valuable and adequate consideration. It was alleged further in the answer that by reason of plaintiff's failure to join Annie Depken Heiser and Emma E. Depken as parties to the action that plaintiff was not entitled to institute or maintain the action.

The court found in substance that the allegations of the complaint, above mentioned, were true, except that it made no finding as to the representation alleged to have been made by defendant to induce plaintiff to make the deed, nor did it find that plaintiff was unable to read, but found that she was unable to read readily by reason of defective eyesight. The court also found that the conveyance of the property to defendant was in trust, and that the said agreement and amendment thereto (above quoted) constituted a declaration of an express trust under the terms of which, and not otherwise, the defendant held title to the property; that defendant had no right, title or interest in the property, except as such trustee and under the provisions of said trust; that under the provisions of said trust no power of sale was given to defendant, and plaintiff at all times retained the right to direct, control and authorize the sale of the property; that on November 12, 1943, plaintiff rescinded and revoked all agreements made by her with defendant, including said declaration of trust; that defendant had paid $1100.50 from her own funds for repairing the property; that plaintiff was entitled to maintain the action without joining Annie Depken Heiser and Emma E. Depken as parties; and that said declaration of trust was void under the provisions of sections 715 and 716 of the Code of Civil Procedure (apparently it was intended that this reference should be to the Civil Code).

The judgment was that plaintiff was the owner of said real property subject to a lien of defendant for the repayment to her of said $1150.50 (apparently it was intended that this amount should be $1100.50, the total of $750.50 and $350) with interest at 7% per annum from the dates when various payments, aggregating $1100.50, were made.

[1] Appellant asserts that the evidence was not sufficient to support the finding that plaintiff did not understand the agreement. The finding was not in that form, but was that plaintiff believed the document expressed fully the conditions on which she conveyed the title, and that she understood that the agreement provided that she could have the management of the property and receive the proceeds from the operation of the property in the same manner as she had theretofore. The evidence was sufficient to support that finding.

[2] Appellant asserts that the conveyance was for a valuable consideration and that the finding to the contrary is without support in the evidence. The $300 which was paid to plaintiff each month, being the rent which was received from the property involved, was money to which plaintiff was entitled before the agreement was made. Defendant did not agree to pay the taxes, interest on the incumbrance or to make repairs. Appellant argues that the most valuable consideration was the board, care and attention furnished to plaintiff. The evidence as to the consideration and as to the reason for the conveyance was conflicting and different inferences might be drawn therefrom. There was evidence to

the effect that there were reciprocal kindnesses between the parties. The evidence was sufficient to support that finding.

Appellant contends that no voluntary express trust was created or intended to be created by the parties. Her argument is that the word "trust" was not used in the deed, the agreement, the testimony, the complaint, or the notice of rescission; that the effect of the amendment to the agreement was to transform defendant's obligation from one to account for the proceeds of the apartment house to an unconditional promise to pay $300 per month until the property should be sold or until plaintiff's death; that the plaintiff "no doubt preferred" the promise of defendant to pay $300 per month for life rather than an amount equivalent to the income, which might vary considerably, with the possibility of becoming nothing at all; and that it was the intention that defendant be rewarded for her services to plaintiff and to plaintiff's sister.

[3, 4] The complaint did allege, as above stated, that the plaintiff understood that if the property was not sold during plaintiff's life it would be held by defendant "as trustee." No particular language is necessary, however, in order to create a trust, and it is not necessary in order to create a trust that the word "trust" or the word "trustee" be used. Weiner v. Mullaney, 59 Cal.App.2d 620, 631, 140 P.2d 704; Hardison v. Corbett, 55 Cal.App.2d 310, 318, 130 P.2d 226. "A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another." Civ.Code, sec. 2216. Such personal confidence existed between plaintiff and defendant, and the transaction arose out of such relationship. Section 2222 of the Civil Code provides that "* * * a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty: 1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and, 2. The subject, purpose, and beneficiary of the trust." Section 2221 of the Civil Code provides that "* * * a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." The agreement and the amendment to the agreement were executed by defendant at the time she received the deed, and those documents were a part of the deed transaction. The whole transaction as to the making of the deed, the agreement and the amendment negative any inference that plaintiff made an absolute conveyance of her property to defendant. The manner in which the property was managed and operated after the deed was made also negatives such an inference. Defendant went to the property only twice during a period of 17 months before the controversy herein arose, and she paid nothing to repair or maintain the property until after their friendly relationship had ended. The evidence to the effect that other persons might try to obtain plaintiff's property indicated a purpose in making the deed. It does not appear that there was any reasonable basis why plaintiff "no doubt preferred," as appellant argues, an unconditional promise of defendant to pay $300 per month to plaintiff rather than the income from the property. The property had been producing $300 per month for years, and the prospect that it would continue to produce that amount was good—the tenant, according to the evidence, was a good one. On the contrary, as to the prospect of better financial security for plaintiff by having the promise of defendant to pay $300 per month, there was evidence that defendant had borrowed money at various times from plaintiff, that she owed money to plaintiff's sister, and that for some time there was an unpaid judgment against her. The evidence was sufficient to support the finding of the trial court that there was an express trust.

[5] The voluntary trust, not expressly made irrevocable by the agreement creating it, could be revoked by plaintiff. Section 2280 of the Civil Code provides: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. * * *" Prior to 1931, when said section 2280 was amended, there was no right of revocation of a voluntary trust unless the right was reserved expressly. In Fernald v. Lawsten, 26 Cal.App.2d 552, at page 560, 79 P.2d 742, under circumstances similar to those in the present case, except as to the

language of the agreement, it was held that the trustor had the right to revoke the trust. It was also held therein (26 Cal.App.2d at page 559, 79 P.2d 742) that the record contained ample evidence to support the finding that the transaction constituted a voluntary trust, and that in construing the real nature of the agreement it was proper to admit evidence as to the circumstances and conditions (26 Cal.App.2d at page 563, 79 P.2d 742) under which the agreement and deed were executed.

[6, 7] Appellant asserts that the effect of section 2280 of the Civil Code is limited by the provisions of section 2250 of the Civil Code which provides that: "The provisions of this chapter [Secs. 2250 to 2289, inclusive] apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such." Plaintiff was not the only one to benefit by the trust herein. By the terms of the agreement Annie Depken Heiser and Emma E. Depken were to benefit from the agreement upon the death of plaintiff. One who creates a voluntary trust is not the sole beneficiary if he manifests an intention to create a contingent interest in others. Bixby v. Hotchkis, 58 Cal.App.2d 445, 451, 452, 136 P.2d 597; Restatement of Law of Trusts, p. 1039. It is to be noted, however, that in Fernald v. Lawsten, supra, the trust agreement was for the sole benefit of the trustor, but the court held that the trust was revocable under said section 2280.

[8] Appellant contends further that Annie Depken Heiser and Emma E. Depken, beneficiaries under the alleged trust, were necessary and indispensable parties and that the action could not be maintained without them as parties thereto. Under the provisions of said Section 2280 a trustor may revoke a trust, within the provisions of that section, without the consent of the beneficiaries. Furthermore, those beneficiaries were not parties to the agreement, and they had no present interest in the property and would not have any interest therein until the death of the trustor. The trustor commenced the action. This contention of appellant is not sustained.

By reason of the above conclusions, it is not necessary to discuss the other contention of appellant to the effect that the transaction does not constitute a restraint upon alienation of the property.

The judgment is affirmed.

DESMOND, P. J., concurs.

SHINN, Justice (concurring).

I concur. By the terms of section 2250 of the Civil Code, the succeeding sections of the chapter, including section 2280, apply only to express trusts created for the benefit of another than the trustor, and defendant argues that the provisions for revocation contained in the latter section are not applicable here because the trust was for the benefit of the trustor as well as for others. Under original section 2280, a trust could not be revoked by the trustor after its acceptance, except by the consent of all beneficiaries, unless the declaration of trust reserved the power of revocation by the trustor. The clear implication of the section was that a trust could be revoked by the consent of all beneficiaries, which is the law generally in the absence of statutory limitations (Perry on Trusts and Trustees, 7th ed., Vol. 1, sec. 104), and there are none in California. If the trustor had been the sole beneficiary, she could have revoked the trust (Bradbury v. McClure, 1892, 93 Cal. 133, 28 P. 777; Fernard v. Lawsten, 1938, 26 Cal.App.2d 552, 79 P.2d 742), and consequently could revoke it as to her own interest as beneficiary, even though there were other beneficiaries. Under amended section 2280 she had the power to revoke it as to all other beneficiaries.

There are two additional grounds for affirmance of the judgment. The findings are subject to the construction that plaintiff executed the deed with the understanding, concurred in by defendant, that plaintiff, under the agreement, could direct a sale of the property at any time and that the entire proceeds would be paid to her. Consistently with plaintiff's testimony on the subject, which was meager, the writings signed by defendant and the circumstances of the case tended strongly to prove that plaintiff had such an understanding and that both parties so understood the writings. As plaintiff had the right to require the property to be sold, she had a right to revoke the trust, since the sale of the property and the payment of the proceeds to her would revoke or terminate it.

The second ground is that the findings established defendant's relation as trustee of a constructive trust. She refused to allow a sale of the property and thus violated her promise, which was a material inducement for the transfer of the property to her. Under these circumstances a court of equity will decree the property to be held in trust and direct that it be reconveyed. Lyttle v. Fickling, 1945, 164 P.2d 842. Any and all adverse claims of defendant under the deed and the agreement were vitiated when it was established that her only interest in the property was that of a trustee under a constructive trust.

MERCHANT SHIPPERS ASS'N v. KELLOGG EXPRESS & DRAYING CO.*

Civ. 12940.

District Court of Appeal, First District, Division 1, California.

Jan. 7, 1946.

Hearing Granted March 7, 1946.

1. Carriers 🔑76

Ordinarily, when title passes to buyer on delivery of goods to carrier and when lawful possession of bill of lading is in consignee, consignor may not bring an action against carrier for damages to goods occurring while in transit.

2. Carriers 🔑76

When forwarding shipper merely accumulates goods for shipment for a fee which is paid by shipper and has no interest in goods and assumes no responsibility beyond shipping goods by a reliable common carrier, forwarder's position is equivalent to that of a shipper from whom title has passed, and forwarder has no right of action for damage to goods in transit.

3. Carriers 🔑4, 76

Where forwarder assembles various lots of goods for shipment in carload lots and by contract, through bills of lading, assumes responsibility for safe transportation of goods from point of receipt to point of destination, forwarder becomes a "freight forwarder" or forwarder with common carrier liability as well as a forwarder shipper, and hence has sufficient interest to maintain an action for damage to goods by a common carrier.

See Words and Phrases, Permanent Edition, for all other definitions of "Freight Forwarder".

4. Carriers 🔑76
Pleading 🔑193(5)

In action against common carrier for damage to freight, allegation that plaintiff was a forwarder would be sufficient as against a general demurrer, but, as a matter of defense, carrier could prove that plaintiff was type of forwarder who assumed no liability to consignee. Interstate Commerce Act § 402, 49 U.S.C.A. § 1002(5).

5. Indemnity 🔑13(1)

When a freight forwarder intrusts freight to a common carrier and freight is damaged in transit and forwarder pays consignee upon a legitimate claim, forwarder is entitled to recover against negligent carrier.

6. Bailment 🔑1
Carriers 🔑76

Where freight forwarder had right to control shipment and therefore had responsibility of safe carriage of freight to point of destination, forwarder stood in position of a bailee and, although not having actual possession, had right of possession and control over any sub-common carrier until freight reached point of destination sufficient to support right of action as a bailee against carrier for damage to goods, under rule that, where bailee's responsibility has not ended, right of action exists though he may not have actual physical possession.

7. Carriers 🔑131

In action against carrier to recover for damage to freight, plaintiff must allege and prove that freight was in good condition when delivered to carrier and that damage took place while freight was in carrier's hands.

8. Carriers 🔑134

In action against carrier for damage to machinery being shipped, where principal damage consisted of breaks and cracks in machinery, evidence that carrier dropped machine and that skids, which were not part of machine, came off, was not sufficient to establish that breaks and cracks occurred while machine was in carrier's possession and did not authorize judgment against carrier.

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* Subsequent opinion 170 P.2d 923.

9. Carriers ⚷132

Goods are presumed to arrive in the condition in which they were shipped.

10. Carriers ⚷134

Proof of delivery of goods to carrier in sound condition and of their redelivery at end of route in damaged condition is sufficient to sustain recovery of damages against carrier.

11. Damages ⚷113

Generally, where damage to personal property is caused by partial destruction of property, damages may be measured by difference in value immediately before and after injury, provided that, if repairs may be effected, lesser sum of two measures is limit of recovery.

12. Damages ⚷163(4)

Where personal property is damaged and repaired and evidence shows that repair bill is reasonable, duty of showing diminution in value immediately before and after injury as being less than repair bill rests with defendant.

13. Damages ⚷113

Where repairs have been made to a damaged machine but repairs have not resulted in making machine workable, measure of damages is restricted to difference in value immediately before and after injury.

14. Damages ⚷113

In applying the measure of damages of the difference in value immediately before and after the injury, value at time of trial is irrelevant.

15. Damages ⚷103

Compensation awarded as damage should at least be an approximation to accuracy.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Merchant Shippers Association against Kellogg Express & Draying Company, to recover for damage to freight delivered to defendant for transportation. Judgment for plaintiff, and defendant appeals.

Reversed.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for appellant.

Jacobs, Blanckenburg & May, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant from a judgment in an action for damages to a wood working machine wherein the complaint alleged that plaintiff corporation "was a forwarder of goods for hire in interstate commerce"; that defendant corporation "was a common carrier of goods for hire in interstate commerce" and "That on or about the 1st day of August, 1942, at the City and County of San Francisco, State of California, plaintiff caused defendant to take delivery of certain goods, to-wit: One (1) crate woodworking Machinery, consisting of a Heath 2 Drive Sander Machine, at the freight shed of the Associated Forwarders in San Francisco, California, which machine had been shipped by Beach Manufacturing Co. from Montrose, Pennsylvania, as consignor, to Defense Plant Corporation, c/o Moore Dry Dock Company, Oakland, California, as consignee, through plaintiff as the freight forwarder; that said machine was then in good order and condition and defendant agreed to safely deliver the same to said consignee at Oakland, California, and then and there received said machine for that purpose." It is then alleged that defendant negligently carried the machine and caused it to be tipped over and dropped from a loading platform of a freight shed to the street, resulting in the loss of "skids," which were affixed to the machine, the machine sustaining damages consisting of numerous breaks and cracks. The amount of damages was alleged to be $2,951.58, the cost of the machine, plus necessary repairs. It was also alleged that plaintiff had paid the consignee for the cost of the machine, had caused it to be repaired and had paid for such repairs, and the plaintiff had possession of the machine.

A special and general demurrer was interposed and was overruled, wherein it was claimed that plaintiff had not stated facts sufficient to constitute a cause of action and that the complaint was uncertain and ambiguous in that "the nature of the relationship, if any, between plaintiff and Defense Plant corporation" and "what, if any, right, title or interest plaintiff has or claims to have in or to the property referred to in the complaint" can not be ascertained therefrom. These same objections which are raised by demurrer are raised by the answer which affirmatively alleged as a separate defense that at the time of shipment plaintiff "was neither the owner, bailee, person in possession, nor person entitled to possession of said shipment."

The assistant vice-president of plaintiff corporation testified that his company had taken possession of the crate of machinery at Montrose, Pennsylvania, and agreed to transport it to Defense Plant Corporation, c/o Moore Dry Dock Company at Oakland, California; that at that time plaintiff had an agreement with defendant to pick up at a designated point in San Francisco all plaintiff's shipments destined for Oakland at a flat rate, irrespective of compensation collected by plaintiff. Further, he testified that the Merchant Shippers Association was engaged in the consolidation of less than carload shipments of freight into full cars and forwarding them to strategic points on the Pacific coast for distribution to the ultimate consignees, and that the damaged machinery was shipped in a car which the Merchant Shippers Association supervised and consolidated and paid the freight on. He also testified that plaintiff was a freight forwarding company possessing a certificate from the Interstate Commerce Commission. The "concurrence" agreement between plaintiff and defendant as to freight tariffs was on file with the Interstate Commerce Commission. The findings follow substantially the allegations of the complaint. It was also found that the denials of the answer and the separate and further defense were not sustained by the evidence presented.

[1-5] In respect to appellant's first contention that the complaint failed to state a cause of action and the evidence fails to prove a cause of action, appellant argues that the consignee, Defense Plant Corporation, which had the beneficial ownership of the goods, is the only party entitled to bring the action. Defendant argues that "the complaint shows affirmatively that plaintiff was a mere forwarder and that other parties were the shipper, consignee and bailee in possession of the machine at the time of the alleged damage." Defendant cites authorities, including Lawrence v. Minturn, 58 U.S. 100, 17 How. 100, 15 L.Ed. 58, 61, and Bruner v. Chicago & E. I. R. Co., 87 Ind.App. 374, 161 N.E. 680, 682. The latter case is authority for the well-recognized rule that ordinarily when title has passed to the buyer on delivery to the carrier, and when the lawful possession of the bill of lading is in the consignee, the consignor may not bring an action for damages to the goods occurring while in transit. It is defendant's theory that, as a forwarder, plaintiff was merely a shipper, and that title to the machine rested with the consignee who is the proper party to maintain this action. When the forwarding shipper has no interest in the goods the above contention is correct, but it appears from the above noted testimony of the vice-president of plaintiff that plaintiff had an interest in the shipped goods. When the forwarder is one who assembles various lots of goods for shipment in carload lots, and by contract, through bills of lading, assumes the responsibility for the safe transportation of the article from point of receipt to point of destination, the forwarder becomes, so to speak, a freight forwarder, or forwarder with common carrier liability as well as a forwarder shipper. Heath v. Judson F. Forwarding Co., 47 Cal.App. 426, 190 P. 839; United States v. Chicago Heights Trucking Co., 310 U.S. 344, 60 S.Ct. 931, 84 L.Ed. 1243. A forwarder who merely accumulates goods for shipment, for a fee which is paid by the shipper, and who has no interest in the freight and who assumes no responsibility beyond shipping the goods by a reliable common carrier has no actionable interest. The allegation that plaintiff was a forwarder would be sufficient as against a general demurrer inasmuch as, though it is an allegation of a mixed question of law and fact, it sufficiently alleges the basis upon which an interest in the plaintiff is to be shown. However, as a matter of defense, the defendant could prove that plaintiff was the type of forwarder who has assumed no liability to the consignee. Interstate Commerce Act, 49 U.S.C.A. § 1002(5), provides: "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the

transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title." A freight forwarder is entitled to recover against a carrier to whom it has entrusted goods to deliver. Elliott on Railroads, Vol. 4, p. 599; Michie, Carriers, Vol. 1, p. 484. When a forwarder entrusts goods to another carrier which are damaged in transit, and the forwarder pays the consignee upon a legitimate claim, the forwarder should be permitted to recover against the negligent carrier. Bunge, Law of Draymen, Freight Forwarders and Warehousemen, p. 117.

In the present action there is no contention that the consignee is not the lawful holder of the bill of lading. There is evidence that plaintiff is a freight forwarder and that it paid the consignee's claim though it was not in the actual possession of the goods. There is also evidence from which an inference may be drawn that plaintiff was a freight forwarder who assumed responsibility for the goods from point of receipt to destination. In Schuette v. Larson, 44 Cal.App.2d 296, 112 P.2d 275, the only point raised was that the bailee of personal property who is not in actual possession cannot maintain an action against a tort feasor for damages for the loss of the property. There was no evidence there that the merchandise was the property of a third party and the court did not decide what the result would have been had the merchandise belonged to a third party. An allegation in one of the causes of action in reference to a bailee was "somewhat ambiguous," and the theory upon which the case was tried was questionable. The precise issue in this case was not determined in the Schuette case. There the court held that the particular question was raised by appellant for the first time on appeal when it should have been presented to the trial court.

[6] In the present case, in the absence of a counter order by the owner, plaintiff under the testimony of its vice-president had the right to control the shipment and therefore had the responsibility of the safe carriage of the goods to the point of destination. The forwarder stands in the position of a bailee. Heath v. Judson F. Forwarding Co., supra. A contract of bailment covering such period may be made, and the forwarder carrier, though not having actual, has the right of, possession and control over any sub-carrier until the goods reach the point of destination. Where the bailee's responsibility has not ended, the right of action exists though he may not have actual physical possession. Marietta Ice & Coal Co. v. Western & A. R. Co., 24 Ga.App. 725, 102 S.E. 182. In Whitworth v. Jones, 58 Cal.App. 492, 497, 209 P. 60, 62, the court said: "Conceding that the plaintiff did not become the legal owner of the automobile, he did nevertheless, by reason of his having been given possession of the machine and having at all times exercised control over it, acquire the rights of a bailee. Among those rights is that to sue for damages for injuries caused to the property by third persons. 'The bailee is entitled to the possession of the property, * * * therefore has a special right or property in the chattel to the extent of his bailment contract, and can protect it against wrongdoers who occasion loss or injury. * * * In such cases the damages are not confined to the mere interest of the bailee, but in case of injury or loss of the property he may recover its full value, together with any special damage to him, and for all beyond his own interest he would be a trustee for the bailor or owner.' Van Zile on Bailments and Carriers, 2d Ed., par. 57. * * *" The evidence as it was presented is sufficient to sustain plaintiff's position, but on remanding and new trial the specific contract between plaintiff and the consignee might be produced or defendant might rebut the inference of assumption of liability by other proof that plaintiff was a mere accumulator of freight who did not assume responsibility.

[7, 8] However, the judgment must be reversed because of a deficiency in proof concerning the time of damage to the machine. The complaint alleged that defendant was negligent in dropping machine from a loading platform of a freight shed to the street, as a result of which the skids affixed to the machine were torn off "and said machine was damaged in that it sustained numerous breaks and cracks." The complaint also alleged that at the time of the delivery of the goods to defendant "said machine was then in good order and condition." The answer admitted the receipt of the goods and that in the course of loading the skids came off but denied generally all and singular each and every allegation contained in the complaint, including the allegation of delivery of the machine in good

condition to defendant. This allegation is essential to plaintiff's action against defendant. To sustain the judgment evidence that the damage took place while in defendant's hands is necessary and consequently that the machine was in good condition when received by defendant. This issue was not raised for the first time on appeal but was raised by the pleadings. If the evidence showed that the cracks and breaks occurred when the machine was dropped, and that the skids, which are not part of the machine, came off, it might be inferred that the machine was in good order when delivered to defendant, but there is no substantial evidence that any breaks or cracks were observed or occurred prior to the time the consignee acknowledged receipt of the goods. An affidavit by one of the truck helpers or drivers in the employ of defendant who participated in loading the machine at the time of "dropping" states that at that time the skids fell off, but there is not one word about breaks or cracks in the machine. There is some hearsay evidence that an agent for the Defense Plant Corporation advised plaintiff that the machine had been injured by defendant, but further testimony along this line was not permitted. There is a statement in the form of a question in the record made by the attorney for plaintiff as to the pleadings admitting that the machine was dropped "and sustained damages." Defendant's attorney remained silent. The pleadings show that the statement of the attorney for plaintiff was incorrect. The court found that at the time the machine was delivered to defendant it "was then in good order and condition." There is no evidence to sustain such finding.

[9, 10] Goods are presumed to arrive in the condition in which they were shipped. Plaintiff must prove that the damage occurred while the goods were in the possession of the particular carrier (13 C.J.S., Carriers, § 254, p. 538), "and proof of the delivery of the goods to the carrier in sound condition and of their redelivery at the end of the route in damaged condition makes a sufficient case to sustain a recovery of damages by the shipper." Swiney v. American Express Co., 144 Iowa 342, 115 N.W. 212, 213, 122 N.W. 957. "It is elementary that in order to establish liability on the part of a carrier for injuries sustained by merchandise while in its possession it is necessary to show, at least, that such merchandise was, when delivered to such carrier, in better condition than it was after receipt at destination. The burden was upon the plaintiff, claiming damages alleged to have resulted from such injuries, to prove, by a preponderance of the evidence, the extent to which the condition of such merchandise was better when it was received by the defendant than when it was delivered to the consignee." Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co., 6 Cir., 39 F.2d 840, 841. Plaintiff failed to prove an essential allegation of the complaint. Upon retrial, this defect in proof must be remedied by some evidence from which a reasonable inference can be drawn that the machine was not damaged when received by defendant.

[11, 12] It is advisable in view of a new trial to consider the claim of defendant that the wrong measure of damages was applied. The general rule is that where the damage to personal property is caused by the partial destruction of the property the damages may be measured by the difference in value immediately before and after the injury, provided that if repairs may be effected, the lesser sum of the two measures is the limit of recovery. The rule is expressed in Rhodes v. Firestone Tire, etc., Co., 51 Cal.App. 569, 573, 197 P. 392, 394, as follows: "According to some authorities the measure of damages in such instances is the cost of repairing the injured personal property, together with the value of the use of the property while undergoing repair. * * * The usual measure, however, to apply in the ascertainment of damages in cases where personal property has been negligently injured but is *susceptible* of repair, and the one we prefer to follow, is that which makes the measure of damages the difference in value immediately before and immediately after the injury, subject, however, to the proviso that if it can be *entirely* repaired at a less expense than the diminution in value because of the injury, the measure of damages is the reasonable cost of repairs." (Emphasis added) When the evidence shows that the repair bill is reasonable, the duty of showing diminution in the amount rests with the defendant. City of Oakland v. Pacific Gas & E. Co., 47 Cal.App.2d 444, 118 P.2d 328. In Konda v. Frumpkin, 90 Cal.App. 384, 386, 265 P. 955, the diminution rule is expressed as follows: "If the diminution in value of the vehicle occasioned by the collision is less than the cost of repair, the defendant is privileged to make such showing; and, if he successfully carries this burden, the judgment will then be for the amount that the vehicle has been lessened in value by reason of the injury."

[13-15] One factor to consider is whether the article is susceptible of repair and if it can be entirely repaired. If, in the present case the repairs have not resulted in making the machine workable, then the repair effort has been in vain and the measure of damages "is the difference in value immediately before and after the injury." 8 Cal.Jur., p. 815, sec. *72*. Under the circumstances, the amount of damages awarded is not to be construed as the law of this case. There is no testimony in the record as to the value of the machine immediately upon the discovery of the damages and prior to the time of trial. It is not necessary to consider the method of ascertaining the amount of damages in this case further except to state that it is not "the present value" *at the time of trial* that may be an item of consideration but rather the value immediately after the injury. Compensation awarded as damages should at least be "an approximation to accuracy." Slater v. Pacific American Oil Co., 212 Cal. 648, 654, 300 P. 31, 34.

The judgment is reversed.

PETERS, P. J., and ATTERIDGE, Justice pro tem., concur.

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72 Cal.App.2d Supp. 875

PEOPLE v. SMITH.

Cr. A. 2147.

Appellate Department, Superior Court,
Los Angeles County, California.
Jan. 2, 1946.

1. Criminal law ⚷409, 517(4)

The corpus delicti need only be proved prima facie or by slight evidence to lay foundation for introduction of extrajudicial confession or admission of defendant.

2. Criminal law ⚷406(4)

Proof of corpus delicti as foundation for introduction of extrajudicial confession or admission of defendant may consist of testimony at the trial by the defendant himself.

3. Criminal law ⚷409

In prosecution for carrying concealed weapon in automobile in parking lot across street from hotel in which defendant was staying, defendant's testimony in his own defense that parking accommodations of the lot were furnished by the hotel in connection with the rental of his room sufficiently established the corpus delicti to permit introduction of police officer's testimony that defendant stated when the weapon was found, that defendant had been robbed of a sum of money, and that he was looking for the robber. St.1923, p. 695, as amended.

4. Weapons ⚷10

An automobile is a "vehicle" within statute prohibiting the carrying of a weapon concealed in a vehicle. St.1923, p. 697, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Vehicle".

5. Weapons ⚷10

The word "carry", in statute making it unlawful to carry a weapon concealed on the person, means to bear or hold a weapon concealed on the person or in a vehicle in such a manner that the locomotion of the person or vehicle would carry along the weapon. St.1923, p. 697, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Carry".

6. Weapons ⚷17(4)

Evidence warranted conviction for carrying concealed weapon in automobile which was parked in lot and was not moving, on ground that revolver found in automobile belonged to defendant and had been concealed by him in closed glove compartment of automobile, which was registered to defendant as the owner. St.1923, p. 697, § 5.

Appeal from Municipal Court of Los Angeles; F. Ray Bennett, Judge.

Edgar L. Smith was convicted for carrying a concealed weapon in a vehicle, and he appeals.

Affirmed.

Henry C. Huntington, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

KINCAID, Judge.

The defendant herein is charged with a violation of Chapter 339, p. 695, Stats.1923 of the State of California (Vol. 1, Deering's Cal.Gen.Laws, Act 1970, p. 864), in that, on or about June 9, 1945, within the City of Los Angeles, he did wilfully and unlawfully carry concealed within a vehicle, which said vehicle was then and there under his control and direction, a certain Colt pistol or revolver that was then and there capable of being concealed upon the person, without having a license to do so, and he not being a peace officer at the time of carrying said firearm in such vehicle. From the judgment of conviction thereof and the order denying a motion for a new trial the defendant appeals.

The evidence discloses that at about 1:30 a.m., of June 9, 1945, two police officers went to the defendant's hotel room, located within the City of Los Angeles, and upon being admitted by the defendant searched the room and placed him under arrest. They were then taken by defendant to a parking lot located across the street from the hotel where an automobile was parked. The car was opened by means of keys which defendant had in his possession and which fitted the locks of the car, and therein was found a registration certificate bearing the name of defendant as the owner of the car. Upon the opening of the closed glove compartment within the automobile a 45 calibre revolver was found therein. The police officer witness further testified that he had not seen the defendant inside of said car nor had he seen the car in motion or on a public street. The defendant testified in his own defense only that parking accommodations on the lot were furnished by the hotel in connection with the rental of his hotel room.

[1-3] Defendant objected to the introduction into evidence, by the police officer, of the following statement attributed to defendant as having been made by him at the time the revolver was found: "he 'had been taken' or robbed of $2000 and that he was looking for the man who did it." The objection was based mainly upon the claimed lack of proof of the corpus delicti as prohibiting the admissibility of extrajudicial confessions or admissions of a defendant. It is now well settled that slight or prima facie evidence is all that is necessary to prove the corpus delicti (People v. Harshaw, 1945, Cal.App., 161 P.2d 978), and such proof may consist of testimony at the trial by the defendant himself. People v. Kaye, 1941, 43 Cal.App.2d 802, 810, 111 P.2d 679; People v. Kelly, 1925, 70 Cal. App. 519, 234 P. 110. Tested by these standards the corpus delicti was sufficiently established to permit the defendant's admission to be received into evidence.

[4] Section 5 of the Act provides, in part: "(I)t shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm as hereinafter provided in section eight hereof." An automobile is included in this section as being a vehicle within which such a concealed weapon may not be carried. People v. Frost, 1932, 125 Cal.App. (Supp.) 794, 12 P.2d 1096.

Such being the case, the sole remaining question before us is whether, under the evidence as here presented, and in the absence of any direct showing that the involved automobile was or had been moving, the concealed revolver was being *carried* within such vehicle in violation of such Act.

Webster's New International Dictionary, Second Ed., defines the word "carry," in one sense, to mean: "To have upon or about one's person; hold. To hold or bear; to bear. To act as a bearer." Used in the active transitive sense, the word "carry" has been said to connote transportation (13 C.J.S., Carry, p. 1763), but when used in the general sense of carrying arms or carrying weapons the word means "going armed, wearing weapons." 13 C.J.S., Carry, p. 1765; 10 C.J. p. 1243.

Several cases from other states have construed the word "carry" in connection with statutes making it a crime to carry concealed weapons on or about the person. The early case of Owen v. State, 1858, 31 Ala. 387, 389, held that locomotion is not essential to constitute a carrying within the meaning of the statute and if concealed possession on the person is proved it is not necessary to further prove that the defendant moved about nor that he had possession of the pistol when he entered or left the room. This holding was followed in the later Alabama case of Thomas v. State, 1913, 9 Ala.App. 67, 64 So. 192, 193, where it was held that one could be guilty of carrying a concealed weapon even though he had not walked a single step. The defendant there argued that the word "carry" necessarily means and embodies the act of locomotion, but the court said: "This argument is fallacious, and might properly be said to have *carried,* or had, no weight with the trial court. The word 'carries' or the words 'to carry,' as used in the statutes defining the offense * * *, are used in the sense of to have concealed about the person, or to bear concealed about the person; and it is necessary to a conviction of this offense only that the concealed weapon be so connected with the person that the locomotion of the body would carry with it the weapon as concealed." To the same effect see Danal v. State, 1916, 14 Ala.App. 97, 71 So. 976.

The Supreme Court of Ohio in the case of State v. Nieto, 1920, 101 Ohio St. 409, 130 N.E. 663, came to the same general conclusion in a case wherein the defendant was lying on a bunk in a bunkhouse when the officers searched him and found a pistol concealed in his pocket.

A defendant was convicted of violating a similar statute in the Texas case of Emerson v. State, 1916, 80 Tex.Cr.R. 354, 190 S.W. 485, when the officers found the defendant sitting in a motionless buggy and on searching the vehicle found a pistol concealed in a box under the seat cushion.

[5] Under the California Act here before us, the legislature has seen fit to extend the prohibition of carrying any concealed weapon of the designated class to "within any vehicle" as well as "upon his person." We see no reason why the same general interpretation of the meaning of the word "carry" as applied to the person should not equally apply to a vehicle. By including vehicles in the manner and place as contained in such act, the legislature must have intended to likewise make it unlawful for any person to bear or hold about such vehicle any concealed weapon of the designated class in any way or fashion so connected with such vehicle that the locomotion of it would carry with it the weapon as concealed. Thomas v. State, supra.

We are not dissuaded from this conclusion by the case of In re Bergen, 1923, 61 Cal.App. 226, 214 P. 521, as, so far as the matters before us are concerned, such case overlooked the authorities upon which we here rely, and we interpret the cases there listed as failing to support the proposition for which they are cited.

[6] The trial court was also entitled to infer from defendant's own testimony to the effect that the parking lot accommodations were furnished him as a part of the services to guests by his hotel, as well as from the fact the car was registered to him as owner and he was possessed of the keys to its locked doors and ignition, that such vehicle had been driven to and parked there by defendant. From these facts, as well as the evidence of the admission by the defendant at the time of the finding of the revolver to the effect that he had been robbed of $2000 and he was looking for the man who did it, the court was justified in inferring that the weapon belonged to defendant and had been concealed by him in the closed glove compartment of the vehicle, and had been and was then being carried so concealed in such automobile. Such facts and inferences support the conclusion of the trial court in holding the defendant guilty of a violation of the act in question as charged in the complaint.

The judgment and order appealed from are affirmed.

SHAW, P. J., and BISHOP, J., concur.

27 Cal.2d 449

BURROUGHS v. BEN'S AUTO PARK, Inc., et al.

L. A. 19384.

Supreme Court of California, in Bank.

Dec. 28, 1945.

1. Landlord and tenant 🔑167(8)

A landlord leasing property to which public will be admitted must see that property is safe for the purposes intended and must exercise reasonable care to inspect and repair property before transferring possession so as to prevent any unreasonable risk of harm to the public.

2. Landlord and tenant 🔑83(1), 164(1), 275

An agreement to renew a lease or relet the premises does not deprive landlord of right of re-entry on expiration of the old term, and so does not relieve the landlord of his duty to see that the premises are reasonably safe at time of such expiration.

3. Landlord and tenant 🔑91

A "renewal" of lease creates a new and distinct tenancy, and an "extension" of lease stretches out a former term.

See Words and Phrases, Permanent Edition, for all other definitions of "Extension" and "Renewal".

4. Landlord and tenant 🔑115(1), 275

An agreement between landlord and tenant, revising rental rate after expiration of lease and extending tenancy for 3 months on a month to month basis under terms of original lease, did not merely extend term of original lease, but created month to month tenancy, and did not deprive landlord of right of re-entry as of date of expiration of original lease.

5. Landlord and tenant 🔑275

On expiration date of lease not giving tenant right or option of renewal or extension, landlord had right to re-enter to see that premises were reasonably safe for the purposes for which they were thereafter to be used, whether agreement with respect to tenant's future occupancy of premises created a new tenancy or merely extended term of lease.

6. Landlord and tenant 🔑167(8)

A landlord's liability for injuries sustained when patron, after expiration of parking lot lease, fell from unguarded and poorly illuminated wall with 12-foot drop forming parking lot boundary, was governed not by condition of lot at time of lease, but by condition existing at date of expiration of lease, where enactment of dim-out regulations during term of lease increased hazard of unguarded wall, and landlord did not, by agreement concerning tenant's occupancy after expiration, relieve himself of duty to re-enter on expiration to see that premises were reasonably safe for parking lot purposes.

7. Appeal and error 🔑1064(1)
Landlord and tenant 🔑169(10)

In action against landlord for injuries sustained by parking lot patron, instruction to determine landlord's liability solely by condition of premises when tenant first took possession under lease was prejudicially erroneous, where lease expired prior to accident, and conditions had changed during term of lease, and landlord had not relieved himself of duty to re-enter on expiration to see that premises were reasonably safe for parking lot purposes.

8. New trial 🔑72

In passing on motion for new trial based on insufficiency of evidence, trial court must weigh the evidence.

9. Negligence 🔑126(1)

In action against adjoining landowners for injuries sustained by parking lot patron who fell from unguarded and poorly illuminated wall with 12-foot drop to areaway on premises of adjoining landowners, evidence whether dangerous condition of wall was created by adjoining landowners or owner of parking lot was admissible.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Personal injury action by James Burroughs against Ben's Auto Park, Inc., a corporation, and another, the Pacific Electric Railway Company, and Bessie E. Perry and another. From a judgment in favor of the Pacific Electric Railway Company and from the order granting Bessie E. Perry and another a new trial, the plaintiff appeals, and Bessie E. Perry and another cross-appeal.

Judgment for the Pacific Electric Railway Company reversed and order granting new trial affirmed, and cross-appeals dismissed.

Prior opinion, App., 157 P.2d 380.

McLaughlin & McGinley, of Los Angeles, for plaintiff and appellant.

Parker, Stanbury & Reese, Harry D. Parker, Peery Price, and A. P. G. Steffes, all of Los Angeles, for defendants and appellants.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff was injured at night when he fell into an areaway adjacent to a parking lot where he had left his automobile. He sued the lessee and operator of the park, Ben Sirota and Ben's Auto Park; the owner and lessor of the parking lot, Pacific Electric Railway Company; and the owners of the adjoining property on which the areaway was situated, Bessie E. Peery and J. J. Peery. The trial resulted in a verdict in favor of the Pacific Electric Railway Company and against the other defendants. Ben Sirota and Ben's Auto Park have not appealed from the judgment entered against them. A new trial was granted the Peerys on the ground of insufficiency of the evidence and errors in law occurring at the trial. Plaintiff appeals from the judgment in favor of the Pacific Electric Railway Company and from the order granting the Peerys a new trial.

The Pacific Electric Railway property and the Peery's property faced South Olive Street in the city of Los Angeles. A concrete retaining wall twelve feet high separated the two lots along the north line of the Peery property and the south boundary of the parking lot. The areaway into which plaintiff fell was adjacent to and extended the full length of the wall. It was a narrow passageway between the retaining wall and an eight-story hotel located on the Peery's property and was used by the hotel as a means of ingress and egress for supplies and the removal of garbage. The top of the retaining wall was flush with the surface of the auto park, twelve feet above the floor of the areaway, and there was no guard rail or other barricade along the top of the wall. The parking lot was equipped with five floodlights, two of which were located on the south side of the park above the retaining wall. This was the condition of the property when, in January, 1940, defendant Pacific Electric Railway Company let its premises to Sirota for use as a parking lot, and except as hereinafter noted, the condition remained unchanged until the accident. The lease was for a three-year period expiring on December 31, 1942. On December 16, 1942, the lessor entered into an agreement with the lessee with respect to the continued occupancy of the premises beyond the term specified in the lease.

In November of 1942 an ordinance establishing dimout regulations in accordance with the proclamation of the Commanding General of the Western Defense Command became operative in the Los Angeles area. At the time of the accident the parking lot was illuminated by only one lamp and it appears that the light intensity at the point where plaintiff fell was less than that permitted by the ordinance.

At approximately 8 o'clock on the evening of January 28, 1943, plaintiff left his automobile at the parking lot and departed. Later an attendant parked the automobile facing north so that its rear wheels were within a few inches of the retaining wall and its rear end projected over the areaway. When plaintiff arrived at the lot at 11 o'clock the auto park was almost filled with cars which had been parked "bumper to bumper." He had never been at the parking lot prior to the evening in question and was unaware of the existence of the areaway. While two automobiles parked immediately in front of plaintiff's car were being removed by attendants, plaintiff endeavored to reach his automobile by passing behind a car parked parallel to it, and in so doing fell into the areaway and was seriously injured.

Appeal from the Judgment in Favor of Pacific Electric Railway Company

Plaintiff contends that the court erred in giving the jury the following instruction:

"Insofar as the defendant Pacific Electric Railway Company is concerned you must determine its liability, if any, solely by considering the condition of the premises at the time [the lessee] took possession. Anything that happened after that time is immaterial as to the Pacific Electric Railway Company, and if you find that considering the construction of the premises, together with the lighting facilities furnished, the property was reasonably safe for use as a parking lot at the time it was leased, the Pacific Electric Railway Company it not liable to plaintiff and you should under such circumstances return a verdict in favor of that company, whether or not your verdict is against any other defendant or defendants."

It is urged this instruction in effect told the jury that in determining whether the Pacific Electric Railway Company was liable it should limit its consideration to the condition of the premises in January, 1940, the date the lessee first entered into possession, and that it should not have been so limited because the lessor had a right of reentry upon the expiration of the lease and was under a duty to see that the premises were reasonably safe at that time. It is further claimed that the alleged error in giving this instruction was aggravated by the failure to give other proffered instructions which would have informed the jury that they were entitled to consider the company's liability in the light of the condition of the premises at the time of the reletting.

[1, 2] A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 515, 125 P.2d 559; Boothby v. Town of Yreka City, 117 Cal.App. 643, 649 et seq., 4 P.2d 589; Prosser on Torts, § 81, p. 653; 123 A.L.R. 870. An agreement to renew a lease or relet the premises does not deprive the lessor of the right of reentry on the expiration of the old term and consequently cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time. Dennis v. City of Orange, 110 Cal.App. 16, 293 P. 865; Lucas v. Brown, 8 Cir., 82 F. 2d 361, 363; McLaughlin v. Kelly, 230 Pa. 251, 79 A. 552, 50 L.R.A.,N.S., 305; Fleischner v. Citizens' R. E. & Investment Co., 25 Or. 119, 35 P. 174; Ingwersen v. Rankin, 47 N.J.L. 18, 54 Am.Rep. 109; see, also, 49 A.L.R. 1419.

The lessor contends, however, that the agreement of December 16 merely extended the term and did not constitute a renewal of the lease and therefore it had no right of reentry. The understanding with respect to the future occupancy of the premises is evidenced by a letter written by the lessor to the lessee in which it is agreed that the "rental rate, as called for under lease No. 10382 which expires December 31, 1942, be revised for a three month period to a 50-50 basis and your tenancy be extended on a month to month basis under the same terms and conditions as provided in lease No. 10382. At the end of this period, the matter can again be reviewed."

[3] A "renewal" creates a new and distinct tenancy (32 Am.Jur. 805; see, also, 1 Tiffany, Real Property (1939), 3d ed., p. 293; cf. Morello v. Metzenbaum, 25 Cal. 2d 494, 500, 154 P.2d 670), whereas an "extension" is in effect the "stretching or spreading out" of a former term (Lang v. Pacific Brewing, etc., Co., 44 Cal.App. 618, 187 P. 81; see Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130).

[4] The agreement of December 16 provided for an extension of the tenancy on a month to month basis at a revised rental for a three-month period under the same terms as the lease "which expires on Dec. 31, 1942." The effect of this agreement was not to merely extend the term of the old lease. It created a month to month tenancy upon expiration of the old lease and in our opinion did not deprive the lessor of the right of reentry.

[5] Under the facts of this case, however, it is immaterial insofar as the lessor's duty to the public is concerned whether a new tenancy was created or the old term extended. The lease did not confer upon the lessee a right or option of renewal or extension. When the lessor made the agreement of December 16, it had the right to enter when the lease expired, and it was then under a duty on the expiration date to see that the premises were reasonably safe for the purposes for which they were thereafter to be used.

[6] The enactment of the dimout ordinance resulted in a change in conditions which affected the use of the property as a parking lot, and thereafter on compliance therewith the unguarded wall with a twelve-foot drop to the bottom of the areaway became an increased hazard to members of the public using the lot at night. The dimout regulations became effective prior to December 16 and were in force at the expiration of the lease and on the night of the accident. Under these circumstances the lessor could not relieve itself of a duty imposed by law by making an agreement with the lessee whereby it waived its right to enter the premises for

the purpose of performing that duty. The lessor could not thus absolve itself from liability for injuries caused by a dangerous condition which it was under a duty to correct if the property was thereafter to be used for the same or a similar purpose. See McLaughlin v. Kelly, 230 Pa. 251, 79 A. 552, 50 L.R.A.,N.S., 305; Ingwersen v. Rankin, 47 N.J.L. 18, 54 Am.Rep. 109. The lessor's duty is measured by the conditions as they existed at the time of its right of reentry and any legal responsibility arising from failure to discharge its duty is unaffected by the conduct of the lessee.

[7] It was therefore prejudicially erroneous for the court to instruct the jury that it must determine the liability of the lessor solely by considering the condition of the premises at the time the lessee first took possession.

Appeal from the Order Granting the Defendants Peery a New Trial.

Defendants Peery were granted a new trial upon the ground of the insufficiency of the evidence and errors in law occurring at the trial.

[8] Plaintiff argues that the Peerys are liable as a matter of law and the trial court therefore erred in granting them a new trial on the ground of insufficiency of the evidence. It is contended that since the Peerys knew that cars were parked on the adjoining premises in such a manner that the rear ends extended over the areaway, they participated in the operation of the auto park and that the jury, having found against the operator of the park, the negligence of the Peerys was established as a matter of law. It does not necessarily follow, however, that the Peerys participated in the operation of the auto park merely because they knew the lessee of the park was trespassing over their property. It is clear from the record that the issues of negligence and proximate cause involved questions of fact for the jury, and in passing upon the motion for a new trial based upon the ground of insufficiency of the evidence, it was the exclusive province of the trial court to weigh the evidence. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689.

[9] In granting a new trial upon the ground of errors in law, the trial court apparently concluded it had erroneously refused the Peerys' offer to prove that the retaining wall was erected by their predecessors in title prior to 1920 and that it then extended approximately six feet above the surface of the adjoining lot; that thereafter the adjoining lot was filled by its owner until it was flush with the top of the wall. One of plaintiff's contentions is that the areaway constituted a trap and that the Peerys, as adjoining land owners, were under a duty not to maintain a dangerous condition adjacent to a public parking lot. The rejected evidence was admissible and the jury was entitled under proper instructions to consider the facts offered to be proved in determining who was responsible for creating and maintaining the dangerous condition which is alleged to have existed on the premises and whose negligence, if any, was the proximate cause of the injuries suffered by plaintiff.

We cannot say, therefore, that the court erred in granting the defendants Peery a new trial.

Conclusion.

The judgment in favor of the defendant Pacific Electric Railway Company is reversed and the order granting the defendants Peery a new trial is affirmed. In view of the affirmance of the order granting the defendants Peery a new trial, their cross-appeals are hereby dismissed.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

EDMONDS, Justice.

I concur in the judgment but do not join in the statement that "the lessor could not relieve itself of a duty imposed by law by making an agreement with the lessee whereby it waived its right to enter the premises for the purpose of performing that duty." Unquestionably the agreement made by the parties on December 16th was a new lease; therefore the question as to the liability of a lessor who contracts prior to the date of expiration of a lease for an extension of its term is not reached in the present case. It may be noted, however, that the authorities have recognized a clear distinction between the extension and the renewal of a lease. Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130; Braun v. Leo G. McLaughlin Co., 93 Cal. App. 116, 269 P. 191; Lang v. Pacific Brewing, etc., Co., 44 Cal.App. 618, 187 P. 81; Robertson v. Drew, 34 Cal.App. 143, 166 P. 838.

72 Cal.App.2d 505

PACIFIC FREIGHT LINES v. VALLEY MOTOR LINES, Inc., et al.

SAME v. PIONEER EXPRESS CO.

Civ. 14843, 14844.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1946.

1. Judgment ⚿707

A holding that ratification of unauthorized employment of attorneys by president of voluntary association of motortruck freight carriers, in proceedings before Railroad Commission to establish unlawfulness of operations of rival carrier, rendered members of association jointly and severally liable for services rendered by attorneys, was not binding on those carriers which were not parties to case wherein such holding was made.

2. Associations ⚿16, 18

President of voluntary association of motortruck freight carriers, which gave members privilege of using name of association in proceedings before Railroad Commission, had no authority to employ attorneys at association's expense to institute proceedings before commission to establish unlawfulness of operations of rival carrier, and hence members of association were not liable for services rendered by such attorneys.

3. Associations ⚿14

Where a member of association of motortruck freight carriers contributed toward expenses of proceeding before Railroad Commission to establish unlawfulness of operations of rival carrier, and in letters to other carriers in effort to obtain their financial support for litigation member maintained that its responsibility was limited to amount contributed, and letters were written before withdrawal from or re-entry into proceeding of a carrier which paid the attorneys' fees, such carrier could not recover part of fees from the member on theory that such carrier's re-entry was on assumption that member would pay or become liable for a greater sum than it had already paid.

◆

Appeals from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Actions by Pacific Freight Lines, a corporation, against Valley Motor Lines, Inc., a corporation, and others, and against the Pioneer Express Company, to recover from defendants the proportionate shares of a judgment which plaintiff had paid, and for which plaintiff claimed defendants were liable. From judgments for defendants, plaintiff appeals.

Affirmed.

Hugh Gordon, of Los Angeles, for appellant.

Courtney L. Moore, of San Francisco, for respondents.

WILSON, Justice.

A judgment for attorneys' fees and expenses incurred in proceedings before the Railroad Commission rendered against plaintiff and several other corporations was affirmed in the case of Johnson v. California Interurban Motor Transportation Assn., 24 Cal.App.2d 322, 74 P.2d 1073. Plaintiff paid the judgment and brought this action to recover from defendants the proportionate shares thereof for which plaintiff claims they are liable respectively. The actions were consolidated for trial and are here on consolidated appeals from judgments in favor of defendants.

The facts upon which the judgments were based are set forth fully in the decision in the Johnson case. 24 Cal.App.2d 322, 325-330, 74 P.2d 1074, 1075, 1077. After the litigation had been completed the attorneys submitted an account for services and expenses, addressing the same to several corporations including Pioneer Express Company, Valley Motor Lines, Inc., and United Motor Transport Lines, Inc., respondents in the instant cases, but said three corporations were not named as defendants in the Johnson case. When that case was tried the corporate name of Pacific Freight Lines, plaintiff herein, was Motor Freight Terminal Company and is so referred to in the Johnson case.

In the Johnson decision, 24 Cal.App.2d page 334, 74 P.2d 1079, seven findings of the trial court are enumerated which are held to be unsupported by the evidence, with the single exception of the finding of express ratification of the employment of the attorneys by the Pacific Freight Lines group, not, however, including any of the respondent corporations now before this court.

[1, 2] During the pendency of the litigation before the Railroad Commission the Pacific Freight Lines group withdrew from the proceedings. Later another company filed a schedule of rates which, if allowed to become effective, would have seriously impaired the earnings of the Imperial Valley line which was one of the Pacific Freight Lines group. Thereupon said group reentered the litigation and agreed to participate in the payment of the fees and expenses in connection therewith. In so doing, said the court, 24 Cal.App.2d page 338, 74 P.2d 1081, Pacific Freight Lines expressly ratified the employment of the attorneys. No one of the respondents in the pending appeals was a party to the agreement to re-enter the proceedings nor to any act constituting ratification. The assertion in the decision, 24 Cal.App.2d page 338, 74 P.2d 1081, that said ratification rendered the members of the group "jointly and severally liable" with the other companies is not binding on respondents because they were not parties to the Johnson case. Appellant asserts that although not binding on respondents it is nevertheless a correct statement of their liability. We find nothing in the record that creates a liability on the part of any of the respondents for the payment of any part of the expenses of the litigation. The court held in the Johnson case, 24 Cal.App.2d page 334, 74 P.2d 1079, that McLenegan did not have authority to make a contract for the association or for its members for the payment of attorneys' fees or costs. No valid reason appears why membership in the association should have created such liability.

Respondents Valley Motor Lines, Inc. and United Motor Transport Lines, Inc. were not members of either one of the associations involved in the litigation before the Commission and no competitive rate installation was threatened in territory in which they were operating. Appellant's re-entry into the proceedings after its withdrawal was occasioned by the jeopardy threatened to the Imperial Valley route. Respondents had no interest whatsoever in that controversy and we have not been referred to any evidence that they were consulted concerning said issue.

[3] Respondent Pioneer Express Company agreed to and did contribute $1,000 toward the expense fund. In letters addressed to other transportation companies in an effort to obtain their financial support for the litigation Pioneer maintained that its responsibility was limited to said amount. Since these letters were written before appellant's withdrawal from or re-entry into the proceedings it cannot successfully assert that its re-entry was on the assumption that Pioneer would pay or become liable for any greater sum than it had already paid.

These conclusions are determinative of the case and discussion of the other questions argued in the briefs is unnecessary.

The judgments are affirmed.

MOORE, P. J., concurs.

72 Cal.App.2d 472

GHIOZZI v. CITY OF SOUTH SAN FRANCISCO.

Civ. 12789.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1946.

Rehearing Denied Feb. 6, 1946.

Hearing Denied March 7, 1946.

Municipal corporations 🔑845(1)

The filing of claim by landowner stating time and place of damage, as required by claim statute, was a condition precedent to landowner's action against city for damages from the flooding of his land by waters of creeks flowing through canals built by city for public purpose of securing protection against damages in times of high water, notwithstanding that city had actual knowledge of time and place of the damage. Gen.Laws 1943, Act 5149, § 1.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Z. Ghiozzi against the City of South San Francisco, a municipal corporation, for damages arising out of the flooding of a piece of land on which the plaintiff raised vegetables. From a judgment for the plaintiff, the defendant appeals.

Reversed.

J. W. Coleberd, of South San Francisco, for appellant.

Frank V. Kington, of Redwood City, for respondent.

GOODELL, Justice.

This is an appeal from a judgment for $2245 after a trial by the court without a jury.

The respondent sued for $2245 damages arising out of the flooding of a piece of land on which he raised vegetables. On March 1, 1941, a flood covered this property with sand and debris to a depth of from 6 inches to about 4 feet, destroying the crop and damaging the irrigation system and pump.

Colma Creek and Baden Creek have their sources in the mountains lying between San Francisco bay and the ocean and flow in a general easterly direction through South San Francisco and thence into the bay. They have always carried a large quantity of silt, depositing it over the lower area. Both creeks in a state of nature meandered considerably and frequently overflowed their banks. In 1936 the city constructed two canals to carry the waters of these creeks. The larger one, called Colma Creek Canal, runs in a straight course in a general northwesterly-southeasterly direction and is intersected by a smaller one, called Baden Creek Canal, which runs in a general northeasterly-southwesterly direction, and forms an angle of approximately 60 degrees with the Colma Creek Canal at their confluence. Both canals are lined with masonry and carry most of the water of the two creeks. Before they were built Colma Creek was about 600 feet distant from the Ghiozzi place and Baden Creek flowed across its southerly end. The construction of the canals brought the waters of both creeks right up to the Ghiozzi place, for the Colma Creek Canal runs for about 500 feet along its entire northeasterly boundary line and the Baden Creek Canal runs along its entire northwesterly boundary line, the junction of the two canals being at the northwesterly corner of the property.

During the winter of 1940–41 there were heavy rains and large quantities of silt were washed down and lodged in both canals, choking them and retarding the flow of water. In the latter part of February, 1941, the situation had become serious and on the 28th Urban S. Marshall, the appellant's city engineer, had a crew of 7 or 8 men working night and day, placing sand bags, timbers and brush on the banks of the canals, and operating a drag-line dredge which was digging sand and debris out of Colma Creek Canal and throwing it on the northerly embankment—toward the town proper. A witness for the appellant testified that Baden Creek Canal (in which the dredge did no work) was full of sand, clay and mud, tin cans, boards "and everything," which debris came up to the top of the embankments, 3 or 4 feet above the surrounding land. He also testified that the reenforcement was being done "to keep from flooding the town."

The city engineer kept a diary in which he noted, before this overflow, several places where the water had overrun the banks. Thereafter he entered in his diary "And floods several acres of Ghiozzi's land which was already partially flooded from rainfall only." He took photographs on March 1, one of Colma Creek Canal showing Ghiozzi's pump-house "just before it flooded", and another showing the junction of the two canals "just after the flood, or during the flood." He testified that the flood came out of the south side of Baden Creek Canal "over a distance of about 150 feet from the junction * * * up stream about 150 feet".

The respondent himself worked in the emergency crew. The city engineer testified as follows: "On the first day he, Mr. Ghiozzi, worked there, the day after the big storm, I saw we were not going to be able to hold the water within the confines of the channel of Baden Creek, and I said to him, 'I think your pump house is going to get flooded * * * I will give you some men and we will go down and get your pump out. We will put some sacks in the well, so the sand won't go down in the well.' He said he wasn't interested * * *. A little later, so the pump wouldn't be short-circuited, * * * I cut the electric wire that fed the pump." On cross examination he admitted that he thought there was going to be sand in the place and that there was a likelihood the pump would be covered.

The appellant contends that no liability on its part because of negligence or on any other ground, has been established, and, further, that the claim filed with the city by the respondent was wholly insufficient.

The respondent contends that no claim was required in this case for the reason that the city is responsible under the doctrine of inverse eminent domain.

As already appears, these canals do not follow the lines of the natural channels of the two creeks. The city built the canals to protect itself, its inhabitants, and the property within its borders, from damage by the two creeks in times of high water. That such improvements constitute a public purpose cannot be gainsaid. It is true the canals were built in 1936 and the respondent suffered no damage until March 1, 1941, but the damage which he then suffered was a direct consequence of the construction of the artificial water-ways both of which were built for the benefit and protection of the municipality.

The case falls within the doctrine of Elliott v. County of Los Angeles, 183 Cal. 472, 191 P. 899, and Pacific Seaside Home etc. v. Newbert Protection District, 190 Cal. 544, 213 P. 967, both of which are followed in House v. Los Angeles etc. District, 25 Cal.2d 384, 389, 153 P.2d 950. The general principle which they announce was restated in Powers Farms v. Consolidated Irr. District, 19 Cal.2d 123, 126, 119 P.2d 717, 720, as follows: "It is well settled that damage to land caused, with or without negligence, by the seepage of water from canals of an irrigation district which have been constructed and are maintained to supply water for public use, gives the owner of such land a cause of action in the nature of eminent domain against the district." Among the cases there cited are Massetti v. Madera Canal & Irr. Co., 20 Cal.App.2d 708, 715, 68 P.2d 260, an overflow case, and Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 200 P. 814, where, in denying a hearing, 53 Cal. App. page 568, 200 P. 818, the Supreme Court re-affirmed the rule that a property owner's right to recover is secured "by the constitutional provision that private property shall not be damaged for public use. Article I, section 14." See, also, cases collected in the concurring opinion of Justice Traynor in the House case, supra, 25 Cal.2d at pages 393–398, 153 P.2d 950.

"But the fact that the cause of action is one of that kind does not exclude it from the operation of a claim statute, the terms of which are broad enough to embrace it. Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages". Powers Farms, Inc. v. Consolidated Irr. Dist., supra, citing numerous cases.

The statute, Stats.1931, p. 2475, sec. 1, Deerings Gen.Laws 1943, Act No. 5149, requires the filing of a verified claim within 90 days after the accident specifying "the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received".

The claim herein was filed within 90 days; it was verified; it stated the respondent's name and address, and it specified the damages. The only respects in which the appellant claims it failed to respond to the call of the statute is that it did not state the date and place of the occurrence.

The claim does not purport to state either the date or the place, and the respondent does not contend that it does so. His position is that no claim at all is required in a case such as this, where the right to damages is based entirely upon the constitutional provision.

That the city knew the time and place of the damage clearly appears from the undisputed facts already summarized. The day before the flood the city engineer foresaw just what happened, and the day after the flood he measured 3 feet of sand at the respondent's pump-house. It is difficult to imagine a case presenting stronger evidence of actual knowledge than this case presents. If, as said in Knight v. Los Angeles, Cal.Sup., 160 P.2d 779, the purpose of the statute is "to provide the city with information in order that it may settle claims of merit without litigation" and "where there is continuing damage to give the city an opportunity to provide against the continuance of the injury" then certainly in this case the city was not harmed by the failure of the respondent's claim to state the time and the place, for the city already had first-hand, accurate and comprehensive knowledge.

However this may be, the authorities seem to require substantial compliance with the statute even in the face of actual knowledge. In the Powers case, supra, 19 Cal.2d at page 130, 119 P.2d at page 722, the court said:

"The district is not estopped to invoke the requirement for the filing of a verified claim by reason of the fact that it had timely notice of the danger to plaintiff's property derived from written and oral communications with plaintiff concerning the damage. It is well settled that written notice to or actual knowledge on the part of public officers does not constitute a substantial compliance with or satisfaction of a statutory requirement for a verified claim, or give rise to an estoppel to assert the defense. The long-established rule in this state is that the courts may allow no exceptions to the plain provisions of a claim statute under the guise of interpretation or construction. Compliance with the statute is mandatory and the requirement may not be waived." (Citing numerous cases).

A few days after the decision of the Powers case, the Supreme Court handed down its decision in Hall v. Los Angeles, 19 Cal.2d 198, 120 P.2d 13. In that case the claim failed to state the place where the accident occurred. Such failure was held to be fatal to a recovery. The court said 19 Cal.2d, page 202, 120 P.2d 15: "In the present case, however, there is an entire failure on the part of the plaintiff to comply with one of the mandates of the statute. Substantial compliance cannot be predicated upon no compliance. A contrary holding would permit a claimant to bring suit against a city on the basis of a claim that included none of the information required by the statute if he offered to show that the city acquired the information independently of the claim. Such a holding would emasculate the statute. The present case is governed not by the doctrine of substantial compliance but 'by the principles enunciated in Cooper v. County of Butte, supra, [17 Cal.App.2d 43, 61 P.2d 516] and Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320. In each of these cases it was held that the filing of an unverified claim is not a substantial compliance with the requirements of the statute. The failure to state the place of the accident is as serious a defect as is the failure to verify the claim. * * *'"

Among the many cases cited in Powers Farms, Inc., v. Consolidated Irr. Dist., supra, is Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102, the facts of which are quite similar to those in the instant case. There the claim was not filed within the 90 day period, but was presented about 9 months after the damage. The delay was held to be fatal to a recovery. In that case the appellant made the same argument as the respondent makes in this, namely, that as his right to damages was derived from the constitution it was not necessary for him to present any claim. That contention however was rejected by the court.

Under the authorities to which reference has been made we are constrained to hold that the filing of a claim by the respondent stating the time and place of his damage was a condition precedent to the maintenance of this action.

The judgment is reversed.

NOURSE, P. J., concurs.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

72 Cal.App.2d 494

SALINAS v. PACIFIC TELEPHONE & TELEGRAPH CO.

Civ. 12898.

District Court of Appeal, First District, Division 2, California.

Jan. 9, 1946.

As Modified on Denial of Rehearing Feb. 8, 1946.

Hearing Denied March 1, 1946.

1. Telegraphs and telephones 🔑10(3)

The term "public highways" in statute authorizing telegraph and telephone companies to construct their lines on public highways, includes city streets. Civ.Code, § 536.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Highways".

2. Statutes 🔑238

A delegation of power to grant franchises is strictly construed in favor of the public, and the agency to which the power is delegated has only such powers as are expressed or necessarily implied.

3. Municipal corporations ⚿57, 59

A municipality has only those powers granted in express words, or those powers necessarily or fairly implied in the expressly granted powers, or those powers essential and not merely convenient to accomplishment of declared objects and purposes of the municipality.

4. Municipal corporations ⚿58

Any fair, reasonable, substantial doubt concerning existence of municipal powers is resolved against the municipality and the power is denied.

5. Municipal corporations ⚿680(4, 5)

A provision in 1903 Salinas charter authorizing city to grant right to construct pipes, tubes, conduits, wires and other electric, telegraph and mechanical apparatus in city streets and highways, authorized city to grant franchise to telephone company to construct and maintain poles, wires, and conduits in city streets, notwithstanding absence of word "telephone". St.1903, p. 604, § 19, subd. 48.

6. Municipal corporations ⚿680(4, 5)

The words "other electric apparatus" in 1903 Salinas charter, authorizing city to grant right to construct pipes, tubes, conduits, wires and other electric apparatus in city streets and highways did not exclude telephone pipes, tubes, conduits and wires from the operation of the charter provision. St.1903, p. 604, § 19, subd. 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Other Electric Apparatus".

7. Evidence ⚿20(2)

It is common knowledge that pipes, tubes and conduits are in general use to inclose and carry telephone wires as well as other wires used to conduct electric current, whether they be telegraph wires or those conducting electricity for light, heat and power.

8. Evidence ⚿20(2)

It is common knowledge that a telephone or telegraph system necessarily contains, in addition to pipes, tubes, conduits and wires, countless other pieces of electrical equipment and apparatus.

9. Municipal corporations ⚿680(4, 5)

The word "electric" in 1903 Salinas charter authorizing city to grant right to construct pipes, tubes, conduits, wires, and other electric, telegraph and mechanical apparatus in city streets and highways, did not exclusively connote light, heat and power. St.1903, p. 604, § 19, subd. 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Electric".

10. Municipal corporations ⚿680(4, 5)

The word "mechanical" in 1903 Salinas charter authorizing city to grant right to construct pipes, tubes, conduits, wires, and other electric, telegraph and mechanical apparatus in city streets and highways, meant such mechanical apparatus as was similar to or of the same general character as the things theretofore mentioned in the provision. St.1903, p. 604, § 19. subd. 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Mechanical".

11. Municipal corporations ⚿680(4, 5)

The word "telegraph" in 1903 Salinas charter authorizing city to grant right to construct pipes, tubes, conduits, wires, and other electric, telegraph and mechanical apparatus in city streets and highways, did not exclude telephone apparatus from the operation of the provision, where latest Supreme Court pronouncement at time of enactment of charter was that substantial identity existed between words telegraph and telephone. St.1903, p. 604, § 19, subd. 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Telegraph".

12. Municipal corporations ⚿680(4, 5)

The inclusion of word "telephone" in second and third clauses of 1903 Salinas charter, requiring certain wires to be placed underground and regulating mode of wiring streets for certain kinds of service, did not deprive city of the right it had, but for such inclusion, to grant franchise to use city streets for telephone wires under first clause not specifically naming telephones. St.1903, p. 604, § 19, subd. 48.

13. Municipal corporations ⚿680(4, 5, 8)

A provision in 1903 Salinas charter authorizing city to grant right to construct pipes, tubes, conduits, wires and other electric, telegraph and mechanical apparatus in city streets and highways, authorized city to grant franchises for use of city streets for gas, oil, water and steam pipes, and police, fire or private intercommunicating wires and apparatus. St.1903, p. 604, § 19, subd. 48.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Suit by Salinas, a municipal corporation, against the Pacific Telephone & Telegraph Company to recover reasonable rental value of the occupation and use of the streets, alleys and public places by the defendant. From a judgment of dismissal, the plaintiff appeals.

Reversed and remanded.

Russell Scott, City Atty., of Salinas, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, and Hudson, Martin & Ferrante, of Monterey, for respondent.

GOODELL, Justice.

This appeal was taken from a judgment of dismissal entered after the sustaining of a demurrer to the complaint without leave to amend.

The complaint alleges that on May 2, 1891, the city granted a 25 year franchise to the predecessor of the respondent; that on November 6, 1916, that franchise was renewed for another 25 years, and the latter term expired on December 6, 1941. It also alleges that since that expiration the respondent has not procured from the city any further franchise and now operates and maintains its telephone system and facilities in Salinas without any franchise.

On August 9, 1943, it is alleged, the city adopted the ordinance upon which this action is based. This ordinance directs the respondent to remove all its property within one year, or, in the alternative, to pay the city the reasonable rental value of the temporary use of the streets, alleys and other public places, fixed and declared therein to be $30 a day, plus the furnishing to the city for its use of 20 business telephones and certain fire and police alarm services. The ordinance provides that if and when the respondent obtains a franchise the ordinance will become null and void. The complaint alleges the reasonable value of the use of the 20 telephones to be $75 a month. It states that there is due, owing, and unpaid on account of the reasonable rental value of the occupation and use of the streets, alleys and public places since December 6, 1941, $25,065, with interest at 1% per month as provided in the ordinance. The prayer is for $25,065 with interest and costs.

The respondent interposed a general demurrer, accompanying which it disclosed its position, namely, that by virtue of sec. 536, Civil Code, it enjoys in Salinas and has enjoyed ever since May 20, 1905, a franchise granted by the state itself.

A stipulation was entered into that "Upon the hearing of the defendant's demurrer filed herein, one question will be argued and submitted to the court for determination, namely, 'Did the Charter of Salinas as it existed on May 20, 1905, confer upon the City the power to grant franchise to telephone companies to construct and maintain their poles, wires and conduits, etc., in the streets of the City?'" The significance of the date is that on May 20, 1905, said section 536, as re-enacted, went into effect.

The trial court answered this question in the negative. In a written decision it held that the doctrine of strict construction is adhered to in this state and that under this doctrine the wording of the 1903 charter did not confer the power to grant franchises to telephone companies.

The respondent concedes that section 536, Civil Code as re-enacted in 1905, does not apply to such chartered cities as prior to the re-enactment were empowered by their charters to grant telephone franchises. Sunset Tel. & Tel. Co. etc. v. City of Pasadena, 161 Cal. 265, 118 P. 796. The appellant concedes, on the other hand, that if the charter of a city does not empower the municipality to grant telephone franchises then section 536 does apply. Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 P. 557.

Section 536, Civil Code, ever since its re-enactment in 1905 has read: "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

[1] The purpose of the 1905 change was to add telephone lines and telephone corporations to the section. Theretofore it

had covered only telegraph lines and telegraph corporations. The section has been construed as a continuing offer by the state to all telegraph and telephone companies to use without compensation such public highways as may be convenient or necessary for the operation of their lines (Postal Telegraph-Cable Co. v. City of Los Angeles, 164 Cal. 156, 128 P. 19), and the term "public highways" includes the streets of cities. Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 118, 116 P. 557.

Appellant contends that by the express terms of its 1903 charter it had the power to grant franchises for telephone purposes, and hence before 1905 the state had already conferred upon the city such power and had thereby deprived itself thereof. The respondent argues, to the contrary, that the charter did not confer upon the city the power to grant telephone franchises and therefore the company, by its acceptance in 1905 of the right granted by section 536, acquired a complete franchise for its telephone lines from the state without any liability to compensate the city. In 1903, while the original 1891 franchise was in effect, a new charter was adopted by the city and approved by the Legislature. St.1903, page 599. It contained the following provision:

> "* * * Subject to the provisions, limitations and restrictions in this charter contained, the council shall have power: * * *
>
> "48. To grant the right to construct and maintain and to regulate the construction and maintenance of all pipes, tubes, conduits, wires and other electric, telegraph and mechanical apparatus in, along, over, under and across all public streets, and highways, within the city; to require all telegraph, telephone and electric light wires to be placed underground; and to regulate the mode of wiring houses, buildings and structures for telegraph, telephone, electric light, electric power and all other electric service."

The question presented to the trial court and on this appeal involves the interpretation of the foregoing provision.

It will be noted that the first clause does not include the word "telephone" but that the second and third clauses do so.

[2-4] It is settled law that "a delegation of power to grant franchises is strictly construed in favor of the public, and the agency to which the power is delegated has such powers, and only such powers, as are expressed or necessarily implied." 37 C.J.S., Franchises, § 14, p. 160. California has followed this rule of strict construction since its early days. Douglass v. Mayor of Placerville, 18 Cal. 643, 647. In Wichmann v. City of Placerville, 147 Cal. 162, 164, 81 P. 537, 538, the Supreme Court stated that the doctrine of strict construction was "a proposition too well settled to call for discussion." The established rule for the measurement of the powers of a municipal corporation is stated in 1 Dillon on Municipal Corporations, 5th Ed., § 237, as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." That rule has been approved in a long line of decisions in this state. Von Schmidt v. Widber, 105 Cal. 151, 157, 38 P. 682; Hyatt v. Williams, 148 Cal. 585, 84 P. 41; Oro Electric Corporation v. Railroad Commission, 169 Cal. 466, 477, 147 P. 118; City of Long Beach v. Lisenby, 175 Cal. 575, 576, 166 P. 333; City of Madera v. Black, 181 Cal. 306, 312, 184 P. 397; Miller v. City of Los Angeles, 185 Cal. 440, 444, 197 P. 342.

The "Powers of the Council" are contained in Sec. 19, Art. II. Subsection 48 thereof is divided into three clauses, the first of which reads: "To grant the right to construct and maintain and to regulate the construction and maintenance of all pipes, tubes, conduits, wires and other electric, telegraph and mechanical apparatus in * * * all public streets, and highways, within the city; * * ."

[5] We are satisfied that, bearing the rule of strict construction in mind, this language was sufficient to grant a telephone franchise despite the fact that the word "telephone" is not to be found therein.

[6-9] It must be conceded that if the clause had ended with the word "wires" it would have to be held to include all pipes, tubes, conduits and wires of a telephone system. The first inquiry, then, is whether

the added language so restricts or qualifies that which preceded it as to destroy its inclusive character. The words "and other electric * * * apparatus" do not do so, for it is common knowledge that pipes, tubes and conduits are in general use to enclose and carry telephone wires as well as other wires used to conduct electric current, whether they be telegraph wires or those conducting electricity for light, heat and power. It is common knowledge also that a telephone or telegraph system necessarily contains, in addition to pipes, tubes, conduits and wires, countless other pieces of electrical equipment and apparatus. "Apparatus" is a word of broad meaning, defined in Webster's New International Dictionary, 2d Ed., as "A collection or set of materials, implements, or utensils, for a given work, experimental or operative". "Equipment", "instrument" and "machine" are there given as synonyms. The respondent, in support of its argument that "Commonly * * * 'electric' utilities are understood to be those selling electricity for light, heat and power, as distinguished from the telephone business * * * ", cites Southwestern Bell Telephone Co. v. Drainage Dist. No. 5, 215 Mo.App. 456, 247 S.W. 494, 495, which holds that the term "electric wires" does not include "telephone wires". There a judgment for the plaintiff Telephone Company was affirmed. In that case the drainage district, in moving one of its dredges across a road along which the plaintiff's telephone wires were strung, cut the wires. The defendant district assumed to act under a statute which applied to "houses, buildings and other structures" and the court held a dredge not to be within this language. Another reason why the judgment was upheld was that the act described *electric wires, transmission wires and trolley wires.* A journal of the Legislature was produced showing that "telephone wires, cable, etc., was stricken from the bill as originally introduced, and [that the bill had] passed after such portion as referred to telephone and telegraph companies was stricken out." "Probably" said the court, "the purpose of the bill was to provide for removal of wires carrying deadly electricity, and which, of course, did not apply to telephone wires." This case, therefore, is not in point. The respondent cites it as "the only case on the subject", but in our own state In re Johnson, 1914, 167 Cal. 142, 138 P. 740, 742, deals with the same subject. Section 591, Penal Code, as it then read made it a misdemeanor to interfere with "any line of telegraph or telephone, *or any other line used to conduct electricity.*" (Emphasis ours.) Section 593 made it a felony to interfere with any line "transmitting electricity for light, heat, or power." One Cannon had been convicted of a felony under section 593 and sought, by habeas corpus, a holding that the words of 591 "or any other line used to conduct electricity" repealed section 593. The court said that "It is true that the words 'or any other line used to conduct electricity' might be interpreted in certain juxtapositions as referring to electric light and power lines. Used as they are in section 591, following the enumeration of telephone and telegraph lines, they doubtless come within that rule of construction known as ejusdem generis and refer to things of the same general nature as those specified." From this it is clear that the word "electric" does not necessarily or exclusively connote light, heat and power.

[10] The word "mechanical" neither adds nor detracts anything for it simply means that there may be *mechanical* apparatus in addition to *electrical* apparatus (strictly speaking) and under the ejusdem generis rule it must be held to mean such mechanical apparatus as is similar to, or of the same general character as, the things theretofore mentioned in the clause.

[11] This leaves only the word "telegraph" for discussion. It is true, as the respondent argues, that " 'telegraph' and 'telephone' are both words in common use, commonly understood to mean two very different things." Moreover, we would add that the Pasadena case, supra, definitely holds that the word "telegraph" as used in section 536, Civil Code, before its re-enactment did not include "telephone". But that case was decided in 1911, and it was not until then that it was definitely settled in this state that "telegraph" had *not* included "telephone". As part of its argument the respondent says that "the United States Supreme Court had decided, just before Salinas framed its charter, that the word 'telegraph' in the Post Roads Act did not include 'telephone' ", citing City of Richmond v. Southern Bell Tel. Co., 1899, 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162. The respondent's predecessor was not convinced by this case for, in the Pasadena case, decided 12 years later, it contended that "telegraph" *had* included "telephone" as used

in section 536, Civil Code, before its reenactment in 1905. The Richmond case is cited by the respondent under the argument that everybody should have known after its decision was handed down in May, 1899, that "telegraph" did not include "telephone". However, 7 months later in December, 1899, in the case of Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, 57 P. 764, 59 P. 698, the Supreme Court of this state held that, as used in section 591, Penal Code (discussed earlier herein), "telephone" was included in the meaning of "telegraph", saying—"that a substantial identity exists between the two words."

In the Pasadena case (161 Cal. at page 278, 118 P. at page 801) in construing section 536, Civil Code, the court uses this language "It is to be remembered that the question in determining the meaning of the word 'telegraph' contained in this statutory grant is: What was in the minds of the legislators as to its meaning *when they used it?*" (Emphasis added.) The same thought is expressed in the following quotation from the Richmond case on the same page (161 Cal. at page 278, 118 P. at page 801): "But the question is, not what Congress might have done in 1866, nor what it may or ought now to do, but what was in its mind *when enacting the statute in question.*" (Emphasis added.)

It was all very well for the Supreme Court in 1911 to settle, once for all, the mooted question whether "telegraph" included "telephone", but the present inquiry is, as just emphasized, what was in the legislative mind *when the Salinas charter was drafted in 1903?* The Pasadena case, it is true, distinguished the Davis case, but in the interval between the decision in the Davis case and the decision in the Pasadena case—about 12 years—the pronouncement of our Supreme Court "that a substantial identity exists between the two words" was the last word in this state on the subject, binding on the courts, guiding the legal profession and guiding the Legislature. It was during this interval, in 1903, that the Salinas charter was drafted and adopted, and there is every reason to assume that to its draftsmen there was, as our Supreme Court four years earlier had held, "a substantial identity * * * between the two words" *telephone* and *telegraph.* For these reasons the presence of the word "telegraph" in the clause is understandable, and presents no problem at all under the rule "Inclusio unius est exclusio alterius", or otherwise.

[12] We have discussed the first clause of subsection 48 independently of the remaining two clauses and are satisfied that, standing alone, it authorizes the granting of a telephone franchise. The respondent argues that it does not do so for the reason, among others, that the other two clauses mention both telephone and telegraph wires, and other wires as well, and that such inclusion of those words is significant.

The second and third clauses of section 48 grant the power "to require all telegraph, telephone and electric light wires to be placed underground; and to regulate the mode of wiring houses, buildings and structures for telegraph, telephone, electric light, electric power and all other electric service." The first clause opens with the words *"To grant the right."* The second opens with the words *"to require"* and the third with the words *"and to regulate."* Conceding that it might be argued that the second and third clauses do not purport to *grant,* we do not think they destroy the meaning of the first clause, particularly in view of what has just been said with respect to the inclusiveness of the word "telegraph" as contemplated by the draftsmen of the legislation at that time or, to put it another way, considering the fact that at that time the two words, on high authority, were undoubtedly treated as synonymous. Why the word "telephone" was omitted from the first clause, but included in the second and third clauses, is difficult to understand, but we cannot for a moment believe that such omission can give to the word "telegraph", found therein, a restrictive effect in view of what has just been said.

The case of Oro Electric Corporation v. Railroad Commission, 169 Cal. 466, 147 P. 118, 121, is relied on by the respondent but it is distinguishable from the case at bar. In that case the court had to decide whether, before the Public Utilities Act was adopted, the city of Stockton had been empowered by its charter to grant franchises for the furnishing of electric light and power to the city's inhabitants. The charter in general terms gave the city the control of the streets as well as the lighting thereof and allowed it to make rules of a local, police and sanitary nature. Specifically the council was empowered "To grant franchises permitting any company or corporation to lay and maintain tracks, and to pass, with steam railroads * * * along, upon, and across, * * * any streets of the city. * * *" and "To grant franchises for the construction of street railroads on and along the streets of the city." The charter went no further in enumerating the utilities for which a franchise could be granted, and the court held that in the absence of such enumeration, and in the face of the express specification of said named utilities, general powers found elsewhere in the charter such as the broad grant of power to control and regulate the streets (169 Cal. at page 478, 147 P. at page 122) were insufficient to authorize a franchise for electric light and power. In the Oro case the controversy did not arise, as it did here, over the meaning of a clause purporting to grant certain powers, but the decision turned on the clear-cut proposition that the granting clause of the Stockton charter embraced, in express terms, *steam railroads and street railroads,* and conspicuously failed to embrace, even by implication, *electric light and power.*

[13] But is must be noted that the decisions herein discussed were written before the 1914 amendment to section 6 of article XI of the Constitution; that, prior to the amendment the *power* of the state was supreme over municipalities "except in municipal affairs"; that, by the 1914 amendment the *power* of the cities was supreme in all municipal affairs unless that power was limited or restricted by express provisions "in their several charters." The provisions of subdivision 48 of the charter heretofore cited were broad enough to enable the city to grant franchises for the use of the city streets for gas, oil, water and steam pipes, and police, fire, or private intercommunicating wires and apparatus though these various facilities were not mentioned specially in the section. All these facilities may run "along, over, under and across all public streets" and it is the right to use these streets which is the basis of the municipal franchise. It is apparent that if section 536 of the Civil Code had never been enacted the courts would have no difficulty in holding that the city had *power* to grant the franchise under the charter section.

The record in this case presents an unusual situation. It appears from the stipulation already quoted that there was but one legal question presented to the trial court on the submission of the demurrer, namely, whether, under the 1903 charter, the city could and did grant a telephone franchise. All other questions were reserved. In the record filed herein the demurrer is not set out in full. The second and third grounds are withheld from this court by the words "(Omitted pursuant to stipulation)". Whether said grounds II and III had to do with the validity of ordinance No. 380, upon which this suit was based, we have no means of determining. The only ground appearing on the face of the demurrer *as shown by the record on appeal* is that "The complaint does not state facts sufficient to constitute a cause of action." In these circumstances this court cannot intelligently discuss or pass upon any point other than that presented to the trial court. On that point we are satisfied, as already indicated, that the charter gave the power to the city to grant a telephone franchise, and that, therefore, the court erred in ruling as it did.

For these reasons the judgment of dismissal is reversed and the cause remanded for further proceedings in accordance with the stipulation on file, and such other proceedings as may be proper.

NOURSE, P. J., concurs.

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BOGAN v. WILEY et al.

Civ. 12904.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1946.

Rehearing Denied Feb. 13, 1946.
Hearing Denied March 14, 1946.

1. Frauds, statute of 🔑50(2)

An oral contract to devise or bequeath property by will is invalid under the statute of frauds. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

2. Frauds, statute of 🔑138(4)

Where oral contract to leave property by will is in compensation for services rendered or to be rendered, and hence unenforceable under statute of frauds, the remedy, if any, is in quantum meruit for value of services rendered. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

3. Estoppel 🔑52

The vital principle of "equitable estoppel" is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

4. Frauds, statute of 🔑144

In suit against persons taking under will by son-in-law for specific performance of alleged oral contract by which mother-in-law was to will her one-half interest in furniture business partnership to daughter and son-in-law who worked for partnership, in consideration of the son-in-law abandoning his investigation of an opportunity to engage in another business, persons taking under will were not estopped from asserting invalidity of oral contract under statute of frauds, where son-in-law did not alter his position or suffer any loss by discontinuing his investigation and continuing to work for partnership. Code Civ. Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

5. Partnership 🔑244

An employee of furniture business partnership, having alleged oral contract with deceased partner by which deceased partner was to will interest in partnership to employee, could not after death of deceased partner by any action at law or in equity inject himself into the partnership without consent of surviving partner, who, when partnership ceased on death of deceased partner, could settle the partnership and pay what was due to estate of deceased partner. Probate Code, § 571.

6. Specific performance 🔑86

The cause of action, if any, of person having alleged oral contract with deceased partner by which deceased partner was to will her interest in partnership to such person, was against deceased partner's estate for damages for breach of contract or in quantum meruit for value of services rendered under the contract, and fact that such person could not have recovered in such action at law or that he lost the right by failure to pursue it did not justify equitable relief of specific performance of the contract.

7. Equity 🔑43

Where the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit by Lewis E. Bogan against James Francis Wiley and Verna Gardner for specific performance of an alleged oral contract to leave by will a one-half interest in a business partnership. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Marcel E. Cerf, Robinson & Leland, and Courtney L. Moore, all of San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher and Frank M. Hultman, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for specific performance of an oral contract to leave by will a one-half interest in a business partnership. The defendant had judgment and plaintiff's appeal rests on the ground that defendants are estopped to raise the defense of the statute of frauds.

Since no attack is directed to a claim that the evidence is insufficient to support any particular finding of fact, a brief statement of facts resting on the findings made by the trial court will suffice. Mrs. Martha Wiley and her son James operated as equal partners a furniture business located in San Francisco. In 1914 plaintiff, who was an employee of the partnership, married Martha Wiley's daughter Zaida. Plaintiff, his wife and Martha Wiley lived together until 1938 when Zaida died. In 1922 these three moved to a pent house on the roof of the store of the partnership provided by Mrs. Wiley where "plaintiff and his said wife paid no rent and no charges for telephone, gas or electricity." In 1932 plaintiff learned of the insolvency of a furniture business in the city of Oakland and of the desire of the creditors to get someone to "take over" that business. He made some investigations by looking through the widows of the Oakland store, but made no inquiries of the owner of the business or of any of the creditors as to whether the business was to be closed out by the creditors, sold to an independent purchaser, or run by some individual on behalf of and under the direction of the creditors. While thinking of this proposition plaintiff, his wife, and Mrs. Wiley discussed the prospect and Mrs. Wiley told the plaintiff that "if he would reject the said offer of the representative of T. W. Corder, Inc., and remain with the J. H. Wiley Company business and continue to live in a home in San Francisco with Martha Wiley and his wife, Zaida Bogan, she would by her last will and testament bequeath to plaintiff and his wife, Zaida Bogan, the 1/2 interest in the copartnership." (This finding is much too favorable to the appellant and it is not supported by the evidence. The appellant repeatedly testified, and was supported by other witnesses who heard the conversations, that Mrs. Wiley said on many occasions that the "children" [appellant and Zaida] already had a good business, that one-half of the partnership was going to them at her death, that she always intended to leave the "children" her share of the business, and that they should forget the Oakland offer because it would break up the pleasant family association. As a "contract" this is nothing more than an agreement to compensate by will for services to be rendered, and for companionship, which was the basis of the cause of action in Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, and similar cases hereinafter cited. But it was an agreement which was not conditioned on the rejection of the Oakland offer.) Plaintiff's wife was at all times opposed to his leaving the Wiley concern as it would require them to move to Oakland and give up their residence with Mrs. Wiley and all its advantages, and for many years prior to the date in question Mrs. Wiley had informed her daughter and the plaintiff that she regretted that her deceased husband had made no provision for Zaida and that she, Mrs. Wiley, would make it right by her in her will. The trial court found that at the time plaintiff rejected the "offer" to go to the Oakland concern he had not made sufficient investigation "to determine whether or not it was to his interest to accept the proposition;" and that in giving it up he "did not so alter his position as to incur any unjust, unconscientious injury or loss;" also that it was not true that, after Zaida's death, Martha Wiley and plaintiff agreed that, if he would remain in the employ of the Wiley concern, Mrs. Wiley "would by her last will and testament leave and bequeath to plaintiff a 1/2 interest or any interest in said copartnership." (This finding is important in relation to the testimony of plaintiff throughout the trial. The defendants had raised the defense that decedent's promise to leave the estate to her daughter and son-in-law was unenforceable because of the death of the daughter. To meet this plaintiff testified that after the daughter's death decedent made a new contract promising to leave the whole estate to him alone if he would continue to work for her. The trial court's finding that this testimony was untrue, taken with its inherent improbability, casts a serious shadow over the entire testimony of the witness.)

After the death of Zaida in 1938, plaintiff continued to live with Mrs. Wiley until 1940 when he remarried over her objections. Her bitterness over this event continued until her death in 1942. Then plaintiff discovered that she had transferred her interest in the partnership to her granddaughter. The trial court found that the purported contract was unenforceable because of the statute of frauds, Code of Civil Procedure, sec. 1973, subd. 6, and Civil Code, section 1624, subd. 6. It is conceded that this finding is conclusive unless this court should determine as a matter of law that defendants are estopped from raising the plea of these statutes.

There is no merit in the appeal and hence the judgment must be affirmed upon the rules of law so well settled that a brief reference to the decisions will suffice.

[1] The code sections declare that an oral contract to devise or bequeath property by will is invalid. Since their enactment our decisions have consistently held that such contracts are unenforceable. Hagan v. McNary, 170 Cal. 141, 144, 148 P. 937, L.R.A.1915E, 562; Trout v. Ogilvie, 41 Cal. App. 167, 173, 182 P. 333; De Mattos v. McGovern, 25 Cal.App.2d 429, 432, 77 P.2d 522; Zaring v. Brown, 41 Cal.App.2d 227, 231, 106 P.2d 224; Smith v. Bliss, 44 Cal.App.2d 171, 175, 112 P.2d 30; Long v. Rumsey, 12 Cal.2d 334, 341, 84 P.2d 146; Rotea v. Izuel, 14 Cal.2d 605, 607, 95 P.2d 927, 125 A.L.R. 1424.

[2] There is complete harmony in the decisions that where the oral contract to leave property by will is in compensation for services rendered or to be rendered, and hence unenforceable under the code sections, the remedy, if any, is in quantum meruit for the value of the services rendered. Morrison v. Land, 169 Cal. 580, 586, 590, 147 P. 259; Zellner v. Wassman, 184 Cal. 80, 84, 193 P. 84; Long v. Rumsey, 12 Cal.2d 334, 342, 84 P.2d 146; De Mattos v. McGovern, 25 Cal.App.2d 429, 432, 77 P.2d 522.

Cases are cited holding that, notwithstanding the invalidity of the oral contract, equity will grant relief by invoking an estoppel against those taking under the will. Notten v. Mensing, 3 Cal.2d 469, 474, 45 P.2d 198, is relied on. Reference to that case calls for a brief history of the litigation. The cause first came to this court on appeal from a judgment sustaining a demurrer to the complaint. The action was one to enforce a constructive trust upon property devised to the heirs of Mrs. Notten. It was based upon the theory that Mr. and Mrs. Notten had by agreement executed joint wills dividing their property between their respective relatives and that the execution of the wills was part execution of the oral contract. The complaint alleged that Mr. Notten died first, that his widow took under his will, and that she thereafter repudiated the agreement and left all the joint property to her own relatives. This court affirmed the judgment, but, on the theory that the widow's repudiation of the agreement was a constructive fraud upon those who would have taken under the joint wills, the Supreme Court reversed the judgment holding that the defendants were estopped to plead the statute of frauds. The cause went back for trial on the merits and there it appeared that the widow had received approximately $600 through the husband's will whereas her estate was approximately $800,000. On this showing the trial court found that there was no fraud and no basis for an estoppel. An appeal from that judgment also came to this court and we affirmed it. Notten v. Mensing, 20 Cal.App.2d 694, 67 P.2d 734. A petition for a transfer to the Supreme Court was denied.

The rule of the Supreme Court's decision in the Notten case [3 Cal.2d 469, 474, 45 P.2d 201] is that "under the proper circumstances" a party may be estopped to plead the statute of frauds. But it is fully emphasized in that decision that "in order to raise the estoppel, fraud in some form is essential." On the first appeal based on the demurrer to the complaint the Supreme Court was impressed with the pleading that the widow had accepted and "retained all the benefits" of the mutual agreement as a devisee under her husband's will. On the pleading alone it was held to be a case where the plea of estoppel might lie. But when the facts were disclosed at the trial and the evidence of "benefits" was produced the plaintiffs' plea of estoppel vanished.

Here the evidence is that Martha Wiley's interest in the partnership was worth $112,000. This is the consideration for which appellant insists he abandoned his investigation of the opportunity to engage in another business. No attempt was made to place a value on this mythical opportunity; nothing was shown except that the Oakland concern had failed and that appellant was informed that he might be considered for employment in some undisclosed capacity. But if appellant lost any material advantage the record does not disclose it. He and Zaida continued to work for the Wiley concern and wages were paid in full to them; they were given their rooms free from rent, gas, electricity and telephone charges and a mother-in-law who did their cooking and nursing. These advantages would have been sacrificed if appellant had accepted the Oakland employment and from appellant's testimony it appears that that was the one big consideration which induced appellant and his wife to abandon the suggestion of the Oakland concern and to remain under the protection and support of Mrs. Wiley. The evidence is that appellant's wife urged him to abandon the plan,—not because of Mrs. Wiley's promise to provide for them by will because that promise had been made on numerous occasions prior thereto, and without any "consideration," but because she did not wish them to give up the advantages of the mother's present care and maintenance. On the other hand the appellant failed to show that he gave up any advantage in rejecting the "offer," and the trial court found that he "had not investigated far enough into the business to determine whether or not it was to his interest to accept the proposition."

[3, 4] These repetitious statements of the facts and the findings are made to demonstrate the complete failure of appellant to prove the essential elements of the plea of estoppel. It is said in 10 Cal.Jur. pp. 626, 627 that: "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." The trial court found that: "In rejecting said offer of the said representative of Corder, Inc., and in continuing with the said copartnership of 'J. H. Wiley, The Furniture Man,' plaintiff did not so alter his position as to incur any unjust, unconscientious injury or loss." And also that: "The said offer was too indefinite for this Court to find whether the acceptance of the offer would have been beneficial or detrimental to plaintiff, even had said representative of Corder, Inc., been authorized to dispose of said business. There is no evidence that plaintiff would have or would not have accepted any such offer and left the employ of 'J. H. Wiley, the Furniture Man,' if Martha Wiley had not promised to bequeath her interest in said business to her daughter, Zaida Bogan, and plaintiff. This Court therefore finds that plaintiff was not damaged by his rejection of said offer and his remaining in the employ of 'J. H. Wiley, the Furniture Man,' until after the death of Martha Wiley." Having failed to prove that he had suffered any loss through any representations made by the decedent, appellant's plea of estoppel against these respondents must fall.

[5, 6] It is manifest that appellant could not by any action at law or in equity inject himself into the partnership of J. H. Wiley without the consent of the surviving partner. Under section 571 of the Probate Code the partnership ceased upon the death of Mrs. Wiley and the surviving partner would then settle the partnership and pay what was due to the estate of the decedent. If appellant had any cause of action it was one against the estate for damages for breach of the contract, or in quantum meruit for the value of the services rendered under it. But he did not sue the estate and the evidence showed first, that there was no consideration for the contract and second, that he was paid in full, and overflowing, for the services rendered. The fact that he could not have recovered in an action at law, or that he lost the right by failure to pursue it does not justify the appeal to a court of equity. De Mattos v. McGovern (supra).

[7] Morrison v. Land, 169 Cal. 580, 586, 590, 147 P. 259, states the rules which are conclusive here (169 Cal. at page 586, 147 P. at page 261): "Passing without discussion other requisites, it is elementary that where, as here, the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice. No principle of equitable jurisprudence is more firmly established than this. 1 Pom. Eq.Jur., § 221. For instance, the exclusive jurisdiction of equity to grant relief by way of specific performance of a contract will be exercised only in those cases where the legal remedy of compensatory damages is insufficient under the circumstances of the case, in the opinion of the court, to do complete justice between the parties." And (169 Cal. at page 590, 147 P. at page 263) "An ordinary action at law for breach of the contract would bring him the very thing to which he is entitled under the allegations of his complaint—afford him full and adequate relief. In such an action the measure of damages would have been the

value of the property agreed to be bequeathed, for that was the amount in which he was damaged by the breach." See Flood v. Templeton, 148 Cal. 374, 378, 83 P. 148; Zellner v. Wassman, 184 Cal. 80, 84, 87, 193 P. 84; Ruble v. Richardson, 188 Cal. 150, 154, 204 P. 572; Long v. Rumsey, 12 Cal.2d 334, 342, 84 P.2d 146.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

72 Cal.App.2d 579

PAOLINI v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 12816.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1946.

Hearing Denied March 14, 1946.

1. Street railroads 🔑114(5), 117(5)

In action for injuries sustained when plaintiff was struck by municipal street car, where plaintiff testified that he was standing on running board of truck leaning over truck bed when struck, but motorman testified that plaintiff was at rear of truck walking backwards and evidence disclosed that second window from front on right side of street car was shattered, a question was presented for jury by the evidence which amply supported verdict for plaintiff.

2. Negligence 🔑83

The last clear chance doctrine presupposes conduct of plaintiff constituting negligence.

3. Street railroads 🔑117(35)

Where evidence indicated that plaintiff was standing on running board of truck leaning over truck bed and that he was unaware of approach of municipal street car until he was struck and motorman admitted that he saw truck when he was a distance of a little less than 200 feet from point of impact and that there was nothing to affect his visibility and motorman testified that he sounded bell but another testified that he did not hear bell, whether motorman was actually aware of plaintiff's danger, whether motorman knew or should have known that plaintiff was unaware of danger and whether motorman had last clear opportunity to avoid accident, were questions for jury.

4. Street railroads 🔑103(1)

Where plaintiff, standing on running board of truck and leaning over truck bed, was unaware of approach of municipal street car, plaintiff's continuing negligence up to moment he was struck by street car did not preclude application of last clear chance doctrine.

5. Street railroads 🔑103(1)

Where plaintiff, standing on running board of truck leaning over truck bed, was unaware of approach of street car until struck by municipal street car, application of last clear chance doctrine could not be avoided on ground that plaintiff had equal opportunity to avoid his injury by merely withdrawing to safety.

6. Street railroads 🔑117(34), 118(15)

Under evidence indicating that plaintiff was standing on running board of truck leaning over truck bed and was unaware of approach of municipal street car until struck by street car, instruction on doctrine of last clear chance was properly given to jury and it was within province of jury to find that negligence of motorman was sole proximate cause of the accident.

7. Appeal and error 🔑1060(1)
Trial 🔑125(1)

In personal injury action, reference before jury by plaintiff's counsel to two sons of plaintiff being officers in the United States Army was not justified, but, in view of nature of evidence, the comments were not so prejudicial as to preclude a fair trial.

8. Appeal and error 🔑201(2)

In action for personal injuries sustained by plaintiff when struck by municipal street car against street car motorman and against city and county, where during examination of jurors on voir dire, defendant's counsel made statement to effect that if there was a deficit in funds of municipal street car system, deficit would have to come from taxpayers, remark of trial judge that a large reserve was building up in municipal street car system was uncalled for, but no objection having been made, it was not prejudicial, under circumstances.

9. Appeal and error ⚷1048(6)

In action for personal injuries sustained by plaintiff when struck by municipal street car, where defendants were permitted to show that 16 passengers in street car at time of accident could not be located but objections were sustained to questions which inferred that they actually witnessed accident and to others which related to where they were at time of trial, the rulings did not prejudicially limit the examination.

10. Appeal and error ⚷201(2)

If counsel believed remarks of trial court to have been prejudicial, he should have made some objection at the time.

11. Trial ⚷228(1)

In action for personal injuries sustained by plaintiff when struck by municipal street car, where trial court in instructing jury, incorporated a phrase used by plaintiff's counsel in argument, but phrase was one in common usage, its use by court could not be construed as an endorsement of any part of the argument.

12. Appeal and error ⚷1046(5)

In action for personal injuries sustained by plaintiff when struck by municipal street car, where the State Compensation Insurance Fund had filed a lien as insurance carrier to recover its medical expenditures on plaintiff's behalf, court's admonition that it was a matter of no concern to jury was proper, and statement of court that if plaintiff did not recover the "State" was out money expended and if plaintiff recovered then they had a lien and that lien was filed hoping they were going to get their money back was not prejudicial.

13. Trial ⚷106

In action for personal injuries sustained by plaintiff when struck by municipal street car, where during conference in chambers court had advised both counsel that he would not instruct jury on last clear chance doctrine, but at adjournment for day during which arguments were made and while counsel for defendants had 10 to 15 minutes left to argue following morning, defendants' counsel was notified that court would give such instruction, record did not disclose that defendants were in any way precluded from a proper and adequate presentation of argument.

14. Damages ⚷208(3)

In action for personal injuries sustained by plaintiff when struck by municipal street car, evidence justified submission of issue as to whether plaintiff suffered permanency of injuries and future disability.

15. Damages ⚷187

In action for personal injuries, all that is required to establish future disability is that from the evidence, including expert testimony, if any, it satisfactorily appears that such disability will occur with reasonable certainty.

16. Damages ⚷132(4)

Twenty thousand dollar verdict to 55-year old plasterer for injuries which precluded him from following his lifetime trade at a wage fixed the day after accident at $14 per day and required him to accept less remunerative employment at wage of $7.40 per day, and which injuries included at least 12 or 15 rib fractures and required hospitalization for period of 65 days, followed by a two months period of convalescence, was not excessive.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Personal injury action by Gino Paolini against the City and County of San Francisco and another. Judgment for plaintiff and defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and John F. Moran, Deputy City Atty., both of San Francisco, for appellants.

Charles V. Barfield and John J. Healy, Jr., both of San Francisco, for respondent.

OGDEN, Justice pro tem.

This is an action to recover damages for personal injuries sustained by plaintiff when struck by a street car operated by the defendant Schmidling, a motorman, in the course of his employment by the defendant city and county. The trial was had before a jury which rendered its verdict in plaintiff's favor in the amount of $20,000. Defendants' motion for a new trial was denied and judgment in the amount of the verdict was rendered, from which judgment defendants appeal.

The accident occurred shortly after 4 o'clock in the afternoon of May 24, 1943. Although the sky was overcast there was no low fog and visibility was good. Plaintiff was a plasterer in the employ of a contracting plasterer who had the plastering contract for a number of houses then under construction as a unit on the east side of 46th Avenue between Ulloa and Vicente Streets in San Francisco. Shortly before the accident, plaintiff had been driven to the site of this construction by the son of his employer in a truck, described as a Dodge express body type, having an enclosed cab in front and a flat bed in the rear which extended out beyond the sides of the driver's cab. The truck was parked in front of one of the houses under construction, on the east side of 46th Avenue facing south, or on the so-called "wrong" side of the street, and some distance out from the curb which was, at that point, obstructed by debris which extended somewhat into the street. The defendant municipality maintained double street car tracks on 46th Avenue at this location. The truck was so parked that the distance from its right side to the nearest street car rail was, as estimated by its driver, two or three feet. The clearance between the truck and the street car which later struck the plaintiff was estimated by the motorman as being about one and a half feet. The truck was so parked for five or ten minutes before the accident, during which time plaintiff and his driver were engaged in carrying tools from the truck to a shed at the rear of the house opposite which it was parked.

Plaintiff testified that after completing the removal of the tools which were to be left at that job, he had mounted the running board of the truck on the side toward the car tracks, for the purpose of rearranging the remaining tools. He remained in that position, standing on the running board alongside the cab, facing north toward the rear of the truck and leaning over the front part of the truck bed arranging the tools therein, for a period of about two minutes, when he was struck by the street car coming from the south. He testified that the first indication he had of the approach of the street car was when he was struck; that when he came back to the truck he looked to see if any cars were coming but saw none; that he did not look around during the approximately two minutes that he was standing on the running board; that he did not hear any signal bell of the street car, and that there was much noise just before the accident from the building operations.

The motorman testified that when twenty feet past or north of the intersection of Vicente Street he first observed the truck and sounded the bell and immediately shut the power off, but did not apply the brakes; that he was then traveling about twenty-five miles per hour; that he was proceeding upon a slight upgrade and a reduction in speed to the extent of five miles per hour resulted; that he continued at this speed of approximately twenty miles per hour; that when the front of the street car was just about opposite the cab of the truck he first saw the plaintiff at the rear of the truck walking backward with his face toward the houses; that he then applied the air brakes as hard as possible and did not have time to do anything else; and that plaintiff continued to walk backwards until struck by the street car. With respect to sounding his bell, the motorman testified that when he saw the truck he sounded it; that he had done so in the preceding block to warn some children and continued to ring it on and off until he saw the truck, when he rang it more regularly, and that when he saw the plaintiff he rang it much faster.

The only other eyewitness to the impact, a passenger on the street car, testified that he first saw the plaintiff when the street car was about twenty feet from him and that plaintiff was standing on the street, motionless, right behind the cab of the truck, facing the cab. This witness and a Mrs. Friday, who lived a few doors from the scene of the accident, corroborated the motorman's testimony as to the sounding of the bell.

The driver of the truck, who was in the basement of one of the houses at the time of the accident, and a carpenter foreman, who was about 300 feet away, testified that they did not hear any ringing of the bell. The latter testified that he saw the plaintiff immediately after the impact, spinning around in the air at least four feet off the ground, and that at that time the street car was traveling more than twenty-five miles per hour.

The evidence further disclosed that the second window from the front on the right side of the street car was shattered and broken. Since the lowest edge of this window was five feet five and one-half inches from the ground, this fact together with the testimony that plaintiff's body, immediately after the impact, was seen spinning in the air, lends support to plaintiff's testimony that he was in an elevated position at the time of the impact.

[1] There was thus presented a sharp conflict in the evidence which was for the jury to determine. Its determination of this conflict in accordance with the version of the plaintiff was amply supported by the evidence, and we do not understand that defendants dispute this. Defendants do, however, urge several grounds for reversal which may be classified under three general headings—first, that assuming defendants' negligence, plaintiff is precluded from recovery because of his contributory negligence and the doctrine of the last clear chance is not applicable; second, that because of certain errors and misconduct occurring at the trial defendants were precluded from having a fair trial; and, third, that there was no evidence of permanency of injuries, and the amount of the verdict is excessive.

[2] As to the first point, defendants contend that from the plaintiff's own testimony it must be concluded as a matter of law that he was guilty of contributory negligence. They urge that his conduct in voluntarily placing himself in such dangerous proximity to the path of the street car, with the realization that street cars ran regularly thereon, and in remaining there without further observation, constituted negligence as a matter of law. Certainly such conduct would support a finding of negligence, but whether it would as a matter of law require it we are not called upon to decide, unless we hold that the doctrine of the last clear chance, which was embodied in the instructions to the jury, is not applicable to this case. That doctrine, if applicable, presupposes that such conduct of the plaintiff constituted negligence. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36.

In dispute of the applicability of the doctrine of the last clear chance, defendants urge two points—first, that the evidence does not show that the motorman actually perceived the plaintiff and his peril in time to have avoided the accident; secondly, that the doctrine must be excluded because the negligence of the plaintiff was active and contemporaneous up to the very moment of his injury, and he had equal opportunity to avoid his injury by merely withdrawing his body to safety. These same contentions were unsuccessfully urged to this court by the defendant municipality in the case of Gillette v. City of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611, (hearing in Supreme Court denied). The factual situation in that case, insofar as it pertains to both of these points, is sufficiently similar to the instant one as to render that decision determinative here. In that case the plaintiff, who was conceded to have been negligent in standing motionless directly in the pathway of an approaching street car, was struck by the latter from the rear. There, as here, the plaintiff, if he had been aware of the approach of the car, could have readily removed himself to a place of safety. There, as here, there was no direct testimony that the motorman actually saw the plaintiff, although there was evidence that the motorman was looking straight ahead and had an uninterrupted view.

As to the actual knowledge of the motorman, the rule was stated in the Gillette case, supra, as follows 58 Cal.App.2d page 442, 136 P.2d 615: "the courts have held repeatedly that it is a question of fact for the jury to determine from all the circumstances presented by the evidence whether the defendant actually knew of the plaintiff's peril; and that notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the facts and circumstances are such as would justify the jury in finding that despite the defendant's denial of knowledge or the absence of direct testimony on the subject, he was actually aware of plaintiff's danger in time to avert the accident; in other words, that he 'must have known' of plaintiff's danger."

[3] That this rule is equally applicable to the present case is apparent from the evidence. The motorman admitted that he saw the truck when he was 20 feet north of Vincente Street, or a distance of a little less than 200 feet from the point of impact, and that there was nothing to affect his visibility. Plaintiff's position on the truck was an elevated one, in clear view of the motorman. It is a fair inference that when the motorman saw the truck he saw the plaintiff standing upon its running board, with his back to the approaching

street car, and in such a position he would be struck unless he moved or the street car stopped. That the motorman knew, or should have known, that plaintiff was not aware of his peril, is an equally fair inference. Whether the motorman adequately sounded his bell was, upon the conflicting evidence, a question for the jury to determine. That he made no attempt to stop, or even slow the speed of his car to less than twenty miles per hour is admitted; that he could have stopped his car before reaching the truck is indicated by the fact that it was brought to a stop after the impact in a much shorter distance than the distance from which he had first observed the truck. The jury was entitled to determine that the motorman was actually aware of plaintiff's danger; that he knew, or should have known, that plaintiff was unaware of it and that he, the motorman, had the last clear opportunity to avoid the accident.

[4] Defendants' contention that the doctrine must be excluded because of plaintiff's continuing negligence up to the moment of his injury is answered in the Gillette case, supra, quoting from Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915: "'But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. * * * The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable.'" 58 Cal.App.2d page 440, 136 P.2d page 614.

[5] As to the ability of respondent to escape from his predicament, in the Gillette case the rule is quoted from Girdner v. Union Oil Company, supra: "As set forth in the Girdner case, supra, those elements [of the doctrine of the last clear chance] are as follows: 'That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'" 58 Cal.App.2d page 441, 136 P.2d page 614.

[6] The arguments of defendants upon the applicability of the doctrine of the last clear chance are so identical with those urged to this court in the Gillette case that it would be but repetition to further discuss them here. The authorities cited to us here are, in the main, referred to and fully elaborated upon in that decision, and there is no need to repeat an analysis or enumeration of them. It is sufficient to say that the circumstances of this case bring it well within the rule stated therein. We therefore hold that the instruction on the doctrine of the last clear chance was properly given to the jury, and that it was well within its province to find that the negligence of the motorman in not avoiding the accident was the sole proximate cause thereof.

Defendants make several charges of misconduct and error occurring at the trial, none of which requires a reversal of the judgment. They were addressed to the trial court upon motion for new trial, and we cannot say that it was an abuse of discretion on the part of that court to refuse a new trial because of any or all of them.

[7] A reference before the jury by plaintiff's counsel to two sons of plaintiff being officers in the United States Army is cited as prejudicial misconduct. Such reference was made once during the examination of the plaintiff. It was stricken by the trial court and the jury was instructed to disregard it. The subject was again mentioned by plaintiff's counsel in his argument to the jury. No objection or request that the jury be instructed to disregard it was made upon the latter occa-

sion. Plaintiff claims justification for the latter reference in that the medical expert called by him as a witness testified, without objection, that one of plaintiff's sons was called back from the army because of plaintiff's serious condition. He further attempts to justify these references on the ground that they simply serve to offset any prejudices that the jury might have against him because of his Italian birth. We do not agree that such references were justified or proper. In Diebler v. Wright, 119 Cal.App. 277, 6 P.2d 344, similar misconduct was a factor contributing to a reversal of the judgment. However, in this case, in view of the nature of the evidence, we cannot say that these comments were so prejudicial as to preclude a fair trial.

[8] During the examination of the jurors on voir dire, the trial court made the following comment, "Well, I understand we are building up a large reserve in the municipal street car system, isn't that right?" This followed a statement by defendants' counsel to the effect that if there was a deficit in the funds of the municipal street car system such deficit would have to come from the taxpayers. The remark made by the trial judge was uncalled for and should not have been made; but no objection was made to such comment. We cannot say that under the circumstances it was prejudicial.

[9] Complaint is made that defendants were not permitted to show their inability to produce as witnesses the sixteen passengers in the street car at the time of the accident. Defendants were permitted to show that these passengers could not be located, but objections were sustained to questions which inferred that they actually witnessed the accident and to others which related to where they were at the time of the trial. The rulings did not prejudicially limit the examination.

[10] The trial court commented, during the examination of a witness: "Why all this emphasis on the color of the truck? * * * This accident did not happen at night. It was a daylight accident. * * * The visibility was good so I don't see what the color of the truck has to do with the accident." Testimony as to the color of the truck, however, was permitted without restriction. No response to the comment or assignment of error was made by defendants' counsel. If counsel believed the remarks to have been prejudicial he should have then made some objection, or at least should have explained to the court his purpose in emphasizing almost to the extent of undue repetition the matter of the color of the truck.

[11] Defendants complain that the trial court, in instructing the jury, incorporated a phrase used by plaintiff's counsel in his argument. The phrase was one in common usage and its use could not, as contended, be construed as an endorsement of any part of the argument.

[12] The State Compensation Insurance Fund had filed a lien as the insurance carrier to recover its medical expenditures on plaintiff's behalf. The trial court, during the trial, stated: "It doesn't make any difference to you, anyhow. If the plaintiff doesn't recover, then the State is out the amount expended; and if the plaintiff recovers, then they have a lien. You are not concerned in the amount of this lien. You are not even concerned as to whether or not it is a proper charge. The State expended the money and they filed a lien hoping that they are going to get their money back." No exception was taken to the remark. In fact, the lien was referred to before the jury by both counsel without objection on the part of either. That it was a matter of no concern to the jury was a proper admonition. We see no merit in the contention of prejudice from the use of the word "State" instead of State Compensation Fund nor from the use of the phrase "hoping that they are going to get their money back."

[13] During a conference in chambers in the course of the trial, the trial court advised both counsel that he would not instruct the jury upon the doctrine of the last clear chance. Counsel for defendants was notified, at the adjournment for the day during which arguments were being made and while he had ten to fifteen minutes left to argue the following morning, that the trial court would give such instruction. Complaint is made that this change in ruling necessitated a change in strategy and materially weakened the presentation of defendants' cause. The record does not disclose that any request for additional time for argument, if required, was made. The argument of counsel for defendants is not embodied in the record before us and so we are not able to judge the possible merit of this complaint. This point was urged before the trial court who heard the

argument as a ground for a new trial, and it was determined adversely to defendants. We are unable from the record to say that defendants were in any way precluded thereby from a proper and adequate presentation of the argument.

[14] Whether plaintiff suffered permanency of injuries and future disability was an issue properly submitted to the jury. No complaint is made of the form of the instructions given upon this subject, but it is contended that they were erroneously given because there was no satisfactory evidence showing to a reasonable certainty that any permanency of disability resulted from plaintiff's injuries.

In support of this contention defendants rely upon certain portions of the testimony of plaintiff's witness, Dr. Ernest du Bray, one of the two physicians who attended the plaintiff and who was the only expert medical witness who testified at the trial. On direct examination the doctor testified with respect to plaintiff's ability in the future to carry on the occupation of plastering: "That of course is a heavy occupation and I think that there is some doubt as to whether he will be able to do that as a regular worker in that field. He might do it part time. He might get away with it for a while but it is doubtful to me if he can resume that heavy type of work." In a written report of an examination of plaintiff made in the month of January following the accident, the doctor had stated, "Examination at this time shows no medical disability with respect to his injury of last May." On cross-examination he testified that at the time of that examination all of the disabilities that plaintiff had suffered were completely healed and that, as far as he could find, plaintiff was suffering from nothing attributable to the accident. It is apparent, however, that the physician's testimony as to plaintiff's condition as disclosed by the medical examination referred only to the absence of objective findings of disability. In reference to a question by the trial court as to plaintiff's ability to do the work of a plasterer, the doctor testified: "He hasn't tried to do it as far as I know, so that, I don't know. It would be uncertain whether he would stand up to it on a routine day, in and out. The thing we have to measure a man's health by, is his blood pressure and his pulse rate and they have come back to normal; but that isn't after all the last word. The crucial test is letting him do it and then see what happens."

The gist of the expert medical testimony, therefore, was not, as defendants contend, that plaintiff had made a full recovery with no future disability. It was rather, in substance, that although a medical examination disclosed no objective evidence of present injury or disability, it was doubtful whether plaintiff would, by reason of his former injuries, be able to stand up to the heavy work of plastering, and that the real test of his ability to do so would be by an actual trial at that occupation. The record discloses that in the latter part of October, after his discharge from the hospital and a two-month period of rest, plaintiff did return to his occupation of plastering. Both he and his employer testified that he was unable to do the work of that trade. After attempting to do this work for three days, he was required to go to bed. He subsequently obtained employment at a chocolate factory and was so employed at the time of the trial. Although the duties of this employment were merely to watch a machine so that it would not overflow, he was exhausted at night therefrom and often was kept awake by reason of the severe pains in his back. If, as the jury apparently believed, plaintiff made an honest and sincere effort to resume his former occupation and was unable to do so, then the very test of future disability which the expert testimony prescribed was met.

[15] It was not required that the doctor testify that he was reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. Bauman v. San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Riggs v. Gasser Motors, 22 Cal.App.2d 636, 72 P.2d 172; Ostertag v. Bethlehem, etc., Corp., 65 Cal.App.2d 795, 151 P.2d 647. The medical expert testified, in effect, that he doubted that plaintiff had no future disability but that he could not be certain until the plaintiff actually attempted his former occupation. The fact that such attempt was made and was unsuccessful was not only consistent with the expert testimony but answered the uncertainty therein. This, considered with the nature and extent of plaintiff's injuries, satisfactorily established the

permanent inability of plaintiff again to engage in his former occupation and a consequent impairment of earning power. Admittedly plaintiff suffered severe injuries which almost proved to be fatal. There were at least twelve or fifteen rib fractures; the doctor stated that they were so numerous that he could not be sure that they were all demonstrated. Three of the first lumbar vertebrae were fractured, with displacement from the spine. There was considerable hemorrhage of the pleural cavity. He required hospitalization for a period of sixty-five days, followed by a two-months' period of convalescence.

The cases of Bellman v. San Francisco High School District, 11 Cal.2d 576, 81 P.2d 894, and Silvester v. Scanlan, 136 Cal. App. 107, 28 P.2d 97, relied upon by defendants, are not determinative in this case. They merely hold, in accord with the rules here stated, that the evidence must establish future detriment with reasonable certainty and that mere speculation or probability is not sufficient. The evidence of future disability in those cases was held to be insufficient because it was purely speculative, which is not the situation here.

[16] As to defendants' contention that the verdict is excessive, we cannot say that it is so excessive as to warrant this court in holding that its amount shocks the sense of justice and raises the presumption that it was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts. Slaughter v. Van Winkle, 213 Cal. 573, 2 P.2d 789; Bellman v. San Francisco H. S. Dist., supra. In view of our conclusion that the future impairment of earning power of plaintiff was a proper element to be considered in its determination, we are unable to say that the verdict is without justification.

At the time of the accident plaintiff was fifty-five years of age. He was hospitalized for sixty-five days and required to rest for an additional period of two months. He is precluded from following his lifelong trade as a plasterer at a wage fixed the day after the accident at $14 per day, and was required to accept less remunerative employment at the wage of $7.40 per day. Up to the time of the trial his loss of earnings amounted to approximately $2,500. His medical expenses amounted to $2,055.75. His present reduction of earning capacity amounts to more than $2,000 per year. His injuries were and continue to be exceedingly painful. The amount of the award was reviewed by the trial court upon motion for new trial and was not disturbed. We cannot say that such ruling was an abuse of the discretion vested in that court. We have examined each of the many cases cited by defendants from this and other jurisdictions where the amount of the award was held to be excessive. As defendants recognize, each case presents an individual problem and must be determined upon its own factual situation. The rulings in the cases cited can only be regarded as illustrative applications of the rules we have already considered in measuring the damages. We find nothing in those illustrations which alter our views as hereinbefore expressed.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

PEOPLE v. KOENIG et al.*

Cr. 3870.

District Court of Appeal, Second District, Division 3, California.

Jan. 7, 1946.

Hearing Granted Feb. 4, 1946.

1. Criminal law 🔑1173(2)
Robbery 🔑24(1)

In prosecution for robberies while armed, police officers' conflicting testimony as to defendant's oral confessions was sufficient, when considered with circumstantial evidence, to justify conviction, but not so convincing as to require affirmance thereof on appeal, in view of trial court's erroneous failure to give defendant's requested instructions to jury on consideration of circumstantial evidence and evidence of party's oral admissions.

2. Criminal law 🔑552(3)

A conviction may not be based on circumstantial evidence alone, unless each of circumstances relied on to establish defendant's guilt is not only consistent with his guilt, but inconsistent with his innocence.

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* Subsequent opinion 173 P.2d 1.

3. Criminal law 🔑784(4)

The rule as to consideration of circumstantial evidence in determining defendant's guilt should be stated in instruction to jury as distinct proposition of law, not in combination with statement of doctrine of reasonable doubt, which applies to manner in which jury should determine what circumstances are established by evidence, while circumstantial evidence rule applies to analysis and comparison of circumstances established.

4. Criminal law 🔑784(4)

An instruction that if evidence was susceptible of two reasonable interpretations, one of which pointed to defendant's guilt and the other to his innocence, jury's duty was to adopt interpretation admitting of innocence and reject that pointing to guilt, was not adequate substitute for refused instruction that, to warrant conviction on circumstantial evidence, all facts and circumstances necessary to establish guilt must be proved beyond reasonable doubt and be consistent with each other and conclusion of guilt, inconsistent with any reasonable theory of innocence, and so conclusive and satisfactory as to produce in jurors' minds reasonable and moral certainty that defendant committed offense charged.

5. Criminal law 🔑814(17)

In prosecution for robberies while armed, police officers' testimony as to defendant's incriminatory admissions was properly received and constituted direct evidence of defendant's commission of crime, so that prosecution did not rest wholly on circumstantial evidence. Code Civ.Proc. §§ 1831, 1832, 1870.

6. Criminal law 🔑814(17)

Evidence by either sworn testimony or proved admissions of defendant that he committed crime charged is direct evidence of such ultimate fact, as testimony of any other eyewitness of crime would be. Code Civ.Proc. §§ 1831, 1832, 1870.

7. Criminal law 🔑552(1)

A defendant's testimony to, or admission of, matters not conclusively establishing his commission of crime charged, though supporting inference that he committed it, is purely circumstantial evidence insufficient to warrant conviction.

8. Criminal law 🔑516

Evidence of defendant's full confession of his guilt, whether written or oral, is direct evidence of such fact. Code Civ. Proc. § 1831.

9. Criminal law 🔑784(1), 814(17)

Where evidence of defendant's guilt is entirely circumstantial, instruction on law of circumstantial evidence must be given jury, but, if People's case is based on direct evidence and circumstantial evidence is merely incidental and corroborative, refusal of such instruction is not error.

10. Criminal law 🔑784(1)

An instruction on law of circumstantial evidence should be given, where such evidence is substantially relied on to prove defendant's guilt or jurors may find themselves confronted with question whether circumstantial evidence alone is sufficient to prove guilt or essential element of offense.

11. Criminal law 🔑814(17)

Where direct evidence of defendant's guilt is such that jury may conceivably reject it, instruction on law of circumstantial evidence should be given on hypothesis that direct evidence may be rejected, leaving People's case wholly dependent on circumstantial evidence.

12. Criminal law 🔑784(3)

Where jury might reasonably have disbelieved police officers' testimony as to defendant's oral confessions and defendant testified that he made no admission of guilt, court erred in refusing defendant's requested instruction on law of circumstantial evidence.

13. Criminal law 🔑784(1)

Doubt as to whether defendant's requested instruction on law of circumstantial evidence should be given jury should be resolved in defendant's favor.

14. Criminal law 🔑824(5)

Where prosecution relied substantially on evidence of defendant's alleged oral confessions of crime charged, instruction to view with caution evidence of his oral admissions should have been given jury on court's own motion in absence of request therefor by defendant. Code.Civ.Proc. § 2061, subd. 4.

15. Criminal law 🔑824 (7, 9)

In criminal case, where rules of law apply, court must, of its own motion, instruct jury as to accomplices and their testimony and circumstantial evidence rule.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Donald Edgar Koenig and William Richter were convicted of robberies while armed with a revolver, and defendant Richter appeals.

Reversed.

Prior opinion, Cal.App., 160 P.2d 184.

Leola Buck Kellogg and Montgomery G. Rice, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Appellant Richter, Donald Koenig and Ralph Hagenios, were jointly charged with two offenses of robbery while armed with a revolver. Koenig was charged with two prior convictions of felony and admitted them. Hagenios pleaded guilty. Appellant and Koenig were tried by jury and found guilty as charged. They appealed from the judgment and from the orders denying their motions for new trial, but Koenig failed to perfect his appeal and it was dismissed.

On Sunday, May 21, 1944, shortly after midnight, Hagenios entered a cafe on Pico Boulevard near the city of Santa Monica and at the point of a gun robbed the proprietor and a man for whom the proprietor was cashing a check. The proprietor testified that the sum taken was $1915, including $64.13 taken from the customer, and that it consisted principally of $10 bills, the remainder being $1 and $5 bills. Upon leaving the cafe Hagenios fired a shot into the wall, entered a car which was parked at the curb about 25 feet from the cafe, and immediately left the scene. The manner of his departure indicated that another person was driving the car, although no witness testified to having seen one.

Appellant had been employed by the Veterans Administration at Sawtelle for more than eight years and when he left the employment May 4, 1944, he was chief cook. Hagenios had been employed at the same place prior to the robbery and had worked under appellant's supervision. Appellant was married and his wife was away on a vacation on May 5, when appellant and Hagenios went to San Francisco for about two weeks, returning to Los Angeles about May 19. Shortly before the San Francisco trip, Hagenios introduced appellant to Koenig. The latter had stolen a .38 revolver from his employers and had left it in the possession of Hagenios. When appellant and Hagenios returned from San Francisco they rented a room in a hotel at Ocean Park, where Hagenios registered for both of them under fictitious names, although it was not shown that appellant was aware of that fact. In the afternoon following the robbery Koenig went to the hotel room of Hagenios and appellant and when he left took with him the gun, which Hagenios had used in the robbery. About 10 o'clock that night Koenig was arrested while he was attempting to hide the gun in a box in an alley. The gun was then unloaded. About 9 a. m. on the following day five police officers went to the room of appellant and Hagenios and there found forty-nine .38 cartridges. At that time Hagenios had $233 in bills and appellant had $276. One of the arresting officers, Subers, testified that when he found the cartridges, Hagenios said they were his; that appellant denied any knowledge of the crime and told him that the money in his possession had been acquired through the sale of his automobile for $235, a loan of $100, and winnings "on the horses" to the extent of $90, through betting while in San Francisco. This witness then testified that he had had a conversation in the West Los Angeles jail, at which police officer Ward was present a part of the time and officer King a part of the time and during all of the last part of the conversation. The testimony of this witness will be stated somewhat fully, as will that of officer King, in order that the two accounts of alleged admissions of appellant amounting to a confession may be compared. Officer Ward was not called as a witness. Subers testified that he told Hagenios and appellant he had a good case against them and asked them if they wanted to plead guilty; that he told them he expected them "to cooperate" with him, and "get back the rest of the money" that was missing, and that they "both spoke up" and said, "that was all the money they got with the exception of a few dollars they might have spent"; that Hagenios denied getting "any more money from there, and the defendant Richter stated that was all they had gotten"; that the amount they named was $750 to $780; that appellant said it was "$780 to be exact"; that appellant said he had given "Koenig $120 as his share," and Hagenios said he had given Koenig $100 as "his share"; that appellant said "they [he and Hagenios] picked" the automobile up on the night of the robbery "at a drive-in place at Wilshire and Santa Monica Boulevard"; that appellant said he drove the automobile and abandoned it, after the robbery, one block east of the St. John's Hospital in Santa Monica; that the witness asked appellant if the automobile was a LaSalle coupe and appellant stated he did not know what kind of automobile it was; and that they (the officers) did not ask appellant to make a written statement. He testified further that after this conversation, during which officer King was present, he and King brought Koenig from his cell to the cell occupied by appellant and Hagenios where a further conversation was had; that appellant, Hagenios, Koenig, King and the witness were present during said conversation; that the witness said, "Koenig, are you sure you got $220, you said it was just a loan," and that appellant "spoke up and said, 'I gave you [referring to Koenig] $120 and it wasn't a loan.' The defendant Hagenios then spoke and he says 'and I gave you $100 and don't try to lie out of it' "; and that Koenig then said he had furnished the gun and received $220 as his share. He testified that the receipt of money by Koenig was the only matter mentioned in this conversation.

Police officer King testified that he did not recall the first conversation to which Subers had testified but that he had participated in a conversation on May 23rd, at which time appellant, Hagenios and Koenig were present, this being the second conversation testified to by Subers; King testified that he did not make notes, but officers Subers did; that he (King) left before the "conference was over," but he was there most of the time—5 or 10 minutes; that he did not remember that officer Ward was present; that he and Subers took Koenig from his cell to the one occupied by appellant and Hagenios; that they took Koenig inside the cell, and told the three defendants they "wanted to find out more of the details"; that he questioned Richter, and Subers asked Koenig a few questions; that the witness did not remember anything in particular that Koenig said; that he (the witness) asked Koenig to tell about the robbery, and Hagenios "spoke up" and said appellant drove the car, and all three of them were involved; that appellant denied knowing anything about the robbery; that Hagenios called appellant a "fink" and said, " 'You are into this as well as we are, and we are not going to take the rap for this alone,' " and that appellant said he drove the car; that appellant then told him "they" stole the automobile at a drive-in stand on Santa Monica Boulevard in Santa Monica; that he said it was a green convertible coupe, and that it was abandoned in Santa Monica about a block east of St. John's Hospital; that appellant said he knew when he drove the automobile it was "for the purpose of robbery, that the three of them had planned it, that he knew that the money which he had received was the proceeds from the robbery"; that he did not recall any conversation about appellant having given Koenig money; that he and Subers were the only ones who asked any questions; that he did not question Hagenios "particularly," and he did not recall that Subers questioned him; that during this conversation the door to the cell was left open, the three defendants were standing, and the witness stepped into the cell; that before Koenig was taken away the witness left to telephone the Santa Monica police and "have them go over and find the car."

Police officer Barham testified that on May 23rd, he and his partner found a 1937 LaSalle green convertible one block east of St. John's Hospital.

Koenig testified that he had stolen the gun and had left it with Hagenios, whom he had known about 9 years; that on May 21st he went to the hotel room occupied by appellant and Hagenios; that while appellant was absent from the room Hagenios told Koenig about the robbery and he took the gun; that before telling him of the robbery, Hagenios paid him $200 which had been owing to him about two months. He denied having participated in the robbery or receiving any money with knowledge that it had been stolen. He testified that he had met appellant but once before the date of the robbery, and, although admitting that he had signed a confession, denied that he had read it or that he had made any statement to the officers which implicated appellant in the robbery.

Appellant testified that he left the Veterans Administration on May 4, 1944, but he was on the pay-roll until May 15th; that he had known Hagenios about 4 months before they went to San Francisco together; that he (appellant) had approximately $500, consisting of the $235 received from the sale of his automobile, the $100 loan, a pay check for $89.54, $75 savings, and the amount he received when he cashed a $50 bond; that he did not register at the hotel; that on the night of the robbery he was not with Hagenios or Koenig between the hours of 8:30 and midnight; that the first he knew of the robbery was after he had been arrested and was at the police station; that he explained to the police his possession of about $275; that the first time he saw officer King was when King testified; that he did not tell the officers at any time that he had had any part in the robbery; that he did not say that he drove or abandoned the automobile; and that Subers asked him if he drove the LaSalle, and he said "No."

The commissary officer, the steward of the Veterans Administration, and the automobile dealer who purchased appellant's automobile testified to appellant's good reputation. No attempt was made by the prosecution to prove that appellant had not received the sums he mentioned from the sale of his car and the other named sources.

[1] In arguing the insufficiency of the evidence, appellant insists that while the circumstantial evidence placed him under suspicion, it did not necessarily point to his guilt. We are of the opinion that the circumstantial evidence alone was not of sufficient strength to have supported a verdict of guilty. But it did not stand alone; the testimony of the officers as to defendant's confessions, if believed, together with the circumstantial evidence, would have furnished support for the verdict. Appellant earnestly insists that the officers' testimony should have been rejected by the jury for the reason that it was so contradictory and inconsistent as to be of no value as evidence, and that for the same reasons it should be disregarded upon appeal in a consideration of the sufficiency of the evidence. It could have been argued to the jury with much force that the testimony should be accorded no weight whatever. A comparison of the accounts of the claimed interviews given by the two officers reveals surprising discrepancies and inconsistencies. Officer Subers testified to an interview with appellant and Hagenios, at which officer King was present, but not Koenig, and in which statements were made by appellant that he participated in the theft of the car, drove it, and received a portion of the stolen money. He testified to a later conversation with appellant, Hagenios and Koenig, when King also was present, in which, as he testified, nothing was mentioned except the fact that Koenig had received part of the money. Officer King had no recollection of the first conversation testified to by Subers when appellant and Hagenios alone were interviewed. In giving an account of an interview with the three defendants, to which Subers had testified, King did not recall that anything was said about the receipt of money by Koenig which, according to Subers, was the only matter mentioned. And officer King recounted a lengthy and detailed interview with the three defendants, participated in by Subers, which was wholly at variance with the testimony of the latter. While both officers testified that at one time or another appellant admitted full participation in the robbery, a careful comparison of their testimony as to the interviews in which the admissions were claimed to have been made fails to disclose other points of agreement. It would appear that the recollection of one or the other or of both as to the circumstances and the substance of the interviews was seriously defective. Having quoted the substance of their testimony, we shall not mention other points of dissimilarity. We think the testimony of the officers was lacking in that degree of accuracy and fidelity without which testimony of oral confessions of guilt must necessarily be regarded as unconvincing and unsatisfactory.

It does not follow, however, as a matter of law that the testimony was wholly without evidentiary value. The jury might have rejected it or might have resolved the conflicts by accepting the testimony of one of the officers and rejecting that of the other. The evidence was not legally insufficient, when considered with the circumstantial evidence, to justify the verdict but it clearly was not of such convincing character as to require an affirmance of the judgment, in view of the failure of the court to give instructions which we shall now consider.

[2-4] Appellant requested an instruction reading as follows:

"In order that a jury may be warranted in finding a defendant guilty on circumstantial evidence, all the facts and circumstances necessary to establish the conclusion of guilt must be proved beyond all reasonable doubt, all such facts and circumstances must be consistent with each other and with the conclusion sought to be established which is that the person on trial committed the crime as charged. All such facts and circumstances must be inconsistent with any reasonable theory of the innocence of the defendant William Richter and such facts and circumstances taken all together must be of such conclusive and satisfactory nature as to produce in the minds of the jurors a reasonable and moral certainty that the person on trial, William Richter and not some other person committed the offense charged."

The court instructed as follows:

"If the evidence in this case, as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilty of a defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of such defendant's innocence, and reject that which points to his guilt."

The instruction as requested was not in proper form. The rule relating to the consideration of circumstantial evidence is simple. It is that a conviction may not be based upon circumstantial evidence alone unless each circumstance in the chain of circumstances relied upon to establish guilt is not only consistent with the guilt of the accused but also inconsistent with his innocence. It should be stated as a distinct proposition of law and not in combination with a statement of the doctrine of reasonable doubt. The latter doctrine has application to the manner in which the jury should determine what circumstances have been established by the evidence. The circumstantial evidence rule has application to an analysis and comparison of the circumstances that have been established. The second quoted instruction was not an adequate substitute for the one which was refused. People v. Bender, 1945, 27 Cal.2d 164, 163 P.2d 8; People v. Hatchett, 1944, 63 Cal.App.2d 144, 146 P.2d 469; People v. Rayol, 1944, 65 Cal.App.2d 462, 150 P.2d 812. A repetition of what was said on the point in those cases is unnecessary. See also, statement of Supreme Court in denying hearing in People v. Graves, 1934, 137 Cal.App. 1, 21, 29 P.2d 807, 30 P.2d 508. In the Hatchett and Rayol cases refusal to give requested instructions similar to the one requested by appellant herein was held reversible error. In the Bender case, although the circumstantial evidence of guilt was deemed to be so convincing as to preclude a reversal of the judgment, it was held to be the duty of the court to give such an instruction of its own motion.

[5-8] The People, in defending the refusal of the requested instruction, say: "In the case at bar, appellant Richter's participation in the crime was not established solely by circumstantial evidence. We have in the record alleged admissions made by him that he drove the automobile used by one of his confederates in the commission of the crime, that they had stolen this automobile and had abandoned it after the robbery on a street in Santa Monica, and that he had given defendant Koenig part of the spoils received in the robbery. Therefore, the situation here is not at all comparable to that stated in either People v. Rayol, supra, or People v. Hatchett, supra."

Appellant replies that the testimony of the police officers as to appellant's admissions was circumstantial and not direct evidence, and hence the entire case against him was based upon circumstantial evidence, citing from the Code of Civil Procedure:

"Sec. 1831. Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

"Sec. 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred."

The contention that the prosecution was based upon circumstantial evidence, alone, is not borne out. The testimony given by the officers was direct evidence only insofar as it tended to prove that defendant made the admissions, but if their testimony had been believed it would have been sufficient to prove that appellant himself gave direct evidence of the facts which he admitted. Although his evidence would not have been given under oath, evidence that he had made admissions was properly received under section 1870 of the Code of Civil Pro cedure, and his statements, as testified to, would have constituted direct evidence that he committed the crime. One who commits a crime is, of course, an eye-witness, and if he gives evidence of the fact that he committed the crime, either by sworn testimony or proved admissions, it is direct evidence of the ultimate fact in dispute, just as the testimony of any other eye-witness would be, for the reason that if the things testified to, or admitted, be true, they conclusively establish the fact that he committed the crime. If, however, the matters testified to, or admitted by the defendant, though truly stated, would not conclusively establish the commission of the crime by him, although supporting an inference that he committed it, such evidence would be purely circumstantial. The distinction between direct and indirect evidence stated in the code provisions places evidence of a confession in one class and admissions of accusatory circumstances in the other. If a full confession of guilt is received in evidence, it is direct evidence of the fact in issue, whether it be written or oral. Evidence of a full confession made orally, is not less direct evidence than a written confession would be. To distinguish between the two in this connection, as some courts have done, is to confuse the weight of the evidence with the nature of it. The testimony of the officers to which we have referred, if believed, was sufficient to prove an admission by defendant that he aided and abetted in the commission of the crime. Therefore there was direct evidence that he committed the crime and the case of the People did not rest wholly upon circumstantial evidence.

[9-13] But the right of a defendant to have the jury instructed in the law of circumstantial evidence is not confined to cases where the evidence relied upon by the prosecution is completely and exclusively circumstantial.

The cases which have considered the necessity for instructions on circumstantial evidence are subject to classification as (1) those where the evidence is merely circumstantial, (2) those in which the prosecution depends upon direct evidence, the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence and (3) cases in which the prosecution is founded "mainly" or "chiefly," although not entirely, upon circumstantial evidence. If the evidence is entirely circumstantial the instruction in question must be given. People v. Dick, 1867, 32 Cal. 213; People v. McClain, 1931, 115 Cal.App. 505, 1 P.2d 1085. If the case of the People is based upon direct evidence, and the circumstantial evidence is merely incidental and corroborative, it is not error to refuse the instruction (People v. Ortiz, 1923, 63 Cal.App. 662, 219 P. 1024; People v. Lapara, 1919, 181 Cal. 66, 183 P. 545; People v. Williams, 1933, 134 Cal.App. 232, 25 P.2d 259; People v. Raber, 1914, 168 Cal. 316, 143 P. 317; People v. Burns, 1898, 121 Cal. 529, 53 P. 1096; People v. Baldwin, 1897, 117 Cal. 244, 49 P. 186), and so it has frequently been said that it need not be given if the People do not rely mainly or chiefly upon circumstantial evidence. People v. Gorman, 1916, 31 Cal.App. 762, 161 P. 757; People v. Allen, 1934, 138 Cal.App. 652, 33 P.2d 77. In People v. Miller, 1932, 126 Cal.App. 162, 165, 14 P.2d 342, it was stated that the jury need not be instructed in the law of circumstantial evidence unless the prosecution is rested "wholly and solely" upon circumstantial evidence. This erroneous concept of the rule is the one advocated by the People upon the present appeal, and has been followed at times in the trial courts. The words "mainly" and "chiefly" found in the decisions are somewhat indefinite. A clear and definite statement is found in People v. Bender, supra [163 P. 2d 15], to the effect that the instruction should be given "where circumstantial evidence is *substantially* relied upon for proof of guilt." (Emphasis added.) Stated in another way, in order to point out its application in appellant's case, the instruction should be given in every case in which the jurors may find themselves confronted with the question whether the circumstantial evidence alone is sufficient to prove guilt or sufficient to prove an essential element of the offense. Where there is some direct evidence of guilt, but it is of such a character that the jury may conceivably reject it, the instruction should be given upon the hypothesis that it may be rejected, leaving the case of the People wholly dependent upon circumstantial evidence. People v. Hatchett, supra, was such a case. People v. Rayol, supra, was a case in which it was necessary to prove an essential element of the offense by circumstantial evidence. See also People v. DeVoe, 1932, 123 Cal.App. 233, 239, 11 P.2d 26. The present case is one in which the jury might reasonably have disbelieved the testimony of the officers as to appellant's claimed confessions. If the jury had believed appellant's testimony that he had made no admission of guilt, only the circumstantial evidence would have remained for consideration. The court could not know and could not properly assume that the officers would be believed. In any case where it is questionable whether the instruction should be given, the doubt should be resolved in favor of the accused and the instruction should be given.

[14] Since the prosecution relied substantially upon the evidence of appellant's alleged oral confessions, it was necessary that the jury be instructed, as required by section 2061 of the Code of Civil Procedure, subdivision 4, that evidence of the oral admissions of a party ought to be viewed with caution. In Conger v. White, 1945, Cal.App., 158 P.2d 415, we had occasion to consider the refusal of requested instructions that the testimony of an accomplice ought to be viewed with distrust and the evidence of the oral admissions of a party with caution. Upon authority of the holding in People v. Dail, 1943, 22 Cal.2d 642, 140 P.2d 828, that such instructions should be given in all proper cases, and that the failure to give them might constitute reversible error, we held that in view of the evidence it was prejudicial error to refuse the requested instructions. In the instant case appellant did not request an instruction that testimony of his oral admissions ought to be viewed with caution. Nevertheless, it is our opinion that it was the duty of the court to give the instruction of its own motion. The code declares that the instruction should be given on all proper occasions; the legislature has, in effect, declared that there are proper occasions, and the case of appellant is certainly one of them.

[15] The court must of its own motion instruct the jury in criminal cases, where the rules of law apply, with respect to accomplices and their testimony (People v. Warren, 1940, 16 Cal.2d 103, 104 P.2d 1024; People v. Heddens, 1936, 12 Cal.App.2d 245, 55 P.2d 230), and as to the circumstantial evidence rule hereinbefore discussed (People v. Bender, 1945, 27 Cal.2d 164, 163 P.2d 8); also, as to vital principles applicable to numerous other situations. People v. Putnam, 1942, 20 Cal.2d 885, 890, 129 P.2d 367. It is not debatable whether there is as much need to instruct that the testimony of police officers as to oral admissions or confessions ought to be viewed with caution as to instruct that the testimony of accomplices should be viewed with distrust. The code establishes the law and the courts make no mistake when they follow it. There could scarcely be a more appropriate case for the instruction than one in which there is a close question whether a person accused of crime made oral admissions or a confession to police officers while in custody. If the jurors had viewed the testimony of the police officers with caution, and had scrutinized and weighed it critically, as the law requires should be done, they would have found tenable grounds for rejecting it, and it is not improbable that they would have rejected it if they had been properly instructed as to their duties in weighing it. By reason of the refusal of the first mentioned instruction, the jury were unadvised as to the manner in which the circumstantial evidence should be weighed. Also, the failure to give an instruction applicable to the testimony of the alleged oral confessions left them unguided as to the rule pertaining to the consideration of evidence of oral admissions, which was the only direct evidence in the case. Whether the verdict was based upon the direct or the circumstantial evidence, or upon both, it represents a decision as to the weight of the evidence in which controlling principles of law were not stated to the jury and were given no consideration. The proof of guilt was not so strong as to permit an affirmance of the judgment notwithstanding the mentioned errors.

It is unnecessary to discuss other alleged errors urged by appellant.

The judgment and the order denying appellant Richter's motion for new trial are reversed.

DESMOND, P. J., concurs.

WOOD, Justice (dissenting).

I dissent. According to the majority opinion, the judgment of conviction is being reversed principally because the trial judge refused to give a certain instruction proposed by defendant, relative to circumstantial evidence. I agree with the statement in the majority opinion that the refused instruction "was not in proper form." In addition to that criticism, that it was not in proper form because it mixed the rule relating to the consideration of circumstantial evidence with a statement as to reasonable doubt, that instruction was misleading and confusing. The trial judge exercised good judgment in refusing to give it. The refused instruction included the statement that: "In order that a jury may be warranted in finding a defendant guilty on circumstantial evidence * * * all such facts and circumstances must be consistent with each other * * *." In view of the evidence as to obvious inconsistent statements by the officers, concerning such incidental matters as who were present at conversations and where those who were present stood during the conversations, the refused instruction was tantamount to an instruction directing a verdict in favor of defendant.

The presentation of such a misleading instruction, which it was likely that a trial judge would not give but which in confusing language referred to a principle of law that might properly be given, afforded the appellant a convenient reservation for an argument on appeal, such as his counsel now makes, to the effect that the trial judge committed reversible error because he did not modify the proposed instruction so that it would state fairly in clear language a principle of law referred to therein. Although it is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not requested by the parties, the court was not required to revise an instruction so calculatingly designed. As to whether, under the record here, the trial judge upon his own motion should have prepared and given an instruction to the effect that the evidence should be consistent with guilt and inconsistent with innocence, reference will be made later herein after referring to some of the evidence. The majority opinion, after declaring that the refused instruction was not in proper form, states (at a later place therein) that "By reason of the refusal of" that instruction "the jury were unadvised as to the manner in which the circumstantial evidence should be weighed."

Counsel for appellant in her briefs on appeal and in her petition for a rehearing argues that the trial judge erred prejudicially in refusing the instruction because the evidence was wholly circumstantial—that the evidence as to admissions was circumstantial evidence, and that the evidence being wholly circumstantial the trial judge was required to give the instruction. Counsel for appellant errs in asserting that the evidence was wholly circumstantial. Such evidence as to appellant's admissions of guilt was direct evidence. See Note, 40 A.L.R. 571. The majority opinion does state that "the case of the People did not rest wholly upon circumstantial evidence." It also states that: "The testimony given by the officers was direct evidence only insofar as it tended to prove that defendant made the admissions, but if their testimony had been believed it would have been sufficient to prove that appellant himself gave direct evidence of the facts which he admitted." The character of evidence, as to whether it is direct, is to be determined from the nature of the evidence, and it is not dependent upon whether the evidence is believed by the jury. The trial judge, in determining what instructions to give to the jury, is in a position to consider only the nature of the evidence.

Officer Subers testified that appellant said "they" stole the automobile, that he drove it in taking Hagenios away from the scene of the robbery, that he abandoned it after the robbery at a certain place, that he had given Koenig $120 as his share of the robbery money, that the money which the officers had recovered from the three defendants ($729) "was all the money they got with the exception of a few dollars," and that the amount was "$780 to be exact."

Officer King, who was present during part of the time the conversations with appellant were held, testified that appellant said that "they" stole the automobile, that he drove it from the scene of the robbery, that he abandoned it after the robbery at a certain place, and that he knew that the money he received was from the robbery. He also testified that he did not recall any conversation about appellant having given money to Koenig.

It is true that the testimony of those officers, concerning incidental matters as to who were present when the conversations were had and where those who were present stood during the conversations, was inconsistent. As to the important and material part of the conversations, namely, that appellant admitted participation in the robbery, the testimony of the officers was consistent and certain. That direct evidence as to appellant's connection with the actual commission of the robbery was strong.

In addition thereto the evidence showed that appellant and Hagenios, who actually committed the robbery by displaying and firing a revolver, had spent two weeks together in San Francisco just prior to the robbery. At the time of the robbery appellant, who apparently had a home in Los Angeles, and Hagenios, the robber, were rooming together in a hotel under fictitious names—the names having been signed by one of them while both were present. When the officers entered their hotel room appellant was there with the actual robber. In the room there were forty-nine .38 caliber cartridges and a cartridge box which originally held fifty such cartridges. When Hagenios left the cafe, after committing the robbery, and entered the waiting automobile it was driven away immediately. The automobile was found by officers in the place where appellant said he had abandoned it. Koenig had stolen the gun that was used in the robbery, and had been in the room of appellant and Hagenios with them within a few hours prior to the time Koenig was arrested while trying to hide the gun in an alley. The total amount of money taken by the officers from the three defendants was $729—being $276 from appellant, $233 from Hagenios, and $220 from Koenig. It appeared therefore that each had approximately one-third of $729. The victim of the robbery had been cashing wage checks for ten years, and appellant had lived next door to him for six months about two years prior to the robbery. (A detailed statement of the evidence in this case is in the opinion appearing in 160 P.2d 184.) It appears therefore that there was substantial evidence of circumstances involving appellant with the robbery.

As above shown, however, the evidence was not wholly circumstantial, but included direct evidence, consisting of admissions of appellant that he actually participated in committing the robbery.

In the recent case of People v. Bender, Cal., 163 P.2d 8, cited in the majority opinion, the evidence which tended to show that defendant killed his wife was entirely circumstantial. The trial court therein instructed the jury that "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." The Supreme Court held (163 P.2d at page 16) that that instruction was eminently proper as far as it went, but to it should have been added a statement to the effect that to justify a conviction the circumstances must not only be consistent with the theory of guilt but must be inconsistent with any other rational conclusion. The court held further (163 P.2d at page 16) that since the above quoted instruction was given, the failure to give the further instruction was not, upon the facts of that record, ground for reversal.

The trial court herein gave an instruction which was practically the same as the one given in the Bender case. The one given herein was as follows: "If the evidence in this case, as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilty of a defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of such defendant's innocence, and reject that which points to his guilt." Even if the additional statement, referred to in the Bender case, should have been required herein, the failure to give it was not, upon this record, which included strong direct evidence, ground for reversal.

The majority opinion discusses at some length the weight of the evidence as to the admissions of guilt. In that opinion it is stated that if the jury had weighed the evidence critically "they would have found tenable grounds for rejecting it." The fact that the testimony of the officers was inconsistent as to details incidental to the conversations has been assigned as a reason why the jury might have rejected it. On the contrary, if their testimony had been consistent as to all those details that fact might have been assigned, with more force, as a reason why their testimony should be rejected. The jury and the trial judge, having observed the witnesses while testifying, were in the best position to determine the weight of the evidence. After the verdict that appellant was guilty, the trial judge approved the verdict upon his denial of the motion for a new trial and thereby determined that there was no miscarriage of justice. It was stated in People v. Lindley, Cal., 161 P.2d 227, at page 233: "The weight to be accorded the statement of each of the witnesses was a question exclusively for the determination of the jury and the verdict, which received judicial approval upon denial of the motion for a new trial may not, therefore, be disturbed upon appeal." See People v. Holman, Cal.App., 164 P.2d 297.

The trial judge, having had the advantage of being present when the witnesses testified, was in a better position than this reviewing court is in to determine whether a statement, to the effect that the evidence should be consistent with guilt and inconsistent with innocence, should have been added to the instruction which was given. The instruction, above quoted, which the trial judge gave was clear, direct and highly favorable to the defendant, stating in effect that if there were two reasonable interpretations of the evidence, one pointing to guilt and the other to innocence, it was the duty of the jury to find the defendant not guilty. The statement, relative to evidence being consistent with guilt and inconsistent with innocence, which might have been added to that instruction was not, of course, as clear and as ordinarily understandable as the instruction which was given, and in my opinion it would have been of little consequence, if any, under the evidence in this case, if it had been given. The rule as stated in People v. Bender, Cal., 163 P.2d 8, at page 15, that said statement "should be declared to the jury in every criminal case wherein circumstantial evidence is received," is a good rule. The fact, however, that a trial court fails to declare such statement does not signify that a judgment of conviction should be reversed. In the case of People v. Bender, cited in the majority opinion, the trial court had not included such statement in the instruction and the Supreme Court held that, upon the record therein, such failure was not ground for reversal, even though the evidence was wholly circumstantial. In the present case the evidence was not wholly circumstantial but, as above shown, included direct evidence consisting of several admissions of guilt. As stated in People v. Newland, 15 Cal.2d 678, at page 682, 104 P.2d 778, at page 780, in referring to the rule relative to the evidence being consistent with guilt and inconsistent with innocence: " 'The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant.' " See People v. Holman, Cal. App., 164 P.2d 297. The jury was instructed fully as to reasonable doubt and was given the specific instruction, above quoted, relative to adopting an interpretation of the evidence pointing to innocence. In the Hatchett and Rayol cases, referred to in the majority opinion, there were no admissions of guilt.

The trial judge ably performed his duty to assure the defendant a fair trial. As above stated, the trial judge exercised good judgment in rejecting the misleading and confusing instruction, designed to reserve the very question now engaging the attention of the court. It would have been an easy matter for appellant's counsel to propose an instruction stating in simple, clear language the rule of law which she asserts should have been given. The failure of the trial court to give, of its own motion, such an additional instruction is not, under the evidence and the record, ground for reversal. It cannot be said that a miscarriage of justice has resulted. The weight to be accorded the testimony was exclusively for the determination of the jury, and of the trial judge upon the motion for a new trial. The People should not be required, under the record here, to retry this case.

According to the majority opinion, the trial court of its own motion should have instructed the jury to view the testimony of the officers with caution. Upon the record here the failure to give such an instruction likewise was not a ground for reversal.

In my opinion the judgment and order denying the motion for a new trial should be affirmed.

72 Cal.App.2d 545

FITZSIMMONS v. FITZSIMMONS.

Civ. 3431.

District Court of Appeal, Fourth District, California.

Jan. 14, 1946.

Rehearing Denied Feb. 5, 1946.

1. Divorce ⚷130

Evidence sustained judgment denying husband a divorce on ground of extreme cruelty.

2. Husband and wife ⚷297

In husband's action for divorce where wife filed cross-complaint for separate maintenance, evidence supported finding that husband deserted wife.

3. Appeal and error ⚷1039(13)
Husband and wife ⚷296

Where wife by cross-complaint sought separate maintenance on ground of extreme cruelty but evidence supported finding of desertion by husband, good practice should have required filing of an amended cross-complaint, to conform to the proof, alleging willful desertion, but failure to file amended cross-complaint did not require reversal in view of fact that evidence was received without objection and was sufficient to support a finding of willful desertion and judgment for separate maintenance.

4. Appeal and error ⚷197(3)

Where wife filed cross-complaint seeking separate maintenance on ground of extreme cruelty and evidence supporting finding of desertion and judgment for separate maintenance was received without objection, error in failure to amend cross-complaint to conform to proof could have been corrected in trial court, had timely objection been made, and the question could not be raised for first time on appeal.

5. Appeal and error ⚷1071(1)

Where uncontradicted evidence clearly showed that husband's desertion of wife was willful and no other finding on that question could have been made, the fact that court found the desertion to be wrongful and did not find it to be willful did not require reversal. Civ.Code, §§ 92, 137.

6. Appeal and error ⚷1071(6)

Where a finding, if made, of necessity would have been adverse to appellant, the failure to make such a finding is not a ground for reversal of judgment.

7. Appeal and error ⚷886

The District Court of Appeal has authority to amend findings to conform to proof.

8. Appeal and error ⚷886

Where court rendering judgment for separate maintenance found desertion of husband to be wrongful, and did not find it to be willful, but uncontradicted evidence clearly showed that husband's desertion was willful and no other finding on that question could have been made, the finding would be amended to conform to the proof.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by Woodrow Wilson Fitzsimmons against Glendora A. Fitzsimmons for divorce, wherein the defendant filed a cross-complaint for separate maintenance. From a judgment denying plaintiff a divorce and awarding defendant custody of a minor child and allowing her support for herself and child and dividing community property, plaintiff appeals.

Affirmed.

Cyril A. Walton, of Los Angeles, for appellant.

Charles W. Hinman, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment denying plaintiff a divorce and awarding defendant the custody of the minor child of the parties, allowing her $29 a week for the support of herself and the child and dividing the community property.

Plaintiff filed his action seeking a divorce on the ground of extreme cruelty. Defendant answered denying the extreme cruelty and filed a cross-complaint for separate maintenance, alleging extreme cruelty, to which plaintiff filed an answer denying the cruelty.

We have studied the entire record and it is apparent from the evidence that the marital troubles of the couple grew out of the drinking habits of both parties. They both drank frequently together, usually in moderation but occasionally to excess. The greater part of this drinking occurred at the home of plaintiff's mother, whom he insisted they visit frequently. On several occasions after consuming too much liquor, each of the parties used vile and profane language.

The trial court found that on one occasion plaintiff became angry, left the home of the parties and stayed away several days; that he was quiet, moody and often unsociable and refused to talk with defendant; that he gambled, used vile language in her presence, and withheld financial information from her; that he insisted on handling all family funds and only entrusted defendant with a few cents at a time. The parties acquired a residence and at one time plaintiff had accumulated $1300 in cash and bonds from his wages and gambling.

The trial court found that because of the background, training and associates of plaintiff, defendant's conduct did not constitute mental cruelty, and also because of the circumstances of the parties and the feelings and propensities of defendant, plaintiff's conduct did not cause her extreme mental suffering.

Plaintiff argues that while the trial judge found acts and conduct on the part of defendant which were not proper and which in numerous cases have been held to constitute extreme cruelty, he found that these acts did not cause plaintiff grievous mental suffering which was an abuse of discretion sufficient to justify a reversal of the judgment.

The same argument was made in Parnay v. Parney, 55 Cal.App.2d 703, 131 P.2d 562, 563, and was disposed of as follows:

"Here the court has found to be untrue, not only the allegations of plaintiff's complaint as to the asserted acts of defendant, but also her allegations that said acts caused her grievous mental suffering. Unless defendant's acts did have that effect, they cannot be said to have constituted extreme cruelty even though they may have made it unpleasant for plaintiff to live with defendant. It was said in MacDonald v. MacDonald, 155 Cal. 665, 670, 671, 102 P. 927, 929, 25 L.R.A.,N.S., 45:

"' "Whether in any given case there has been inflicted this 'grievous mental suffering' is a mere question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party, and no arbitrary rule as to what probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given. * * * A correct decision must depend—as most cases depend—upon the sound sense and judgment of juries and courts." Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660. From the very nature of the question it results that in its determination the trial judge, who has the parties before him for observation in the light of the evidence must be invested with a wide range of discretion. It is settled that the finding of the trial court on this question will not be disturbed on appeal unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court. Andrews v. Andrews, 120 Cal. 184, 187, 52 P. 298; Avery v. Avery, 148 Cal. 239, 244, 82 P. 967.'

"In Maloof v. Maloof, 175 Cal. 571, 573, 166 P. 330, 331, the court said: 'The appellant's case must rest upon the inflicting of "grievous mental suffering." * * * Whether or not harsh treatment, unaccompanied by physical violence, has caused "grievous mental suffering," is a "question of fact, to be deduced from all the circumstances of each particular case." Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L.R.A.,N.S., 45.'"

[1] As the question was one of fact and as there are reasonable inferences supporting the conclusions of the trial judge, we cannot disturb the judgment on that ground.

Plaintiff argues that a wife who seeks separate maintenance in an action brought for divorce by her husband cannot obtain any relief under section 136 of the Civil Code but must obtain it under section 137 of that code, citing Sweasey v. Sweasey, 126 Cal. 123, 58 P. 456; Helpling v. Helpling, 50 Cal.App. 676, 195 P. 715; and Tayian v. Tayian, 64 Cal.App. 632, 222 P. 377. He also argues that a guilty wife cannot obtain separate maintenance from an innocent husband. Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351.

These arguments cannot affect the ultimate decision of the case and need not be further considered.

In finding numbered six the trial court found: "That on the 22nd day of September, 1944, plaintiff wrongfully deserted and abandoned defendant, and ever since said date has continued to live separate and apart from her against her will and without her consent."

Plaintiff points out that there is no allegation of wilful desertion in the cross-complaint and that this finding goes beyond the issues made by the pleadings, which is true.

[2] The evidence of plaintiff's desertion of defendant is found in his own testimony and that of John R. Wellington, the stepfather of defendant. This evidence shows that either on the 22nd or 24th of September, 1944, plaintiff took defendant to the home of her mother and left her there; that he told her in effect that this was the end; that he was suing her for divorce. This evidence was received without objection and supports the finding of desertion of defendant by plaintiff.

[3, 4] Good practice should have required the filing of an amended cross-complaint to conform to the proof, alleging wilful desertion. While this was not done, we need not reverse the judgment as the evidence was received without objection and is sufficient to support a finding of wilful desertion and the judgment for separate maintenance. The error could have been corrected in the trial court, had timely objection been made, and the question should not be raised here for the first time.

[5] Plaintiff points out that sections 137 and 92 of the Civil Code provide that desertion must be wilful in order to support a judgment for separate maintenance or for divorce on that ground and that the trial court found the desertion to be wrongful but did not find it to be wilful. This is true.

The uncontradicted evidence to which we have already alluded clearly shows that plaintiff's desertion of defendant was wilful. No other finding on that question could have been made.

[6-8] It is well settled that when a finding, if made, of necessity would have been adverse to an appellant, the failure to make such a finding is not a ground for a reversal of the judgment. Many cases supporting this rule are cited in 24 Cal.Jur. pages 944 and 945, sec. 188, and in Volume 10 of the Ten Year Supplement, pages 741 and 742, sec. 188. Further, we have authority to amend the findings to conform to the proof which we will do in this case.

The judgment rendered in this case is supported by the cases of Booth v. Booth, 100 Cal.App. 28, 279 P. 458; Broad v. Broad, 35 Cal.App. 646, 170 P. 658; Jacobs v. Jacobs, 68 Cal.App. 725, 230 P. 209; and Mohr v. Mohr, 33 Cal.App.2d 274, 91 P.2d 238.

Finding of fact number six is amended by adding the words "wilfully and" after the word "plaintiff" and before the words "wrongfully deserted".

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

72 Cal.App.2d 508

ELMS v. ELMS.

Civ. 15128.

District Court of Appeal, Second District, Division 2, California.

Jan. 11, 1946.

As Modified Feb. 7, 1946.

1. Judgment ⊂⇒363

Code section authorizing vacation of a judgment taken against a defendant through his mistake, inadvertence, surprise and excusable neglect should be liberally construed to the end that trials on the merits may be had. Code Civ.Proc. § 473.

2. Judgment ⊂⇒363

Judgment will not be vacated under code section authorizing such action when judgment is taken against defendant through his mistake, inadvertence, surprise and excusable neglect, where to do so would be the equivalent of granting a new trial at the capricious demand of a defendant who was either grossly negligent or had changed his mind after the judgment. Code Civ.Proc. § 473.

3. Judgment ⊂⇒143(3)

To be relieved of a default on the ground that judgment was entered against defendant through his mistake, inadvertence, surprise and excusable neglect, defendant must establish that he acted in good faith and must demonstrate that his excusable neglect was actual cause of his failure to attend the trial. Code Civ.Proc. § 473.

4. Judgment ⚷363

Under code section authorizing the vacation of a judgment obtained through defendant's mistake, inadvertence, surprise and excusable neglect, "excusable neglect" is that neglect which might have been the act of a reasonably prudent person under the same circumstances and "inadvertence" must be something more than mere inadvertence in the abstract. Code Civ. Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Excusable Neglect" and "Inadvertence".

5. Judgment ⚷143(3)

As respects the validity of a default judgment entered against a litigant, courts do not act as guardians for incompetent litigants or for those who are grossly careless of their own affairs. Code Civ.Proc. § 473.

6. Judgment ⚷143(3)

The law frowns upon setting aside default judgments resulting from inexcusable neglect of person against whom judgment is rendered. Code Civ.Proc. § 473.

7. Judgment ⚷363

The only occasion for application of code section authorizing the vacation of a judgment entered against defendant through his inadvertence, surprise or excusable neglect is where defendant is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Code Civ.Proc. § 473.

8. Judgment ⚷143(3), 145(2)

A default judgment taken in the absence of a party who was duly served with process and entered an appearance in the action, will not be vacated, so as to grant a new trial merely because such party's suggested proof was not before the court or upon his mere request or as a reward for his change of mind, and, in any event, he must show that upon a new trial, with his forces all present, a different judgment would probably ensue. Code Civ. Proc. § 473.

9. Judgment ⚷159

Defendant's affidavit disclosing that he knew that annulment action was pending against him and took such steps as he did take after deliberate consideration and, at most, disclosed, first, a definite plan to permit a judgment of annulment against him and, second, a subsequent change of mind, was insufficient to authorize vacation of default judgment on the ground of excusable neglect. Code Civ.Proc. § 473.

10. Judgment ⚷162(1)

Order vacating default judgment annulling marriage, even if affidavit of defendant made a prima facie case for relief against judgment, in light of counter-affidavits of plaintiff, was unauthorized as an arbitrary decision upon the total proof. Code Civ.Proc. § 473.

11. Judgment ⚷363

The doctrine, that the granting of relief under code section authorizing the vacation of a judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect is primarily committed to discretion of trial court, does not mean that the notion, caprice or inordinate disregard of the opposing evidence should be allowed to control, and such decision must be rooted in sound discretion based upon a fair consideration of total evidence and grounded upon principles of justice and fair dealing. Code Civ.Proc. § 473.

12. Appeal and error ⚷957(1)

In the light of requirements that person against whom default judgment of annulment is taken must prove excusable neglect by preponderance of evidence in order to have judgment vacated, if from a scrutiny of all the evidence it is clear that court abused its discretion in holding that there was excusable neglect by defendant, order must be reversed. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Virginia Randall Elms against John William Elms, Jr., for annulment wherein, pursuant to stipulation, the case was tried in defendant's absence as a default case, and plaintiff was awarded a decree. From an order vacating the decree of annulment, plaintiff appeals.

Reversed.

Frank H. Love, of Los Angeles, for appellant.

No appearance for respondent.

MOORE, Presiding Justice.

The question for decision is whether the trial court abused its discretion in vacating a judgment of annulment under section 473, Code Civil Procedure, where defendant had filed a general denial, had authorized his counsel to stipulate that the case might be tried in defendant's absence as a default case, was notified of the trial date one week prior thereto and did not attend the trial but by telegrams discharged his attorney and requested the court to grant a continuance and permit him to file a cross complaint. Respondent makes no appearance on this appeal.

The parties had celebrated a marriage ceremony at Vallejo in January 1945. On May 9 plaintiff filed this action in three counts for annulment, including in the third count a charge of defendant's sexual perversion. On the following day defendant, then a member of the naval forces, by writing authorized attorney Seay to file answer and "to stipulate with opposing counsel that the matter may be set down for trial in my absence and that the same may be heard as a default case." On May 11 defendant's appearance was prepared containing a stipulation that the count charging sex perversion be dismissed and that his pleading be filed within 10 days. Such appearance was filed on May 23 by his answer containing a general denial. On May 31 counsel filed a stipulation qualifying the action for immediate trial and it was set for June 7 at 9:30 a.m. While defendant was promptly advised of the date of trial and was able to attend he made no appearance. Plaintiff made proof and obtained a decree annulling the marriage.

Following his change of counsel defendant on June 21 served and filed his motion to set aside the judgment on the ground that it "was taken against the defendant through his mistake, inadvertence, surprise and excusable neglect." Code Civ.Proc., sec. 473.

1. Defendant's Supporting Affidavit

In support of the motion defendant presented his own affidavit in which he avers that the judgment was taken (1) through his excusable neglect, etc., and through the collusion of his attorney with counsel for plaintiff; (2) that he had lived happily with his wife until her mother visited them in April; that plaintiff then announced that she desired a divorce; that on May 4 she journeyed to Los Angeles and on her return stated that her attorney had papers drawn for annulment; that she then presented him an answer for his verification and a letter authorizing attorney Seay to act for him; that he did not see a copy of the complaint until June 11; that prior to June 9 he was unaware that Seay occupied offices in the same suite with plaintiff's attorney; that he did not sign the two documents until May 15 when he was confined to the hospital at Vallejo and after signing he delivered them to plaintiff for mailing upon her representation that she would withhold action pending his recovery and that if he, after a rest, should recover she would resume living with him; that he was induced to sign the papers by her statement that she would visit him no more unless he signed them; that on May 30 he was informed by plaintiff that the trial date was June 7; that about June 1 he made demand upon Seay that he cause a postponement of the action until September 1, 1945, and to supply him with a copy of plaintiff's complaint; that while the attorney's letter enclosed with the copy was dated June 4, it was not posted until June 6, 1945, and on June 7 was received by defendant; that he had not been informed of the stipulation for a trial on June 7 before his receipt of that letter; that on June 4, by telegram, he withdrew his "authorization and answer" on the ground of plaintiff's misrepresentations and declared his desire to contest the action; that at the same time he wired the county clerk to the same effect, requesting him to inform the judge that he desired to change attorneys "and file answer and cross complaint"; that on June 7 plaintiff and her counsel appeared before the trial court and introduced her proof that the marriage had not been consummated by the sexual act by reason of defendant's inability or refusal; that Seay was present but did not request a continuance or advise the court of defendant's desire to contest the action; that he did not know until June 11 when he read the original complaint that he had been accused of being a sex pervert; that he did not know prior to June 7 that plaintiff claimed that the marriage had not been consummated; that in answer to his inquiry as to the grounds of her action plaintiff had stated that she had alleged that defendant "was presently unable to consummate sexual relations due to his nervous condition for which he had been hospitalized"; that prior to June 7 he did not know that the attorneys had stipulated to set the case for trial on that day; that prior to June 11 he did not know that Seay had signed the stipulation with Mr. Love on May 11 or that it had been filed on May 23; that while he had advanced no moneys for costs he discovered on June 11 that Seay had paid $5.50 for defendant's appearance; that on May 22 he refused to sign a serviceman's waiver consenting to the action when requested to do so by plaintiff and then stated to her "that he regretted signing the authorization to attorney Seay and the verification of the answer presented to him by plaintiff"; that the allegations of the complaint are wholly untrue; that the marriage was consummated on January 15, and "continuously thereafter and until on or about the 8th day of April, 1945, plaintiff and defendant had continuous sexual relations"; that on or about said date defendant became temporarily incapacitated; that he has been informed by the doctors at the naval hospital that his nervous condition and his sexual incapacity had resulted from his over-indulgence in sexual relations with plaintiff; that on or about April 15 plaintiff would not permit him in their bedroom.

2. The Guiding Rules

[1-7] While it is the judicial policy liberally to construe section 473 to the end that trials on the merits may be had, we find nothing in defendant's affidavit to warrant an order vacating the annulment decree. To do so would be to grant a new trial at the capricious demand of a defendant who was either grossly negligent or had changed his mind after the judgment. One may not be relieved from his default unless he makes a showing that he has acted in good faith and demonstrates that his excusable neglect was the actual cause of his failure to attend the trial. Neither one's change of mind nor his inexcusable negligence is ground for vacating a judgment. To warrant relief under section 473 a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief. Freeman on Judgments, 5th Ed., Vol. 1, p. 482; Shearman v. Jorgenson, 106 Cal. 483, 485, 39 P. 863. It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. Freeman, 483, 5th Ed. Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. All must be governed by the rules in force, universally applied according to the showing made. Gillingham v. Lawrence, 11 Cal.App. 231, 232, 104 P. 584. The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing. Hughes v. Wright, 64 Cal.App.2d 897, 149 P.2d 392.

[8] A judicial proceeding is not to be treated by a party as a game of blind man's buff in which the participants may enter or withdraw at will. It is successor to the duel, in which, after the challenge had been accepted, both parties were obliged to comply with the code duello and to stand on the line until the deadly discharge. Diligence is the watchword and to be on the alert is the constant directive. If judgment be entered against a party in his absence before he can be relieved therefrom he must show that it was the result of a mistake or inadvertence which reasonable care could not have avoided, a surprise which reasonable precaution could not have prevented, or a neglect which reasonable prudence could not have anticipated. See McGuire v. Drew, 83 Cal. 225, 23 P. 312. After such an order has been entered a party may not gain a declaration of its nullity merely because his suggested proof was not before the court. After the service of summons upon or a voluntary appearance by a defendant, the safeguarding of his interests devolves upon him and he will neither be granted a new trial upon his mere request nor be accorded relief under the statute (sec. 473) for inexcusable neglect or as reward for his change of mind. In any event he must show that upon a trial with his forces all present a different judgment would probably ensue.

3. Respondent's Affidavit is Insufficient

[9] Neither defendant's supporting affidavit above outlined nor his rebuttal affidavit discloses mistake, inadvertence, surprise or excusable neglect. According to his own averments as early as May 7 plaintiff informed him that she had retained counsel and drawn papers for annulment. She then requested him to verify the answer she presented and to execute an authorization to attorney Seay. If he did not see the complaint then he knew at that time, as well as after reading it on June 11, that it had been filed. That he retained possession of those documents for eight days before signing them indicates deliberate, meditated decision rather than an act of neglect. That he signed them while in the hospital on plaintiff's promise that she would not use them but would resume life with him after his restoration to normal condition is negated by his very act of delivering the executed documents to her for mailing to Seay. That he relied upon plaintiff's statement as to the grounds of her action before signing his answer is not excusable neglect. That he was unaware prior to June 11 of the "appearance and stipulation" signed by Seay and filed May 23 not only shows a wilful act but is contradicted by his statement to plaintiff on May 22 that he regretted "signing the authorization to attorney Seay." He discourses at length concerning his acts after plaintiff informed him on May 30 that the cause had been set for trial on June 7. He knew then a trial was only eight days ahead and that prompt action was essential to forestall a judgment of annulment. But not until five days had thereafter elapsed did he telegraph for a copy of the complaint. Such nonchalance and indifference could not be distorted into any type of excusable neglect. If he changed his mind after executing the authorization on May 22, reasonable diligence or care necessitated an immediate and direct scrutiny of the course the proceedings had hitherto taken. Prior to the entry of the decree he had discussed the action with no one other than plaintiff. On June 7 Seay was still his counsel or he had been discharged; if the former, he carried out the stipulation that the case should be tried as a default; if the latter, he had no authority to make requests of the court for a continuance. There is nothing excusable in defendant's neglect after May 30. Inasmuch as the answer filed controverted all the allegations remaining in the complaint, if he had desired to prevent an annulment on June 7 his clear course was to be present at the trial where he might either plead for a continuance or give his testimony. By so doing he would have been in a position to defeat the action or to gain delay or to lay the foundation for establishing his diligence.

The behavior of defendant at no stage of the proceeding discloses excusable neglect but on the contrary, first, a definite plan to permit a judgment of annulment and, second, a subsequent change of mind. In presenting his motion defendant offered no new pleading but reaffirms his faith in his original answer. Having made no excuse for his non-appearance at the trial he must be presumed to have had the ability to reach the court. Other than his contradiction of plaintiff's testimony he presents no fact to indicate that upon a retrial annulment would be denied. His mere offer to refute her proof offers little hope for his triumph in view of his admission of his present inability to effect coition and of the declarations in his letters.

4. Counter Affidavits

[10] Conceding arguendo that the affidavits of defendant make a prima facie case for relief, the counter affidavits of plaintiff indicate an arbitrary decision upon the total proofs. The answer was verified by defendant before a notary public of Solano county, and it together with the authorization to attorney Seay to appear for defendant were sent through the mail by defendant or his Vallejo counsel to Mr. Seay. To demonstrate the preponderance of plaintiff's showing upon the hearing of the motion for relief the substance of her counter affidavits follows.

Mrs. Randall, mother of plaintiff, avers that while visiting plaintiff and defendant at Vallejo on March 30, 1945, upon their invitation to discuss their marital difficulties defendant then told her that he had committed a terrible wrong against plaintiff in not having advised her of his sexual impotence prior to their marriage; it was then agreed that plaintiff and defendant should discuss the problem with his naval chaplain; on May 3, 1945, they informed affiant that pursuant to the chaplain's advice they had consulted a naval doctor and that the latter had advised them that defendant's impotency was of a permanent nature; on May 10 when defendant came to plaintiff's home affiant served him with a copy of the complaint and summons for annulment; at midnight of the same day defendant returned to plaintiff's home and created such a disturbance as to necessitate his arrest; on the second day following he called again and stated that he was not going to contest the case but that he would be discharged and return to his home in South Carolina.

Mary Gelling of Solano county averred that on the afternoon of June 1, 1945, she and plaintiff were met by defendant on a street in Vallejo; in their conversation defendant objected to some things alleged in the complaint, to which *plaintiff replied that defendant's doctor and the chaplain had both told defendant that due to his physical condition he should never have married and that his doctor had said that the trouble was of long standing and that defendant had agreed that he should have advised plaintiff of his condition prior to his marriage;* at the same time defendant stated that since the objectionable part of the complaint had been eliminated the pleading was now satisfactory and *he would not contest it, and would not be present at the trial* but would return to his home in South Carolina; that he had been advised by Mr. Seay that the case had been set for trial on June 7, and that he then advised plaintiff to return at once to Los Angeles for the trial.

Plaintiff's affidavit exposes her own recollection of the year's unhappy events. She avers defendant's sexual impotence and her own utter ignorance prior to the marriage of defendant's incapacity; had she possessed such knowledge she would not have contracted the marriage; after some weeks of defendant's demonstration of his incapacity she visited her mother in Los Angeles for over 20 days; upon her return to Vallejo she accompanied defendant on a visit to the naval physician. After their second call the doctor advised that defendant's condition was of long standing, was unusual, and that defendant was so far sexually dissipated that his condition was incurable and that they should annul the marriage. Shortly after May 4, 1945, plaintiff and defendant again conferred with the chaplain and physician who advised defendant that he was incapable of consummating a marriage and that he should execute a waiver of the provisions of the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C.A. Appendix, § 501 et seq. Defendant replied that he had already discussed that phase of the matter with an attorney in the navy; that he would sign the waiver and that it would be satisfactory for plaintiff to file complaint for annulment. On the same day plaintiff proceeded to Los Angeles and caused her attorney to prepare a complaint, summons, and waiver. The complaint was filed and thereafter was served upon defendant by Mrs. Randall. On May 9 defendant penned a letter to plaintiff containing the following declarations: "I am not physically qualified to make a go of our marriage. * * * I shall seek a place of rest where those in my condition go. * * * I am in no physical condition for you to love or stand by me. * * * I can't ask you to love me as I am." Plaintiff avers the meeting of defendant with herself and Mary Gelling and avers substantially the same occurrences and declarations as stated by Miss Gelling after which defendant stated, "I talked with my lawyer, Lloyd J. Seay, in Los Angeles on May 30 on the telephone and he told me that your lawyer had agreed to dismiss that part of the complaint I didn't like so it is ok with me now and I am not going to fight it. * * * He told me that he had agreed with your lawyer to put it on the calendar of the court for June 7 and that it would be tried on that day. * * * I am going back to my home in South Carolina and forget all about you and California." On the night of June 2, upon plaintiff's return from a party with some friends, she had a heated argument with defendant on the porch of her home, and in the presence and hearing of Mr. and Mrs. Whiting who lived next door she said to defendant, "I will see you in court in Los Angeles next Thursday," to which defendant replied, "Oh no you won't because I am not going down there."

John L. Roberts, an attorney at law in Los Angeles, averred that on June 9 he was present in the office of attorney Frank H. Love when defendant asked Mr. Love if the court had continued the annulment case from June 7 to a future time as requested by his telegram to the court. Love replied that the annulment was granted on June 7; defendant stated that he had been discharged from the navy; that throughout the pendency of the annulment action he had consulted with a lawyer in the navy and had relied upon the advice so gained; that he knew that his case was set for trial on June 7, 1945, at 9:30 a.

m.; that Seay had so advised him on May 30 by telephone and that plaintiff had told him the same thing on June 1. At the same time defendant stated to Mr. Love that the telegrams of June 4 to Mr. Seay and to the county clerk had been prepared and sent by an attorney in the navy; that the telegrams were prompted by his fury at plaintiff when he discovered that she had attended a party on the night of June 2; that he had a serious argument with plaintiff and would try to prevent the case from coming to trial on June 7 but would postpone it as long as he could to defeat the annulment. Thereupon attorney Love explained to defendant that he had misconstrued his wife's actions; that she had been invited to a dinner party exclusively for ladies given by a middle-aged teacher; that each had taken her own part of the viands and that at the request of the hostess one of the latter's friends conveyed plaintiff to her home. In reply to Love's inquiry as to what defendant intended to accomplish by his actions defendant stated that he had merely wished to prevent plaintiff from getting an annulment so that she could not marry again; that he did not wish to file a cross complaint for annulment of divorce.

Ted Jordan of Solano county averred that on June 4, 1945, defendant inquired by telephone of plaintiff's whereabouts; he was trying to locate her; she had brought an action for annulment to be heard on next Thursday; defendant stated that he did not purpose to attend the trial and that he did not care whether plaintiff obtained an annulment or not.

Lloyd J. Seay averred in addition to a number of facts declared by others that on May 30 defendant telephoned from Vallejo and stated that he had mislaid his copy of the complaint and requested that another be sent to him; that he told defendant he had secured a stipulation to strike the third cause of action accusing defendant of sex perversion; that he advised defendant of the stipulation to set the case for trial on June 7. Defendant replied that his wife had told him the same thing but that he did not expect to be there. After receiving defendant's telegram of June 4 withdrawing his authorization and indicating his desire to withdraw his answer and to contest the action affiant appeared in court where he discovered the telegram addressed to the county clerk declaring defendant's desire to change attorneys and to file answer and cross complaint.

5. Discretion Was Abused

[11, 12] The doctrine that the granting of relief under section 473 is primarily committed to the discretion of the trial court does not mean that the notion, caprice or inordinate disregard of the opposing evidence should be allowed to control. Such decision must be rooted in a sound discretion, based upon a fair consideration of the total evidence and grounded upon principles of justice and fair dealing. It is not a mental discretion but an impartial discretion guided by fixed legal principles "to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." Brill v. Fox, 211 Cal. 739, 743, 297 P. 25, 26; Bailey v. Taaffe, 29 Cal. 422, 424. The burden of proving excusable neglect is upon the defendant who must establish his thesis by a preponderance of the evidence. Bruskey v. Bruskey, 4 Cal.App.2d 472, 479, 41 P.2d 203. If from a scrutiny of all of the evidence in a proceeding under section 473 to vacate a judgment of annulment it is clear that the court abused its discretion in holding that there was excusable neglect on the part of the defendant, the order must be reversed. Essig v. Seaman, 89 Cal.App. 295, 264 P. 552. Where a defendant is possessed of his normal faculties and is capable of entering into contracts and transacting business, he must conform with and be guided by the rules of legal procedure in the conduct of a lawsuit as well as controlled by legal principles in his daily relations with his fellow men. Gillingham v. Lawrence, 11 Cal.App. 231, 233, 104 P. 584.

In the light of the foregoing authorities the order before us is clearly an abuse of discretion. Apart from the testimony of plaintiff and her mother, that of the witnesses Roberts, Jordan, Gelling and Seay preponderate to prove that not later than June 1 defendant knew that the trial was set for June 7 and then declared that he did not purpose to attend. Having failed to demonstrate that a different result would probably follow another trial, and no mistake, surprise, inadvertence or excusable neglect on the part of defendant having been shown, his application for relief should have been denied.

Order reversed.

WILSON, J., concurs.

72 Cal.App.2d 526

HIGGINS v. LYNCH, City Manager, et al.
Civ. 12941.

District Court of Appeal, First District,
Division 1, California.
Jan. 14, 1946.

1. Municipal corporations ⟹216(1)

Civil service is a municipal affair, and as such the charter of the city and the laws enacted and the rules adopted pursuant thereto govern the rights of the commission, the appointing power and the employees.

2. Municipal corporations ⟹217(5)

Power of Civil Service Commission of San Jose to determine eligibility for promotion granted by section 106 of the charter in the classified service is to be exercised within the limits therein fixed subject to rules adopted pursuant to section 104.

3. Constitutional law ⟹70(3)

That city charter provision empowering the appointing authority to reject an entire list of eligibles for good cause, after they have been found fully qualified by examination and by their records, gives the appointing authority unusual power and one at variance with many other civil service systems, is a matter of legislative policy with which the court is not concerned.

4. Municipal corporations ⟹217(3)

City charter provision giving city manager the power to reject the entire eligible list for good reason and then to make a temporary appointment outside the list was not unreasonable or outside the charter provisions or in violation of the fundamental purpose thereof when construed to mean that the commission determines whether good cause has been shown.

5. Municipal corporations ⟹196

Civil service commission's finding that there was good reason for city manager's rejection of the entire eligible list for appointment to second assistant fire chief, upon which a temporary appointment was based, was conclusive on the court in the absence of fraud, or arbitrary or capricious action.

6. Municipal corporations ⟹196

Where city charter gave city manager the power to reject entire eligible list for good reason, commission rule gave him the power to make a temporary appointment when list was exhausted, and commission had determined that good reason was shown for rejecting entire eligible list for appointment as second assistant fire chief, city manager had the power to make a temporary appointment from outside the list and thereby ignore persons on the rejected list.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Mandamus proceeding by Thomas J. Higgins against John J. Lynch, City Manager, and John M. Felice, Russell Egan and Paul Johnston, as members of and constituting the Civil Service Commission of the City of San Jose, and others to nullify the appointment of Edward A. Powers as second assistant fire chief of the city, and to compel the appointment of petitioner to that position. The trial court denied the requested relief, and petitioner appeals.

Judgment affirmed.

Harry A. Houser and Owen D. Richardson, both of San Jose, for appellant.

Robert E. Cassin, City Atty., City of San Jose, of San Jose, for respondents.

PETERS, Presiding Justice.

By this proceeding in mandamus petitioner, Thomas J. Higgins, seeks to nullify the appointment of Edward A. Powers as second assistant fire chief of San Jose, and to compel the civil service commission and the city manager of that city to appoint him to that civil service position. The trial court denied the requested relief, and Higgins appeals.

The facts are not in dispute. Higgins and Powers are both captains in the fire department of San Jose. Prior to November 22, 1944, Higgins, as the result of an examination, had been placed on the eligible list for the higher-paying and more responsible position of second assistant fire chief. Powers was not then, or at any other subsequent time, on that list. On that date, there being a vacancy in the position of second assistant fire chief, the city manager, John J. Lynch, acting pursuant to the city charter provisions, requested the civil service commission to furnish an eligible list for that position. The commission, on the same day, certified three names, one being that of Higgins, and another being that of the then chief of the fire department, who subsequently withdrew his name from consideration. On the same day the city manager rejected the proffered names, giving as his reasons that the eligible list was twenty-one months old; that it had but two eligible names on it; that members of the department now in the armed forces would shortly return and be eligible to take the next examination; and that before the next examination a training school should be conducted to prepare all captains for the examination. On the same day Lynch appointed Powers to the position for a period of fifteen days.

The civil service commission found that the reasons assigned were not "good reason" as those words are used in the charter, but granted the city manager's request that he be permitted to file a supplementary set of reasons. On December 4, 1944, the commission again submitted to the city manager for the position two names, one being that of Higgins. These were the only two names left on the list. On the same day the city manager rejected the list and gave as his reasons that efficiency requires that eligible lists be made up after a representative group of eligibles have taken the test; that the submitted list was twenty-one months old and was based on an examination in which only six of the eligible captains participated; that there were now fourteen captains eligible to take the examination; that in addition two former captains in the department are about to be released from the armed forces and will be eligible; that in order to secure personnel of ability and leadership the department should conduct a school of instruction and carry on a planned training program for all captains; and that this will assure that all captains will be trained in new fire fighting methods and in the use of new materials that have come into use since the last examination for captain was held.

In addition he stated: "The two persons on the eligible list do not have, in my opinion, a thorough knowledge of the principles and practices of modern fire fighting and of the equipment, materials and apparatus used in such work, and which is required of a person qualified to be a Second Assistant Fire Chief. * * * I further believe that they do not have in the measure desired sufficient knowledge of fire-prevention methods, knowledge of training methods, ability to direct and coordinate the activities of a large number of subordinates, ability to analyze emergency situations and adopt a quick and effective course of action, nor the ability to lead a large number of men and maintain discipline and morale.

"This opinion is confirmed in part by a study of the Probst Service Reports appraising the service value of fire department personnel * * *."

On the same day the commission found that the city manager had stated "good reason" for his rejection, and the city manager thereupon extended the temporary appointment of Powers pending the creation of another eligible list. Both parties in their briefs state that in March of 1945 a new examination was given and that no list was then created because all applicants, including Powers, failed to pass. It was stipulated that at the date of trial the name of Higgins was the only one left on the list, both the chief and the other nominee having withdrawn.

It is the contention of Higgins that under this state of facts he is entitled to the position in question and that the appointment of Powers was beyond the power of the city manager. It is the theory of appellant that the city manager had no power to make a temporary appointment of any man not on the eligible list when there was an existing eligible list, and that the appointing power has no power to reject names on the eligible list when to do so would exhaust the list.

[1] The proper solution of the problem, of course, depends upon the city charter provisions and the lawful rules adopted by the commission. Civil service is a municipal affair, and as such the charter of the city and the laws enacted and the rules adopted pursuant thereto govern the rights of the commission, the appointing power and the employees. Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513; City of San Jose v. Lynch, 4 Cal.2d 760, 52 P.2d 919.

The pertinent provisions of the charter of San Jose are §§ 104, 105 and 106.

Section 104 provides: "The commission, subject to the approval of the council, shall adopt, amend, and enforce a code of rules and regulations, providing for appointment and employment in all positions in the classified service, based on merit, efficiency, character and industry, which shall have the force and effect of law * * *."

Section 105 provides: "The secretary shall provide examinations in accordance with the regulations of the commission and maintain lists of eligibles of each class of the service of those meeting the requirements of the said regulations. Positions in the classified service shall be filled by the city manager from a list of the three persons, if there be that number, on the eligible list who have received the highest standing on examination; provided, that for good reason shown the city manager may reject all three and call for a new list."

Section 106 provides: "The commission shall provide for promotion to all positions in the classified service based on competitive written examinations with due consideration to records of efficiency, character and seniority."

[2] It has been held, in interpreting these sections, that under § 106 the commission determines eligibility for promotion within the limits fixed by the section, subject to rules adopted pursuant to § 104. Haub v. Tuttle, 80 Cal.App. 561, 251 P. 925. The applicable rule adopted by the Commission pursuant to § 104 is Art. V, § 1, of the rules and regulations. It provides: "Positions in the Classified Civil Service are filled by the City Manager as provided in Section 105 of the charter of the City of San Jose. Upon his requisition, therefore, the Secretary shall furnish the names of three persons, if there be that number, from the head of the eligible list, for each position to be filled * * *. In case of rejection by the City Manager of all the names submitted to him at one time, the Secretary shall continue furnishing new lists as long as there be eligibles listed. Names of persons certified, but not appointed shall be returned to their original positions upon the eligible list."

Article VI provides: "The appointing power may make temporary appointments to remain in force until an eligible list shall have been created, or for a period not to exceed fifteen days."

Article VII, § 3, provides: "No applicant for promotion shall have his name placed upon an eligible list therefor until he shall have passed such medical examination, and mental and physical tests as the Commission shall prescribe, to determine whether the applicant for promotion to any given position possesses the necessary standards of health, mind and physique therefor."

[3] Appellant urges that the giving to the city manager the power to reject the entire eligible list for "good reason," and then to make a temporary appointment outside the list, violates the letter and spirit of the charter provisions. It is argued that the temporary appointing power exists solely by virtue of a rule, and that the rule, so construed, annuls the provisions of the charter, and violates the fundamental purposes of civil service.

These arguments lack merit. While it must be conceded that to give the appointing authority the power to reject an entire list of eligibles for good cause, after they have been found fully qualified by examination and by their records, is a most unusual power, and one at variance with many other civil service systems, yet the policy of such legislation is not for the courts. Civil service being a municipal affair the courts have no power to determine the wisdom of a charter provision setting forth the means by which the fitness of an applicant is to be determined—that is, a legislative and not a judicial function. (See cases collected 10 Am.Jur., p. 923, § 4.)

[4, 5] Under the rule which makes § 105 of the charter applicable to promotional appointments, the city manager is authorized for "good reason" to reject the three names certified to him by the commission. In the instant case, shortly after the list was submitted one of the nominees withdrew so that there were only two names submitted, and these two together with the chief of the department who had withdrawn his name, constituted the entire list. The charter obviously contemplates that the city manager shall have some discretion in his choice. He can make no permanent appointment outside the list. The provision in the rules that he can make a temporary appointment where there is no list, although not referred to in the charter, is not in violation thereof because such power would obviously be implied even though not mentioned in the charter because the city government must continue to function whether or not there is an eligible list. Neither the charter nor the rules give the city manager unlimited power to reject the list. There must be "good reason" shown. The charter is silent as to

who shall determine the "good reason"; but the city manager and the commission have construed the clause to mean that the commission must determine whether good cause has been shown. This is a reasonable construction. It places a reasonable restraint upon the otherwise uncontrolled power of the city manager. It is obvious that after the commission has determined the qualifications of applicants, and has prepared a list of eligibles, all of whom it has found are qualified for the position, it is going to be zealous of its powers and to scrutinize carefully the reasons given by the appointing power for rejecting the list. That is exactly what happened here. When the city manager first rejected the list the commission rejected his reasons. He then filed supplementary reasons. Whether those were good or bad reasons rested with the commission. Its conclusion cannot be challenged except in cases of fraud, or of arbitrary or capricious action. Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513. Here neither in the petition nor in the briefs is any such charge made. It is quite obvious that the commission's finding, under the circumstances, is conclusive.

[6] From the above analysis it is quite clear that the city manager had the power to reject the two names on the list for "good reason." When that exhausted the list the power to make a temporary appointment must exist. Here it is provided by rule. That rule is not in contravention of the charter, but is supplementary thereto, and would be implied even if not expressed. The only question that exists is whether the temporary appointment can be made outside the list. If the list were exhausted—i. e., there were no names on it—obviously under Art. VI of the rules the appointment would have to be made outside the list, and the rule so contemplates. Where there is a rejection, for good reason, of all names on the list, that list, so far as that particular vacancy is concerned, has been exhausted, and the same situation exists as if there were no list at all. It is true that names certified but not appointed are put back on the list, and that includes names certified and rejected for good reason, but, so far as that particular job is concerned, those names no longer are part of an eligible list satisfactory to the appointing power.

As we interpret the provisions of the San Jose charter, and the rules adopted pursuant thereto, the people of that community have determined that the commission shall be the exclusive judge of the eligibility of applicants for permanent original or promotional positions, but that the city manager shall have some discretion in selection, even to the extent of rejecting an entire list for reasons determined to be valid by the commission. Further, it has been provided that when no eligible list exists, or the list has been rejected, the appointing power may make temporary appointments. In the very nature of things this power must include the right to ignore persons on the list, who, for "good reason," have been rejected.

The judgment appealed from is affirmed.

WARD, J., and OGDEN, J. pro tem., concur.

72 Cal.App.2d 873

PEOPLE v. ONE 1939 OLDSMOBILE SEDAN, ENGINE NO. F921523 et al.

SAME v. ONE 1941 CHEVROLET SPORT SEDAN, ENGINE NO. AA-74879 et al.

Civ. 3150.

District Court of Appeal, Fourth District, California.

Jan. 11, 1946.

Intoxicating liquors ⚿246

Judgments forfeiting to state two taxicabs, drivers of which unlawfully transported and sold whisky without knowledge and consent of taxicabs' owners, engaged in carrying persons for hire as common carriers, were erroneous. Gen.Laws Supp.1941, Act 3796, § 52.

Appeals from Superior Court, Tulare County; Clark Clement, Judge.

Consolidated proceedings under the Alcoholic Beverage Control Act by the People of the State of California to forfeit one 1939 Oldsmobile Sedan, Engine No. F921523, and one 1941 Chevrolet Sport Sedan, Engine No. AA-74879, claimed by

Odis D. Stalians and Ray C. Stalians, respectively. From judgments forfeiting the automobiles to the State, claimants appeal.

Reversed with directions.

McFadzean & Crowe and Wm. B. Mitchell, all of Visalia, for appellants.

Robert W. Kenny, Atty. Gen., and Allen L. Martin, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appeals from judgments forfeiting to the State two taxicabs in proceedings brought under section 52 of the Alcoholic Beverage Control Act. Stats.1935, p. 1123 and amendments thereto, Deering's Gen.Laws 1941 Supp., p. 2006, Act 3796. The two causes were consolidated for trial and on appeal.

The two claimants and appellants operated a taxicab business in the City of Tulare, with a fleet of taxicabs operated by drivers employed for that purpose. On April 10, 1943, the drivers, respectively, of the two taxicabs here in question were approached by an operative for the State Board of Equalization who requested and was given transportation at the regular rates. In each instance, the operative purchased liquor from the driver during the trip. It appears, without dispute, and the court found, that the claimants-appellants are the owners of these taxicabs; that they were then engaged in carrying persons for hire as common carriers; and that the unlawful acts of the drivers of these taxicabs in transporting and selling whiskey were without the knowledge and consent of the claimants-appellants. On the theory that because these sales were unlawful there was at the time a departure from the lawful business of carrying passengers, the court also found that at the time in question these automobiles were not being used as common carriers. Judgments of forfeiture were entered and these appeals followed.

The material facts and contentions here involved are exactly similar and substantially the same as those involved and considered in People v. One 1937 Lincoln, etc., Sedan, Cal.Sup., 160 P.2d 769. On the authority of that case, each of the judgments here appealed from is reversed with directions to the trial court to enter judgment releasing the vehicle in question to the owner.

ROCK CREEK WATER DIST. v.* CALAVERAS COUNTY.

Civ. 7156; Sac. 5712.

District Court of Appeal, Third District, California.

Jan. 14, 1946.

Hearing Granted March 14, 1946.

1. Taxation ⚷217

A water district organized under Water District Act was a "public agency of the state" whose property, though situated in another county, was exempt from taxation, and not a "municipal corporation" within constitutional provision excepting from tax exemption such lands of a municipal corporation and improvements thereon located outside of such corporation as were subject to taxation when acquired by the corporation. St.1913, p. 815, as amended; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Agency of State" and "Municipal Corporation".

2. Taxation ⚷217

Sale of reservoir system by trustee for former stockholders of corporate owner to water district was not shown to be void so as to preclude exemption of reservoir from taxation as property of state agency, in absence of any showing controverting finding that sale was made in accordance with authorization by Railroad Commission. St.1913, p. 815, as amended; Const. art. 13, § 1.

3. Taxation ⚷217

Grant deed conveying reservoir system to water district vested title thereto in the district insofar as exemption from taxation was concerned, notwithstanding provision in deed that, should district default in payment of unpaid installments of purchase price, the property should revert to grantor. St.1913, p. 815, as amended; Const. art. 13, § 1.

◆

Appeal from Superior Court, Calaveras County; A. I. Pierovich, Judge.

Action by Rock Creek Water District against County of Calaveras to recover taxes paid under protest. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

* Subsequent opinion 172 P.2d 863.

Virgil M. Airola, Dist. Atty., of San Andreas, for appellant.

C. R. Montgomery, of Sacramento, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover from defendant taxes paid under protest. The complaint alleged (paragraph I) that plaintiff was "a public agency of the State of California," organized under the provisions of the California Water District Act, Stats.1913, p. 815, and amendments, its territory lying within the county of Stanislaus; (paragraph III) that it was the owner in fee simple of certain described property in Calaveras County, which property had been assessed for taxes for the year 1942–1943 in the sum of $96; that plaintiff had paid said taxes under protest, claiming that said property was exempt from taxation under the provisions of Article XIII, section 1, of the Constitution of California.

Defendant duly answered said complaint and specifically admitted the allegations of paragraph I; but regarding paragraph III denied that plaintiff was the owner in fee simple of the property described in its complaint, and alleged that it was the owner of but a qualified title which was subject to termination by virtue of an agreement under which it acquired title, and because said agreement and a deed of same date were executed and delivered without the consent of the Railroad Commission; and that its property was not exempt, "by virtue of the method and manner in which same was agreed to be transferred and conveyed in and by said agreement and deed aforesaid."

On the trial of the issues thus presented documentary evidence was introduced and certain stipulations entered into which show the facts to be as follows.

Plaintiff district is a water district organized under the California Water District Act, aforesaid, and lies entirely within Stanislaus County, but the property which was the subject of the tax in question lies within Calaveras County, and consists of a reservoir system. Shortly after the organization of the district, and on May 12, 1941, it entered into an agreement with R. G. Kann, who was trustee for the former stockholders of a corporation which had owned the reservoir system, to purchase said system. Kann secured from the Railroad Commission an order approving the agreement and authorizing the sale "substantially" in accordance with the agreement. Subsequently and on February 27, 1942, plaintiff and Kann entered into a new agreement rescinding that of May 12, 1941, providing for the immediate conveyance of the reservoir system; and on the same date a grant deed under which plaintiff claims fee simple title was executed and delivered to it. The deed recited that it was made in consideration of the agreement of the district to make punctual payments at the times stated therein, and on the express condition that in the event of default in the making of any such payment the grantor might elect to declare the deed void, whereupon the whole property should revert to the grantor and the amounts paid be retained as liquidated damages and rental. The deed was filed with the Railroad Commission on March 11, 1942. It was stipulated that all payments due to date of trial had been paid by the district.

The trial court made findings substantially in accord with the foregoing, and also found that it was not true that Kann, as trustee, was the "real or equitable or beneficial owner of the property," but that the plaintiff was such owner. It also found that the sale was made in accordance with the order and authorization of the Railroad Commission. Its conclusions of law were that plaintiff was a "public agency of the State of California," and that the property in controversy was exempt from taxation under the provisions of Article XIII, section 1, of the Constitution of California. Judgment for plaintiff was entered accordingly, and defendant was enjoined from further assessing the property described in the complaint.

On this appeal it is first contended by appellant that plaintiff is not a "state agency," but is a municipal corporation as that term is used in Article XIII, section 1, of the Constitution; and that, though property owned by the state or by any county, city and county, or municipal corporation is exempt from taxation under the aforesaid constitutional provision, nevertheless the property upon which the tax in controversy was levied comes within the exception of "such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same."

[1] This contention is in direct conflict with defendant's answer in which it admitted the allegation of paragraph I of the complaint that plaintiff was a "public agency of the State." But aside from such admission there is ample authority for holding that water districts formed under the Act of 1913 under which plaintiff district was formed, Stats.1913, p. 815, are agencies of the state and not municipal corporations within the meaning of the above mentioned constitutional provision. In Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, it was held that an irrigation district is a state agency and exempt as such under Article XIII, section 1, of the Constitution, and not a municipal corporation whose property, "located outside of the county, city and county or municipal corporation owning the same," is not exempt. The court there said: 186 Cal. page 187, 198 P. page 1062, 17 A.L.R. 72:

"The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a 'public corporation for municipal purposes.' Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369, [see, also Rose's U. S. Notes]. As to swampland, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations. People ex rel. v. Levee Dist. No. 6, 131 Cal. 30, 63 P. 676; People ex rel. v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51, 32 P. 866; and Reclamation Dist. No. 70 v. Sherman, 11 Cal.App. 399, 105 P. 277. See, also, People v. Selma Irr. Dist., 98 Cal. 206, 208, 32 P. 1047, and cases there cited. The amendment in question must be considered to have been framed and submitted to the people with these decisions in mind, by which it was settled that such corporations were not 'municipal corporations.'"

And in Laguna Beach County Water District v. County of Orange, 1939, 30 Cal. App.2d 740, 745, 87 P.2d 46, it was held that a county water district formed under the Act of 1913, Stats.1913, p. 1049, lacks the broad legislative, executive and judicial powers of a municipal corporation and that it is not a municipal corporation as that term is technically used in the laws of the state; and that plaintiff district was not subject to the tax imposed by the County of Orange upon its property in that county not lying within the water district. Petition for hearing in the Supreme Court was denied. Also see The Housing Authority v. Dockweiler, 14 Cal.2d 437, 453, 94 P.2d 794, in which plaintiff authority was held not to be a municipal corporation within the terms of the constitutional provision.

Appellant attempts to evade the force of the foregoing decisions by declaring that the rule in the former was erroneous, and that because the water district dealt with in the latter was formed under the Act of 1913, page 1049, the county water district act, while plaintiff district was formed under the act of 1913 found at page 815, plaintiff should be held to be a municipal corporation even though a county water district be held to be a state agency. However, there would seem to be less reason to hold districts formed under the latter act to be municipal corporations than to hold those under the former to be such corporations.

Water districts such as plaintiff are formed, not by and for the benefit of a whole county or a municipality, but by and for the benefit of the holders of title to lands susceptible of irrigation, and are formed for the sole purpose of irrigating the lands of such property owners. The act providing for their formation is substantially the same as that providing for the formation of irrigation districts, Stats.1897, p. 254, and the reasoning of the court in Turlock Irrigation District v. White, as to why irrigation districts are not to be included within the words "municipal corporations" as used in the constitutional amendment of 1914, Art. XIII, sec. 1, supra, and the reasoning in such cases as hold that reclamation districts, drainage districts, flood control districts, and the like are not municipal corporations, is equally applicable here. See Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 P. 668, People v. Richards, 86 Cal.App. 86, 91, 260 P. 582, and cases cited in Turlock Irr. Dist. v. White, supra.

While it is argued, with some justification, perhaps, that there is just as much reason why lands owned by a water district and lying outside of the district itself should be taxed for the benefit of the county in which they are situated as there is for taxing lands similarly situated which are owned by a city, the constitutional provision does not in terms include such bodies as irrigation districts, water districts, reclamation districts, etc., and the fact remains that the Supreme Court has decided that districts formed for such purposes are not "municipal corporations" within the meaning of that provision.

Appellant also argues that only such districts as had been held by the courts to be state agencies (and not municipal corporations) prior to the amendment of Article XIII, section 1, in 1914, should be held to be such state agencies, relying apparently upon the statement in the Turlock Irrigation District case, that the amendment must be considered to have been framed and submitted to the people with those decisions in mind. But section 1 of Article XIII was amended in 1944, the proposed amendment having been framed by the legislature, and adopted by the people May 16, 1944. All this was subsequent to the decision of the Supreme Court in Turlock Irrigation District v. White, 1921, Laguna Beach County Water District v. County of Orange, 1939, and The Housing Authority v. Dockweiler, 1939. Therefore, by the same reasoning the legislature must be considered to have framed the later amendment having in mind the aforesaid decisions including that holding that districts formed under the county water district act are not municipal corporations within the meaning of the language of the section. Had it been intended that such districts should be brought within the scope of the constitutional provision we may assume that the legislature in framing the later amendment would have so provided.

Appellant also argues that in view of the decisions in In re Bonds of Orosi Public Utility District, 1925, 196 Cal. 43, 235 P. 1004, Morrison v. Smith Bros., Inc., 1930, 211 Cal. 36, 293 P. 53, and Metropolitan Water District v. County of Riverside, 1943, 21 Cal.2d 640, 134 P.2d 249, the words "municipal corporation" as used in the constitutional provision should be construed to include all districts except irrigation, reclamation, swamp-land, drainage and levee districts, regardless of their purpose and the legislation under which such districts might be formed. But except that in the Metropolitan Water District case it was said that neither the Turlock nor the Orange County case may be accepted as an authoritative determination that a metropolitan water district, such as plaintiff in that action, was not a municipal corporation as that phrase is employed in the constitutional provision, there is nothing in any of those cases indicating that a district formed for irrigation purposes only, as is plaintiff in this action, is to be classed as a municipal corporation within the constitutional provision. Ample reasons for holding the utility districts dealt with in those cases to be municipal corporations and not state agencies, under the legislative enactments under which they were formed, are stated in the opinions; and the distinctions between them and districts formed for irrigation, reclamation and similar purposes are pointed out. In the Morrison case it was said, 211 Cal. page 44, 293 P. page 56: "We feel that sufficient has been said to show that such quasi-municipal corporations as respondent more closely resemble municipal corporations proper than they do state agencies, such as irrigation and reclamation districts." And it may properly be said here that districts such as plaintiff more closely resemble state agencies such as irrigation districts than they do such quasi-municipal corporations as utility districts. Even in the Housing Authority case it was said, 14 Cal.2d pages 453, 454, 94 P.2d 803:

"Such an authority is not unlike an irrigation district which, though held not to be a municipal corporation within the meaning of the quoted constitutional provision, has been held to be a public corporation for municipal purposes whose property is exempt from taxation. Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; Anderson-Cottonwood Irr. Dist. v. Klukkert [13 Cal.2d 191], 88 P.2d 685. Similarly reclamation districts have been declared to be public agencies whose properties are likewise exempt from taxation. Reclamation Dist. v. County of Sacramento, 134 Cal. 477, 66 P. 668. In Laguna Beach Water Dist. v. Orange Co., 30 Cal.App.2d 740, 87 P.2d 46, 47, it is stated that 'It must be conceded that it has always been the policy of the law in California since the adoption of the present Constitution, to exempt from taxation property of the state and state agencies generally classified as public corporations.'"

And in the Metropolitan Water District case it was pointed out that the district was formed by uniting several municipalities and a municipal water district, and that it would be unreasonable to interpret the constitutional provision as permitting cities to unite in a water district and thus secure an exemption which they would not be entitled to as individual municipalities. The Orosi and Morrison cases were there considered, but the distinction between irrigation and reclamation districts and those under consideration in those cases was again pointed out. We are unable to find any such distinction between districts formed under the Water District Act set forth in the Statutes of 1913 at page 815, and irrigation districts formed under the Act of 1897, p. 254, as justifies a holding that the former are municipal corporations within the meaning of Article XIII, section 1, of the Constitution.

[2] Appellant also urges, but without citation of authority, that because the original agreement of sale entered into between Kann and respondent in 1941 was superseded by the agreement of February 27, 1942, and the latter agreement was not submitted to the Railroad Commission, the sale under the later agreement was void. However, the trial court found that the sale was made in accordance with the order and authorization of the Commission, and appellant has not pointed out anything to show the contrary. The order of the Commission authorizing the sale stated that the transfer should be made "substantially in accordance with the terms and conditions of the agreement" of 1941, and it appears to have been so made. A verified statement that the sale had been consummated and possession of the property turned over to the grantee was filed with the Commission by Kann. The deed was duly recorded and a certified copy of same was also filed with the Commission. The said Commission has manifested no dissatisfaction with the manner in which the transaction was carried out, or with the conditions thereof, and nothing has been shown by appellant to justify a holding that the sale was void.

[3] A further contention is made by appellant that under the agreement between Kann and plaintiff and the deed by which the property sought to be taxed was conveyed to plaintiff, the ownership of the property should be held to be in Kann, the grantor, and, therefore, subject to taxation pending the fulfillment of the conditions set forth in the deed, to wit, payment in full of the purchase price. No authority is cited in support of appellant's position. Furthermore, it does not appear that the property was assessed to Kann; it was presumably assessed to the district in which the title stood of record (Revenue and Taxation Code, sec. 405, St.1941, p. 3111), and appellant is contending in this action for the right to retain taxes thereon paid by respondent. But regardless of any real or apparent inconsistency in the arguments of appellant, we are of the opinion that title to the property taxes is in plaintiff and that it is the owner in so far as the right to exemption is concerned. The deed by which the property was conveyed is a grant deed, and the provision that should plaintiff default in payment of the unpaid installments of the purchase price the property should revert to the grantor does not have the effect of constituting Kann the owner of such property for the purposes of taxation. A somewhat similar contention was made in The Housing Authority v. Dockweiler, supra, but the court there said, 14 Cal.2d page 454, 94 P.2d 803: "Nor do we believe that the right of tax exemption fails because of the possibility of a foreclosure in which title to the property might be lost. The status of the property as tax-exempt or nontax-exempt while in the hands of an authority is not altered by its possible status after disposition by the authority."

A case directly in point is Town of Wolf River v. Wisconsin Michigan Power Co., 217 Wis. 518, 259 N.W. 710, 98 A.L.R. 1369. There defendant owned certain real property which it conveyed to Valley Camp Association to hold for the use of the Boy Scouts of America. The deed of conveyance contained a provision that should the grantee suffer the use of the premises for any other purpose than as a camp site for boy scouts the conveyance should become void and the title, on demand, should revert to the grantor who should then have the right to re-enter. The deed also provided that the grantor reserved the right to repurchase, upon notice, within a specified time, and upon payment of the price paid by the grantee.

The court said that this resulted in the grantee's holding title to the premises subject to being dispossessed upon breach of a condition subsequent, and in no way affected the title held by the grantee; that the qualification annexed whereby the estate might be defeated upon breach of the condition left the title in the grantee good as long as he observed the condition. Property exempt from taxation in the state included that held by boy scout organizations, and the property in question was held exempt. Also see Village of Hibbing v. Commissioner of Taxation, 217 Minn. 528, 14 N.W.2d 923, 927; Connecticut Junior Republic Ass'n v. Town of Litchfield, 119 Conn. 106, 174 A. 304, 95 A.L.R. 56, and cases cited in note 98 A.L.R. 1372.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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72 Cal.App.2d 520

BAIRD et al. v. HAVAS et al.

Civ. 12852.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1946.

1. Mechanics' liens ⚷132(7)

Under mechanics' lien statute providing that occupation by owner, plus cessation of labor, or acceptance plus cessation of labor for 30 days shall constitute completion, for computing time for filing lien, cessation of labor must be absolute during the 30-day period following an acceptance of building, to constitute constructive completion, but there is no requirement that cessation of labor must continue for any particular time to constitute a constructive completion following a personal occupancy by the owner. Code Civ.Proc. § 1187.

2. Mechanics' liens ⚷288(3)

Under mechanics' lien statute, after owner has occupied building, whether cessation of labor has continued for a sufficient period to constitute constructive completion is a question of fact. Code Civ. Proc. § 1187.

3. Appeal and error ⚷1071(5)

Where findings sustained by evidence support judgment, findings on other issues are immaterial and judgment must be affirmed.

4. Mechanics' liens ⚷132(7)

Under mechanics' lien statute providing that occupation by owner plus cessation of labor, or acceptance plus cessation of labor for 30 days shall constitute completion, if there is acceptance, plus a 30-day cessation of labor, the 90-day period for filing a mechanic's lien would start to run even if, after the 30-day period, work is resumed, and the same rule applies to personal occupancy followed by cessation of labor. Code Civ.Proc. § 1187.

5. Mechanics' liens ⚷132(4), 281(2)

In action to foreclose mechanic's lien, evidence sustained finding that cessation of labor and owner's occupancy of building constituted constructive completion as of September 4, 1941, so that lien not filed until January 31, 1942, was not within time. Code Civ.Proc. § 1187.

6. Mechanics' liens ⚷132(4)

If owner intentionally leads lien claimant to believe that buildings are not completed and lien claimant relies on the representation in delaying the filing of lien, the owner is estopped. Code Civ.Proc. § 1187.

7. Mechanics' liens ⚷281(2)

In action to foreclose a mechanic's lien, evidence was insufficient to require finding that owners were estopped from claiming that building had been completed more than 90 days before filing of lien. Code Civ.Proc. § 1187.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action to foreclose a mechanic's lien by Floyd L. Baird and others, copartners doing business under the firm name and style of F. L. Baird Lumber Company, against Leo Havas and another. From an adverse judgment, plaintiffs appeal.

Affirmed.

Alfred J. Harwood, of San Francisco, for appellants.

Ivan N. Maroevich, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs, being unpaid materialmen who had furnished lumber used by a contractor in the construction of defendants' home, brought this action to foreclose their mechanic's lien. The trial court held that the lien was not filed within the time required by law. Plaintiffs appeal.

This case has been before this court on a prior appeal—Baird v. Havas, 65 Cal. App.2d 523, 151 P.2d 10. That was an appeal from an order denying plaintiffs' motion under § 663 of the Code of Civil Procedure to set aside the judgment on the ground that the findings of fact were inconsistent and did not support the conclusions and judgment. It was there held that the findings were sufficient. This present appeal from the judgment is based principally on the contentions that certain basic findings are unsupported, and that under § 1187 of the Code of Civil Procedure the lien was filed in time.

Section 1187, since its amendment in 1929, provides that where, as here, no notice of completion is filed by the owner, the materialmen, and others, have ninety days after completion of the work of improvement as a whole in which to file their liens. The section also provides: "In all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter; the occupation or use of a building, improvement or structure by the owner, or his representative, accompanied by cessation from labor thereon; or the acceptance by the owner, or said agent, of said building, improvement or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure." It is also provided that: "The phrase 'work of improvement' and the word 'improvement' as used in this chapter are each hereby defined to mean the entire structure or scheme of improvement as a whole."

The trial court found that "all materials furnished by plaintiff were furnished more than one hundred and twenty (120) days prior to the filing of lien by the plaintiffs on the 31st day of January, 1942"; that the building was completed on September 4, 1941; that there was a cessation of work commencing August 25, 1941; that the lien was not filed within 120 days from and after the cessation of work on the building; and that the defendants went into complete occupancy of the building on September 4, 1941. It was also found that all of the allegations of the answer not inconsistent with the findings of fact were true, and one such allegation is that there was a cessation of labor for thirty days commencing August 25, 1941. It is these several findings that are challenged by the plaintiff as being unsupported.

[1-3] Before discussing the evidence, two fundamental fallacies in plaintiffs' approach to the problem should be mentioned. Plaintiffs seem to assume that the thirty-day cessation of labor requirement of § 1187, supra, applies not only where there is an acceptance of the building by the owner, but also to the case where the owner occupies the building. It also seems to be assumed by plaintiffs that if there is an acceptance by the owner followed by thirty days cessation of labor, and then some minor work done, that the ninety-day period does not start to run until thirty days after the completion of the minor work. Neither contention is sound. Section 1187 provides in the alternative that occupation by the owner, plus cessation of labor, or acceptance plus cessation of labor for thirty days, shall constitute completion. While no doubt the cessation of labor must be absolute during the thirty-day period following an acceptance of the building in order to constitute a constructive completion, there is no requirement that the cessation of labor must continue for any particular time to constitute a constructive completion following personal occupancy by the owner. After the owner has occupied the building, whether the cessation of labor has continued for a sufficient period to constitute a constructive completion would seem to be a question of fact. See Nevada County Lumber Co. v. Janiss, 25 Cal.App.2d 579, 78 P.2d 200. On the prior appeal (Baird v. Havas, 65 Cal.App.2d 523, 151 P.2d 10) it was held that the findings were based on both theories—acceptance plus cessation of labor for thirty days, and personal occupancy plus cessation of labor. Although it is true that the findings are somewhat confusing, it is apparent that if either finding is supported, even though the other finding is unsupported or is contrary to evidence, the judgment must be affirmed under the rule that where supported findings support the judgment, findings on other issues are immaterial. See cases collected 24 Cal.Jur. p. 993, § 217.

[4] The second contention of plaintiffs is also without merit. It is now settled that if there is an acceptance, plus a thirty-day cessation of labor, the ninety-day period starts to run even if, after the thirty-day period, work is resumed. Stanislaus Lbr. Co. v. Pike, 51 Cal.App.2d 54, 124 P.2d 190; Baird v. Havas, 65 Cal.App.2d 523, 151 P.2d 10. The same rule clearly applies to personal occupancy followed by cessation of labor.

Mrs. Havas testified that on August 25, 1941, she visited the house; that no one was then working except the contractor, and he was washing out the bath tub; that she and her husband moved into the house on September 4, 1941; that during the first week of their occupancy the painter returned and put a second coat of paint on the outside of one of the window frames and also on the porch rail; that this took about two hours; that certain screens were delivered on September 20, 1941, and were finally installed on September 29th; that other than this no further work was done on the house by the contractor or his men. The only possible conflict with this testimony was that one of the plaintiffs who testified that the screens were delivered September 29th and installed some unfixed time thereafter.

[5] The lien was filed January 31, 1942. August 25, 1941, was 159 days before January 31, 1942; September 4, 1941, was 149 days before January 31, 1942; and September 29, 1941, was 124 days before January 31, 1942. It is thus apparent that, under the evidence most favorable to plaintiffs, there was a cessation of all labor on September 29th, and that such cessation of labor was thereafter continuous until January 31, 1942. The findings, it is true, attempt to fix the cessation of labor at August 25, 1941, and that finding is not supported by the evidence, because defendants' testimony showed that some work was done in the week following September 4th, and further work was completed September 29th. But the court also found personal occupancy from September 4th, and cessation of labor for 30 days after August 25th. That means that the trial court found that there was a cessation of labor from August 25th to September 24th. This finding is not entirely supported because there were two hours of work performed between September 4th and September 11th. But the important fact is that after September 4th, when the defendants moved in, except for these two minor jobs there was a cessation of labor accompanied by owners' possession. In such event, the cessation of labor, as already pointed out, need not be for any fixed period, it being a question of fact as to whether it is of such a nature that it constitutes a constructive completion within the meaning of the code section. This being so, and the findings on this theory being supported, the judgment must be affirmed.

It should be pointed out that the evidence shows that there was a complete cessation of labor from September 29, 1941, to the date the lien was filed, January 31, 1942. That is a period of 124 days. Even if the thirty-day period were applicable and did not start until September 29th, that period would have expired 94 days before the lien was filed, which means, that under the theory most favorable to plaintiffs the lien was filed four days too late. If it were necessary this court would amend the findings (§ 956a, Code of Civ.Proc.) to set forth these facts, but the findings as made being supported as above indicated, no necessity exists to exercise this power.

[6, 7] Plaintiffs further contend that defendants are estopped as a matter of law from asserting that the building was completed prior to December 27, 1941. In this connection plaintiffs rely upon Hubbard v. Lee, 6 Cal.App. 602, 92 P. 744, in which it was held that it was reversible error to exclude testimony that the owner had told the lien claimant that the buildings were not completed, such evidence being some evidence in support of an estoppel. There can be no doubt that, if an owner intentionally leads the lien claimant to believe that the buildings are not completed and the lien claimant relies upon the representation, the owner is estopped. But that is not the situation here presented. No testimony was wrongfully excluded. One of the plaintiffs testified that he called upon defendant, Mrs. Havas, about December 27, 1941, and asked her if the building was completed and she told him that it was not. Mrs. Havas' testimony was to the effect that she had told this plaintiff that there was a bad crack on the porch and that the State Inspector did not want to pass the house. This was subsequently repaired by a different contractor in February, 1942. She denied stating that the house was not completed. It is obvious that even if the evidence would support a finding of estoppel it certainly does not compel such a conclusion. The trial court evidently believed Mrs. Havas' version of the conversation or was of the opinion that defendants were not, in fact, misled.

The judgment appealed from is affirmed.

WARD, J., and OGDEN, Justice pro tem., concur.

PULLMAN CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 12964.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1945.

Rehearing Denied Jan. 17, 1946.

Hearing Granted Feb. 14, 1946.

1. Workmen's compensation ⚷2001

Original award by Industrial Accident Commission which has become final is res judicata in subsequent proceeding by way of petition for writ of review by employer, unless reopened by the Commission in accordance with law.

2. Workmen's compensation ⚷2016

Where proceeding to recover further compensation for injury in course of employment is instituted within 245 weeks from date of injury, and the employer is given notice and opportunity to be heard within that time, the Industrial Accident Commission may enter its award after expiration of the 245-week period. St.1937, pp. 296, 301, §§ 5410, 5803, 5804.

3. Workmen's compensation ⚷1778, 2021

The Industrial Accident Commission has no power on its own motion to amend or modify a valid award without notice and an opportunity to be heard. St.1937, p. 301, § 5803.

4. Workmen's compensation ⚷2016

The Industrial Accident Commission did not exceed its jurisdiction in reopening case and amending award of compensation theretofore rendered where petition for further award was filed 11 months before expiration of 245 weeks from date of injury as found, and notice was given and hearing had long before expiration of that period, and all that was done was to file two reports and render the decision after that date. St.1937, pp. 296, 301, §§ 5410, 5803, 5804.

5. Workmen's compensation ⚷1207

"Date of injury" within statute relating to time of bringing proceeding for compensation is the date that the accumulated effects culminate in a disability traceable to the latent disease as the primary cause and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in the performance of the duties of employment. St.1937, pp. 295, 301, §§ 5405, 5804.

See Words and Phrases, Permanent Edition, for all other definitions of "Date of Injury".

6. Workmen's compensation ⚷1207

In order to start limitations running in case of claimant suffering from an occupational disease, the disease must have so far progressed as to disable claimant from performance of duties to such extent that he is entitled to compensation, a claimant must know or in exercise of ordinary care should have discovered that he is suffering from the occupational disease, and he must likewise know or should in exercise of care have discovered that he is suffering a compensable disability. St. 1937, pp. 295, 296, 301, §§ 5405, 5410, 5803, 5804.

7. Workmen's compensation ⚷2001

An award of the Industrial Accident Commission expressly finding that claim was filed within six months after applicant first suffered disability as result of condition found, and further finding that disability commenced on a named date which has become final is res judicata in subsequent proceeding by way of petition for writ of review in respect of an amended award pursuant to a petition for new and further disability indemnity. St.1937, pp. 295, 296, 301, §§ 5405, 5410, 5803, 5804.

8. Workmen's compensation ⚷1791

Where denial of petition for writ of review and hearing in proceeding to recover compensation could only have been based on theory that the date of injury was within six months from date of award, such denial even without written opinion rendered that issue res judicata.

9. Workmen's compensation ⚷1857

Contentions not raised in petition for rehearing after award of compensation cannot thereafter be raised on a petition for writ of review. St.1937, p. 303, § 5904.

10. Workmen's compensation ⚷1857

Certain jurisdictional questions may be raised on petition for writ of review in respect of award of compensation although not raised in petition for rehearing.

11. Workmen's compensation ⚷2030, 2061

Evidence required for reopening award of compensation is not evidence supporting the application on the merits, but evidence of good cause for changing the award, and the conclusion of the Commission as to what constitutes good cause is entitled to great weight.

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* Subsequent opinion 170 P.2d 10.

12. Workmen's compensation ⚷2030

Evidence of continued disability after award of compensation was evidence on the main issue of permanence, and supported action of Commission in reopening case on employee's petition for new and further disability indemnity, wherein the issue was whether the disability had become permanent.

13. Workmen's compensation ⚷2008

The mere receipt of wages after an award of compensation for temporary disability is not inconsistent with a claim of permanent disability.

14. Workmen's compensation ⚷2030

Evidence on petition for new and further disability indemnity showing that an injury existed, that it was industrial in nature, and that after over three years it had not responded to treatment and was therefore permanent, was sufficient to support award for permanent partial disability.

15. Workmen's compensation ⚷2005

A change in claimant's condition need not be shown to warrant the reopening of an award of compensation, only good cause being necessary.

16. Workmen's compensation ⚷2040

When a case is reopened on any ground, the Industrial Accident Commission may properly consider all points presented and may grant relief upon points not primarily urged.

WARD, J., dissenting.

Proceeding under the Workmen's Compensation Act by Adeline Mira, claimant, opposed by the Pullman Company, employer. Award of the Industrial Accident Commission for permanent disability on a petition for new and further disability indemnity, and, after a denial of its petition for rehearing, the employer petitions for a writ of review.

Award affirmed.

Corbet & Selby, John Selby and Russel Shearer, all of San Francisco, for petitioner.

R. C. McKellips, of San Francisco, for respondent Industrial Accident Commission.

PETERS, Presiding Justice.

This proceeding, now culminating in this petition for a writ of review, has had a long and somewhat complex history. On February 13, 1942, the applicant filed an application for compensation alleging that while employed by the Pullman Company as a seamstress sewing carpets by hand she sustained an injury on April 20, 1940, by twisting the thimble finger of her right hand, resulting in injury to her right arm and shoulder. The Pullman Company, while admitting that the applicant was employed by it, denied the injury, denied the industrial character of the injury, and affirmatively pleaded the statute of limitations. At the hearing, held in March, 1942, the applicant testified to twisting her thimble finger on April 20, 1940. She reported to the company doctor. Thereafter, according to her testimony, she continued on the same job, but her arm and shoulder became increasingly painful. She secured her own physician who gave her some treatments, which caused some slight improvement. She worked for the company during all periods work was available until January of 1942, when her arm and shoulder became so painful that she was forced to quit work. She testified that the reason she did not file her claim until February of 1942 was that she believed she had no right to compensation while she was still working full time.

The company doctor testified that the applicant probably had some form of neuritis which he admitted might have been aggravated by her employment.

Dr. Fraser, the personal doctor of the applicant, diagnosed her condition as "1. A radial-humeral bursitis. 2. Epicondylitis, right humerus. 3. Deltoid myositis, right shoulder." He stated that the condition could have been caused by some infection but that no definite foci of infection have been found; that the condition "could be produced by occupation requiring repeated motion over a prolonged period of time."

A medical examiner appointed by the Commission testified that the applicant probably had an inflammatory arthritic condition which would be benefited by rest and aggravated by constant use of the parts involved.

On May 11, 1942, the Commission filed its findings and award. It found that the applicant on or about April 20, 1940, sustained an industrial injury resulting in "radial-humeral bursitis, epicondylitis and deltoid myositis in right major hand, arm and shoulder from repeated motions of hand and arm while sewing carpets and curtains over a period of years beginning in 1929." It then found that temporary disability resulted from this injury in January, 1942, and that the claim was not barred by the statute of limitations because it was filed within six months of the date disability was first suffered. The award was for temporary disability starting January 30, 1942, and for medical treatment.

The employer petitioned for a rehearing and, upon its denial, petitioned the appellate court for a writ of review. The records of this court (Pullman Co. v. I. A. C., 1 Civ. 12,256, Div. Two) show that this petition was denied September 1, 1942, without opinion, and that a petition for rehearing was denied October 1, 1942. A petition for a hearing in the Supreme Court was denied October 29, 1942. An examination of these various petitions discloses that it was there contended by the Pullman Company that the injury was non-industrial and, if industrial, was barred by the statute of limitations. The Commission took the position that the evidence supported the finding that the injury was industrial in nature, that the evidence showed that the injury was an occupational one, and that a disabling disability did not occur until January of 1942 when the applicant was forced to quit work. It was therefore argued that for the purposes of the statute of limitations the date of injury was the date of the disability, namely, January of 1942.

[1] This original award has long since become final and is, of course, res judicata in this proceeding unless reopened by the Commission as hereafter pointed out. An examination of the record up to this point demonstrates, beyond any doubt, that, although the Commission found that the applicant twisted her finger in April of 1940, the theory of the award was that the disability was an occupational one caused by the constant use of the arm and shoulder over a long period starting in 1929 and not resulting in a compensable disability until January of 1942.

On November 24, 1942, the employee petitioned for a permanent disability rating. At the hearing on this petition, at which it was stipulated that the only issue was the nature, extent, and duration of the disability, it developed that the employee had not been employed since the last hearing and that treatments had not materially improved her condition. A doctor's report dated December 4, 1942, diagnosed her condition as "a radio-humeral bursitis involving the right elbow joint. It is also my opinion that it is industrial in origin and has resulted from the type of work entailed." The doctor was of the opinion that the employee could do light work without interfering with eventual recovery, and that there would be no permanent disability. The company promised to give the employee some light work. On February 5, 1943, the Commission filed its "Order Amending Findings and Award." By this order the original findings of May, 1942, were amended to provide that the temporary total disability continued to November of 1942 and that thereafter the employee had a temporary partial disability. It was further found that the "applicant's condition has not yet become permanent and stationary, and jurisdiction is reserved to rate for permanent disability, if any exists, when the condition shall have become stabilized, provided application therefor is filed within 245 weeks from the date of injury."

On September 7, 1943, the Pullman Company filed an application for termination of its liability. On September 18, 1943, the employee petitioned for a permanent disability rating. The two proceedings were consolidated for hearing. At the hearing on these petitions certain medical reports were introduced, and the testimony of the employee taken. She testified that she had accepted from the employer light work sorting screws in March of 1943 and was then so working; that she had lost some time from work because of her disability; that she was getting much less per hour than formerly; that the pain and discomfort continued; that there had been no improvement and that the arm was getting weaker. The Medical Director of the Commission filed a report stating that, in his opinion, the employee either consciously or unconsciously exaggerated her symptoms and concluded that no factors of disability were ascertainable. The Commission, on November 30, 1943, made its Supplemental Order by which it terminated liability for temporary disability and denied the petition for a permanent disability rating. By this order it is found that the temporary disability terminated as of March 2, 1943, and that "the evidence is insufficient to show that the injury has resulted in permanent disability or that the condition, at the present time, is permanent and stationary."

On January 31, 1944, the applicant filed a "Petition for New and Further Disability Indemnity," in which it was alleged that since the last hearing applicant had suffered new and further temporary total disability. In this petition she referred to the reports of Dr. Gordon W. Roberts dated October 20, 1943, and January 19, 1944. The October report of Dr. Roberts stated that examination of the applicant disclosed that she was "definitely disabled and that her disability has been gradually coming on over a long period of time, directly caused by her occupation." He was of the opinion that the applicant was not malingering and recommended physiotherapy and complete rest. The January 19, 1944, report stated that the applicant was "still unable to resume her regular occupation," and recommended physiotherapy and massage.

A hearing on this petition was had in February, 1944. The applicant testified that she was still working for the Pullman Company sorting screws, but that even that light work was very painful to her; that her condition was getting worse; that she had lost at least a day a week from her employment because of her disability. The work sheet of this employee corroborated her statement that she had been absent from her work at least one working day each week.

The defendant introduced a report of Dr. Dickson. He was of the opinion that the symptoms of radio-humeral bursitis had subsided and that she was suffering from fibromyositis. He was unable to account for the marked weakness in the grip of the patient's right hand. He thought she unconsciously exaggerated her symptoms. The referee recommended an independent medical examination and appointed Dr. Fender for this purpose. This doctor was of the opinion that "the patient simulates findings that scarcely can be credited. In spite of this, I feel that she has real disability proceeding from her work.

"The alleged injury of April 20, 1940, is felt to be only a culminating event. I should be more inclined to blame the intermittent employment in one type of work from 1929 to 1940.

"The patient appears to be suffering from a seamstress' version of 'writer's cramp' * * *

"* * * I believe the applicant suffers from partial temporary disability." He recommended that an examination be had by Dr. Howard, a neurologist. She was examined by Dr. Howard and he was of the opinion that her illness was not caused by her work, and that she was not disabled. The Medical Director of the Commission was of the opinion that applicant's complaints "are on a functional basis," and recommended settlement or some other form of closure of the case in the best interests of all concerned.

Thereafter, a settlement of some kind was offered to applicant, which she refused. Later, further medical reports were secured. In February, 1945, Dr. Fraser's report was introduced on behalf of the applicant. He described the applicant's symptoms and recommended a further course of treatment. In the same month the Rating Bureau of the Commission made its report recommending a rating of 51¼% as to permanent disability.

On April 10, 1945, the referee filed his report and his proposed findings and award. In his report the referee commented upon the obvious disagreement of the doctors as to the cause and extent of the disability. He was of the opinion that the weight of the evidence supports two conclusions: "First, that applicant suffered industrial injury consisting of radial-humeral bursitis, epicondylitis and deltoid myositis in right major hand, arm and shoulder; and secondly, that the condition must now be considered permanent and stationary." He discussed the reports of Dr. Howard and Dr. Fender and placed considerable reliance on the conclusions of the latter. On April 10, 1945, an "Order Amending Supplemental Order Terminating Liability for Temporary Disability and Denying Petition for Permanent Disability Rating and Amending Order Amending Findings and Award and Fixing Permanent Disability Rating" was filed. In this order it is found that applicant while employed by the Pullman Company was injured on or about *April 20, 1940,* and suffered from radial-humeral bursitis, epicondylitis and deltoid myositis "from repeated motions of hand and arm while sewing carpets and curtains over a period of years beginning in 1929." The degree of permanent disability is fixed at 51¼%, the amount of the monetary award fixed and the applicant denied further medical treatment.

After the award was filed on April 10, 1945, the employer petitioned for a rehearing. In this petition the employer raised but three issues: (1) That the Commission disregarded the medical evidence; (2) that the evidence was insufficient to support the findings of permanent disability, or any disability, or 51¼% disability; (3) that the original claim is barred by the statute of limitations because not filed within the time permitted by law after receipt of the injury. Upon denial of this petition for a rehearing the application for the present writ of review was filed.

It is the employer's main contention that the Commission has found that the date of injury was April 20, 1940; that 245 weeks from that date would be December 30, 1944; that the Commission, under Labor Code, § 5804, St.1937, p. 301, loses jurisdiction to rescind, alter or amend an award after 245 weeks from the date of injury; that for this reason the amending order filed on April 10, 1945, was void and of no effect. There are two answers to this contention.

In the first place, if it be assumed that the date of injury was April 20, 1940, and that the 245 week period prescribed by § 5804 of the Labor Code expired on December 30, 1944, it does not follow, as a matter of law, that the Commission had no jurisdiction to enter its order of April 10, 1945, after the 245 week period had expired. The petition upon which the award was based was filed January 31, 1944, some eleven months before the expiration of the 245 week period. Notice of the hearing was given and the actual hearing had well within the period. The long delay was caused by the necessity of securing further medical reports so as to ascertain whether the condition had become permanent. All such reports, with the exception of two, were filed before December 30, 1944. The law does not place an absolute period of 245 weeks within which the Commission can act. Labor Code, § 5410, St.1937, p. 296, provides: "Nothing in this chapter shall bar the right of any injured employee *to institute proceedings* for the collection of compensation within 245 weeks after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the Commission in such cases shall be a continuing jurisdiction at all times within such period. * * *" (Italics added.) Note that this section confers the right upon the employee "to institute" the action within 245 weeks of the date of injury. So far as this section is concerned all that is required is that the proceeding be started within the 245 week period. But this section does not stand alone. It must be read with §§ 5803 and 5804 of the Labor Code, St.1937, p. 301. Section 5803 provides: "The commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard * * * the commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor. Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded * * *." Section 5804 provides: "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury."

[2] If § 5410 stood alone it would follow that all that is required is that the proceeding must be instituted by the employee within 245 weeks. If § 5804 stood alone the Commission would have no power to enter its order altering, rescinding or amending its awards after the expiration of 245 weeks from the date of injury. But neither section stands alone. Both must be read together, and with § 5803. This last section requires that notice and opportunity to be heard be given within the 245 week period. When the three sections are read together, the only reasonable interpretation is that if the proceeding is instituted within 245 weeks of the date of injury (§ 5410), and if the other side is given notice and an opportunity to be heard within that time (§ 5803), the Commission may enter its award after the expiration of the 245 week period in spite of the language of § 5804.

[3] The employer places its reliance for a contrary construction of these sections on Larsen v. Industrial Acc. Comm., 125 Cal.App. 13, 13 P.2d 850, and on certain decisions of the Commission following the Larsen case. In the Larsen case the Commission, on its own motion without

notice to the parties and on the last day of the 245th week, changed its prior award. The employer thereupon petitioned for a rehearing, which was granted, and upon such rehearing the modifying award was affirmed. The appellate court properly held that the entire proceedings were void. This is so because the Commission has no power, on its own motion, to amend or modify a valid award without notice and an opportunity to be heard. For this reason the modifying order was void and all proceedings based thereon were void. It was the failure to give notice that rendered the original order void, not the fact that the court thereafter acted beyond the 245 week period. Lyydikainen v. Industrial Acc. Comm., 36 Cal.App.2d 298, 305, 97 P.2d 993. The case did not hold that the Commission has no power to enter a modifying order after the expiration of 245 weeks, but, quite to the contrary, pointed out at least one situation where that would be proper.

That the rule of the Larsen case does not prohibit all action by the Commission after the expiration of the 245 weeks is demonstrated by the case of Gobel v. Industrial Acc. Comm., 1 Cal.2d 100, 33 P.2d 413. In that case, the Commission had awarded the employee certain temporary disability benefits. These were terminated May 9, 1929, the Commission finding that the temporary disability had terminated on that date. Thereafter, and on May 13, 1933, which was within two days of the expiration of the 245 weeks from the date of injury, the employee filed a petition to reopen the case on the ground that the original injury had caused a new and further disability. The Commission dismissed this petition on the ground that reasonable notice and a hearing could not be given or had within the two-day period, and that it had no power to reopen by an order made after the expiration of the 245 week period. The Supreme Court annulled the order of dismissal and ordered the Commission to assume jurisdiction. The Court distinguished the Larsen case on the ground that there the Commission purported to make an order without notice or hearing. It was pointed out that the petition here was for an award for a new and further permanent disability (as is the order in the instant case) and that prior awards (as in the instant case) were for temporary disability. The Court therefore held that in such cases it is sufficient that the proceeding be commenced within 245 weeks, and that it need not be heard or decided before that time has expired.

[4] This decision goes much further than it is necessary to go in the instant case. Here the petition for a further award was filed eleven months before the expiration of the 245 weeks, notice was given and hearing had long before the expiration of that period, and all that was done was to file two reports and to render the decision after that date. Under such circumstances the Commission did not exceed its jurisdiction.

[5-8] A second conclusive answer to the contention that the award was unlawfully made beyond the period in which the Commission could act is to be found in the fact that it has been judicially determined in this case that the date of injury, as those words are used in the statute, was not April 20, 1940, but January, 1942. It will be remembered that the original application was filed on February 13, 1942. If the original compensable injury occurred on April 20, 1940, then, obviously, the action was barred by the statute of limitations contained in § 5405 of the Labor Code, St.1937, p. 295. That section, with certain exceptions not here involved, provides that any proceeding to collect compensation must be commenced within six months of the date of injury. The applicant had alleged that the injury occurred on April 20, 1940. The Pullman Company vigorously urged before the Commission and before the Appellate and Supreme Courts on petition for a writ of review that the claim was barred by the statute of limitations. It seeks to renew that contention now. The Commission found, however, that, although the applicant had twisted her finger on April 20, 1940, she did not suffer a disabling injury until January of 1942, when she was forced to quit work. The Commission expressly found that the claim was not barred by the statute of limitations because it was filed within six months of the date of disability. A reading of this voluminous record demonstrates to a certainty that it always has been the theory of the Commission that this applicant was suffering from an occupational disease which came upon her over many years, starting in 1929; that in April, 1940, she first became aware of pain from the occupational disease as a result of twisting her thumb, but the pain and discomfort did not result in a disabling

injury until January of 1942. Under such circumstances the "date of injury" within the meaning of § 5405 of the Labor Code, and within the meaning of § 5804 of that Code, is the date that the "accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment." Marsh v. Industrial Acc. Comm., 217 Cal. 338, 351, 18 P.2d 933, 938, 86 A.L.R. 563. The rules applicable to the statute of limitations as applied to occupational diseases have recently been summarized as follows: "The rule to be drawn from the decisions is that to start the statute of limitations running in the case of a claimant suffering from an occupational disease at least three conditions must concur: (1) The disease must have so far progressed as to disable the claimant from the performance of his duties to such extent that he is entitled to compensation under the workmen's compensation law; (2) the claimant must know or in the exercise of ordinary care should have discovered that he is suffering from the occupational disease; and (3) he must likewise know or should in the exercise of such care have discovered that he is suffering a compensable disability of which the occupational disease is the cause." Williams v. Industrial Acc. Com., Cal.App., 161 P.2d 979, 981; see, also, Price v. Industrial Acc. Comm., 9 Cal.App.2d 213, 49 P.2d 294; Argonaut Mining Co. v. Industrial Acc. Comm., 21 Cal.App.2d 492, 70 P.2d 216. It was on this theory that the original award was made on May 11, 1942. It was on this theory that that award was defended by the Commission before the Appellate and Supreme Courts when the employer petitioned for a writ of review. The petitions for a writ of review and for a hearing were denied. Were the original award before us now for review, which it is not, we would hold that the "date of injury" within the meaning of the statute of limitations was January, 1942, and that for that reason the original claim filed on February 13, 1942, was not barred by the statute of limitations. When the Appellate Court denied the petition for the writ of review and the Supreme Court denied the petition for hearing they must have decided that the claim was not barred. If the date of injury was April 20, 1940, the claim filed in February, 1942, was barred. Obviously, the only possible theory upon which the petitions for a writ of review and for a hearing could have been denied was that the claim was not barred, and the only theory upon which it could be so held was that the disease was occupational in character not resulting in a disabling injury within the meaning of the statute of limitations until January of 1942. The original award of May 11, 1942, expressly found that the claim was filed "within six months after applicant first suffered disability as a result of said condition," and further found that the disability commenced January 22, 1942. That award has become final. That decision is now res judicata. Williams v. Southern Pac. Co., 54 Cal.App. 571, 202 P. 356. It must now be accepted as a fact that the date of injury was January, 1942. Moreover, inasmuch as the denial of the petitions for a writ of review and hearing could only have been based on the theory that the date of injury was within six months of February 13, 1942, such denials, even without written opinion, must now be held to have rendered that issue res judicata. The cases of McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983, and Funeral Dir. Ass'n v. Board of Funeral Dirs., 22 Cal.2d 104, 136 P.2d 785, do not compel a different conclusion. They held that a denial of an application for a discretionary writ without opinion was not necessarily a denial on the merits, and hence, not res judicata, because the denials could have been based on grounds other than the merits. The very holding in those cases suggests that the converse of the proposition is equally true, that is, that where the denial could only be based on the merits, such denial is res judicata. The many cases collected and cited by Mr. Justice Ward in his dissenting opinion in the McDonough case on this point (68 Cal.App.2d 337, 338, 156 P.2d 983) establish the truth of this proposition. The Commission, in reopening a case after a denial on the merits, is bound by the court's decision. Campbell, Workmen's Compensation, Vol. II, p. 1281, § 1546. For these reasons it has become the law of this case that the date of injury was within six months of February 13, 1942, which means not earlier than August 13, 1941. The Commission, in its April 10, 1945, award, had no power to fix the date of injury as April 20, 1940. In that connection the 1945 award merely used the same language used in the 1942 award that the applicant had been injured by twisting her finger in April of 1940, but in 1945 the Commission did not purport to pass upon or to amend its 1942 finding in reference to the statute of limitations. It is quite significant that by its award in 1945 the Commission fixed the start of disability payments as January 30, 1942, thus indicating that the first compensable injury then occurred. If this reasoning is sound, then obviously, since the date of injury could not have been prior to August 13, 1941, the 245 weeks had not expired on April 10, 1945, when the award was made, and has in fact, not yet expired.

Of course, as is pointed out in the dissenting opinion, the Commission can alter or amend its prior awards within 245 weeks from the date of injury. But the point is that the Commission has never reopened, for good cause, or otherwise, its 1942 determination that the original claim was not barred by the statute of limitations. The amendatory order of 1945 passed on the only issue presented to the Commission, namely, whether the disability had become permanent. There was no evidence at all presented to the Commission on the issue of the statute of limitations and the Commission did not pass upon any such issue. To hold, as does the dissenting opinion, that the reference in the 1945 order to April 20, 1940, as the date of injury (which reference was copied from the 1942 order) amounted to a new finding as to the date of injury and amended and modified the prior determination on the issue of the statute of limitations without so stating is to charge the Commission with making a completely useless and ridiculous order. If the 1945 order was intended to modify the 1942 order on the issue of the statute of limitations, then the claim would be barred. But the Commission made an award. Did the Commission intend to hold that the claim was barred by the statute of limitations, but nevertheless decided to make an award? Of course not. Yet that is exactly the result of the reasoning set forth in the dissenting opinion. The point is clearly without merit.

[9, 10] Petitioner's next main contention is that since the Commission by its order of November 30, 1943, denied the employee's petition for permanent disability indemnity, and since the employee did not petition for a rehearing, and, so it is contended, submitted no new evidence on the issue in support of her last petition, no good cause existed for reopening the case on this issue. This contention was probably waived by the failure of the petitioner to raise the point on its petition for rehearing before the Commission. Section 5904 of the Labor Code, St.1937, p. 303, provides: "The petitioner for rehearing shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the manner upon which the rehearing is sought other than those set forth in the petition for rehearing." Under this section contentions not raised in the petition for rehearing cannot thereafter be raised on a petition for writ of review. Cowell v. Industrial Acc.Comm., 11 Cal.2d 172, 78 P.2d 1016; Los Angeles etc. R. R. Co. v. Industrial Acc.Comm., 2 Cal.2d 685, 43 P.2d 282; Hanna, Industrial Accident Commission Practice and Procedure, p. 229. It is true that certain "jurisdictional" questions may be raised on the petition for writ of review although not raised in the petition for rehearing, but this would not appear to be such a "jurisdictional" question.

[11, 12] However, conceding that the point can now be raised, it is without merit. Petitioner states that Dr. Roberts' letter upon which the Commission relies as establishing good cause for reopening was before the Commission when it made its November, 1943, award, and therefore is not new evidence. However, Dr. Roberts' letter of January 19, 1944, stated that the claimant was still disabled. That was new evidence bearing on the question of the permanence of the injury. The Commission had already found that the injury was industrial in origin and, while in November, 1943, it found that the disability was not permanent "at the present time," evidence that the injury still continued in January, 1944, about two years from the first disabling injury, was new evidence of permanence. The evidence required for reopening is not evidence supporting the application on its merits, but evidence of good cause for changing the award. The conclusion of the Commission as to what constitutes good cause is entitled to great weight. Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195. The case is unlike Merritt-Chapman & Scott Corporation v. Industrial Acc. Comm., 6 Cal.2d 314, 57 P.2d 501, where there was no doubt that the applicant suffered from a disability and where the only question was industrial causation. Obviously, in such a case evidence that the disability continued was of no significance at all on the issue of industrial causation. In such a case such evidence would not constitute good cause for a reversal of a prior award on that issue. In the present case industrial causation was established at the time of the first award in 1942. Disability had been established. The issue was whether the disability had become permanent. It is too clear to require further comment that evidence of continued disability after the November, 1943, award was evidence on the main issue of permanence, and that such evidence supports the action of the Commission in reopening the case.

[13, 14] Petitioner's next contention is that there is no substantial evidence to support the award, and in this connection points out that petitioner is still working. That work, however, is much lighter work and at a smaller compensation than was performed and received at the outset of the disability. It needs no citation of authority to support the proposition that the mere receipt of wages is not inconsistent with a claim of permanent disability. The evidence has already been reviewed at length. It appears that there is a sharp conflict as to the existence, duration and extent of the disability. There is also evidence, however, that an injury exists, that it is industrial in origin, and that after over three years it has not responded to treatment and is therefore permanent.

[15, 16] The next contention of petitioner is that the Commission had no jurisdiction to reopen and to make an award for permanent disability after it had already denied such relief. Whatever may have been the law prior to 1927 it has been settled since that year by the leading case of Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195, that a change in claimant's condition need not be shown to warrant a reopening—only good cause need be shown. That such cause existed has already been discussed. It is true that the January, 1944, petition did not allege the existence of a permanent disability, but it is well settled that when a case is reopened on any ground the Commission may properly consider all points presented and may grant relief upon points not primarily urged. 2 Campbell, Workmen's Compensation, p. 1264, § 1528. Moreover, the record shows that the hearings held on the January, 1944, petition were aimed at discovering, if possible, the extent and permanence of the injury. All the evidence was aimed at those issues. This conclusion disposes of petitioner's present contention, as well as the contention that the prior denial was res judicata, that the relief granted was in excess of that asked for, and that the Commission on the reopening had no power to consider evidence produced on prior hearings.

The final contention of petitioner is that the original award was barred by the statute of limitations. On what theory petitioner expects to relitigate that issue is not clear. As already pointed out, that issue has been finally settled by the 1942 award and even if it could now be reconsidered, on the merits, the claim is not barred.

The award is affirmed.

SCHOTTKY, Justice pro tem., concurs.

WARD, Justice (dissenting).

I dissent.

On the facts, the evidence is meager. The latest award seems to be based primarily upon the report of Frederick A. Fender, M. D. In part his report reads as follows: "There is little doubt that the patient simulates findings that scarcely can be credited. In spite of this, I feel that she has real disability proceeding from her work. The alleged injury of April 20, 1940, is felt to be only a culminating event. I should be more inclined to blame the intermittent employment in one type of work from 1929 to 1940. The patient appears to be suffering from a seamstress' version of 'writer's cramp.' The various designations—'occupational neurosis,' 'bursitis,' 'myositis,' 'neuritis,' 'arthritis,' serve only to demonstrate our unfamiliarity with the essential pathology. The latter has not yet been made clear, though the syndrome is recognized. In answer to the specific questions of Mr. A. H. Nelson, Referee, I believe the applicant suffers from partial temporary disability." The referee's report stresses the statements of Dr. Fender though the doctor was not positive but only "inclined" to hold the employment between 1929 and 1940 responsible for a "partial temporary disability."

A number of medical experts reported in substance as the medical director of the commission, whose conclusion is as follows: "Beyond some slight muscular atrophy of the small muscles of the right hand and the applicant's complaints result of my examination is negative." Under the statute courts are not permitted to interfere with findings of fact. Labor Code, sec. 5953, St.1937, p. 305.

All questions herein relate directly or indirectly to the "date of injury." The original application was filed in February, 1942. As the majority opinion asserts: "If the original compensable injury occurred on April 20, 1940, then, obviously, the action was barred by the statute of limitations contained in § 5405 of the Labor Code, St.1937, p. 295." Subdivision (a) of that section fixes six months as the period within which proceedings under that section may be commenced.

I dissent from the views expressed on the following issues: That the date of injury was January, 1942, and that it has been so determined through the denial of a petition to review the Industrial Accident Commission's proceedings in the first award. I am satisfied that the question of the date of the injury is properly before us on the present review, and I deny, on the present proceedings, that we should hold "that the 'date of injury' within the meaning of the statute of limitations was January, 1942, and that for that reason the original claim filed on February 13, 1942, was not barred by the statute of limitations."

After the commission by order had vacated and set aside its first award and subsequently permitted the applicant to ask for new and permanent compensation, it necessarily put in issue the date of injury as a jurisdictional fact which it must find in order to give itself jurisdiction under sections 5804 and 5410 of the Labor Code. This conclusion is recognized by the referee in his report as follows: "More than 245 weeks has now elapsed since applicant's injury, so that the order the Commission is now about to issue will exhaust its jurisdiction." Accordingly that question has been put in issue and is proper to consider on this review. However, it must be noted that the petition upon which the order now being considered was based was filed within 245 weeks of the date of injury as stated in the award.

The majority opinion refers to an application for a writ of review presented to the Second Division of the First Appellate District of the District Court of Appeal. The application was denied without written opinion or minute order giving the reason for the denial. In the majority opinion herein reference is made to McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983. Whatever may have been my views on the subject of "res judicata" as expressed in the dissenting opinion in that case, the denial of the petition for hearing by the Supreme Court indicates that the rules and statements set forth in the majority opinion on the subject of res judicata were not disapproved. To that extent they are worthy of consideration and respect. Mr. Justice Shaw, as an associate justice of the Supreme Court, in writing a dissent in a denial of a petition for hearing after decision in the District Court of Appeal, referred to the denial as "the silent sanction of acquiescence" in the pronouncements of the views of the District Court of Appeal. Estate of Campbell, 12 Cal.App. 707, 724, 108 P. 669, 676. In Bridges v. Fisk, 53 Cal.App. 117, 122, 200 P. 71, 74, the court said: "A petition to the Supreme Court to hear and determine that cause after judgment of the District Court of Appeal was denied. The decision, therefore, possesses all the authority of a pronouncement by the Supreme Court itself." The denial of hearing by the Supreme Court, without comment, after decision in the District Court of Appeal must be viewed as a silent sanction of the statements of law as applied to the particular facts of the case and as a precedent to be followed in other cases wherein the facts may not be basically differentiated.

In the McDonough case the appellate court was called upon to determine the effect of the denial by the same appellate court and a denial of a petition for hearing in the Supreme Court without opinion, of a writ of prohibition to test whether the proceedings were in excess of the jurisdiction of the tribunal wherein a case was pending. Code Civ.Proc. sec. 1102. In the present proceeding this court is called upon to determine the effect of the denial without opinion of a writ of review to test the jurisdiction of the tribunal that made an award. Code Civ.Proc. sec. 1068. The main purpose of Labor Code section 5950 providing for the issuance of the writ to the Industrial Accident Commission is to determine if "the commission acted without or in excess of its powers." Labor Code, sec. 5952. Practically the only difference between the writ of prohibition and one for review is that the purpose of the first is to prevent error and of the second to correct error in the exercise of *jurisdiction*. Section 5803 of the Labor Code permits the Industrial Accident Commission voluntarily to correct error with or without a petition for rehearing. The Industrial Accident Commission has "continuing jurisdiction," at least during 245 weeks from the date of injury. Labor Code, secs. 5803, 5805, 5903, 5908. If it may be held that a reviewing court may deny a petition for a writ of prohibition which shows on its face jurisdictional or factual error "before the entry of a final order" (McDonough v. Garrison, supra [68 Cal.App.2d 327, 156 P.2d 988]), the same conclusion may be reached when applied to proceedings involving review of an order, decision or award of the Industrial Accident Commission which may appear to be "unjust or unwarranted." Labor Code, sec. 5908 provides: "If after rehearing and a consideration of all the facts, including those arising since the making of the order, decision, or award involved, the *commission is of the opinion* that the original order, decision, or award, or any part thereof, is in any respect unjust or unwarranted, or should be changed, the commission may rescind, alter or amend it." (Italics added) In brief, if the "commission is of the opinion" that the award or order is unjust or unwarranted it may change the award or order after giving to the interested parties an opportunity to be heard. Larsen v. Industrial Acc. Comm., 125 Cal.App. 13, 13 P.2d 850; Gobel v. Industrial Acc. Comm., 1 Cal.2d 100, 33 P.2d 413.

Appellate reviewers are often forced to follow rules which do not receive personal approval. Referring to previously decided cases, it was said in McDonough v. Garrison, supra, 68 Cal.App.2d at page 327, 156 P.2d 988:

"It seems clear that these cases establish the following two rules, the second of which is but a corollary of the first:

"1. If there is any other possible ground other than the merits upon which the denial of the petition for a writ could have been based, such denial is not res judicata of the merits in a subsequent proceeding.

"2. Even though a trial court may have entered interlocutory orders in excess of its jurisdiction, an appellate court may assume the error will be corrected before the entry of a final order, and may refuse to interfere by prohibition. This possibility prevents such a denial of the writ without opinion from operating as res judicata in future proceedings.

"* * * The existence of these two possibilities prevents the doctrine of res judicata from arising.

"* * * *It is common practice for an appellate court to decide such applications on grounds not urged by counsel.*" (Emphasis added.)

In brief, the rule appears to be that if there is a "possible ground other than the merits," a denial of a petition for a hearing after decision by another tribunal is not res judicata. The denial of the writ without opinion may possibly be based upon the insufficiency of the allegations of the petition or upon some error in form not "urged by counsel." In view of the commission's right to correct the error, it may be assumed that the District Court of Appeal may have thought that "the error will be corrected" before a final order is made. McDonough v. Garrison, supra, 68 Cal.App.2d at page 327, 156 P.2d 983. In brief, any disposition that the commission may make of an application for compensation, or any order that a reviewing court may make on petition to review, is not res judicata in view of the commission's right under the Labor Code to vacate and set aside any previous order of the commission. After review the holding of the court should be followed as far as applicable but the commission is not foreclosed from the reception of further evidence and changing an award if that is the just course to follow. In the present proceeding evidence was introduced that would play a definite part in determining that there was no injury at all, which would necessitate the elimination of consideration of either date, April 20, 1940 or January 1942. Dr. Fender was uncertain in his diagnosis and requested assistance. He asked that a certain expert should examine the applicant. The expert suggested, according to the report of the referee, "a diagnosis of scalenus anticus syndrome, non-industrial in etiology." Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 29 P. 2d 852. The most that may be said is that the orders on review may be the law of the case but only until the commission changes the record based upon substantial facts.

Irrespective of the views expressed in the majority opinion, there is sound and substantial reason why the District Court of Appeal in the prior petition for a writ did not adjudicate that the date of injury was in the month of January, 1942. The date of injury is a question of fact. No review was granted in this matter and hence there could be no determination even if legally permissible that the date of injury was incorrect. If the reviewing court concluded that the date of injury, April 20, 1940, as pleaded and as found, was incorrect, it would be powerless to act. The findings and conclusions of the commission on factual matters are not subject to court review. Labor Code, sec. 5953. The most that the appellate court can decide is that the evidence in the record before the commission does or does not support the finding made by the commission.

The determination of the date of injury is an essential element of fact in the present proceeding in that it relates to the period when indemnity may begin, the statute of limitations may commence, etc. The majority opinion evidently adopts the theory that if the conclusion that January, 1942, as the date of injury is not res judicata a consideration of that issue can be determined in the present proceeding. The date of discovery of disability, or the date when a reasonable person would have discovered the disability, has in some cases been declared the date of injury in industrial diseases growing out of, or caused by, a particular occupational class of work, which diseases are progressive and the seriousness of which is not immediately discernible. The date of disability is merely a circumstance that may be considered in determining the date of injury. This rule is based upon the theory that the specific date of the injury in some occupational diseases may be impossible of accurate determination. Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563. It was not until the oral argument in the present proceeding that it was claimed the date determined to be the "date of disability" would be substituted for the "date of injury" as found by the commission. Prior to that time in all the petitions or applications presented to, and all orders and awards made by, the commission, the date of injury was set forth as April 20, 1940, and is so set forth in the present findings.

The "injury" referred to in the Labor Code relative to workmen's compensation and insurance includes any detriment, harm or damage arising out of an accident or disease which is proximately caused by the employment. If the injury arises from an accident, such as twisting a finger, the date of the injury is easily ascertainable. If the injury is the result of a disease which is the proximate and natural result of the employment the date of injury may be hard to ascertain if the symptoms are latent and the effects dormant. Such an injury has been recognized for many years as an occupational disease.

An occupational injury is one that is the usual result of continuous employment in certain hazardous work. Such injury does not appear suddenly, but is a gradual breaking down of some part of the physical system resulting finally in complete incapacity to continue the particular work. Pulmonary silicosis is generally recognized as an occupational disease. Marsh v. Industrial Acc. Comm., supra. The date of injury in such an occupational disease is not the date of disability but it is the date either before or subsequent to the date of incapacity to work that the presence of the occupational disease "should have been diagnosed as the primary and efficient cause of the injury." Price v. Industrial Acc. Comm., 9 Cal. App.2d 213, 49 P.2d 294, 295; see, also, Travelers Ins. Co. v. Industrial Acc. Comm., 32 Cal.App.2d 643, 90 P.2d 327. In the very recent case of Williams v. Industrial Acc. Com., Cal.App., 161 P.2d 979, 982, the court said: "Even if there were evidence that the claimant was so disabled by silicosis in 1940 as to impair his ability to work as a molder there is no evidence to support a finding that he knew or in the exercise of ordinary care should have known that fact."

The disease need not be peculiarly an incident to the work performed or that naturally results from the pursuit of the particular occupation but it may be generally attributable to many occupations or to no particular occupation if it is of long standing and culminates in an injury which is attributable to the work performed. It is not claimed that arthritis is a necessary incident to, and an ailment that will occur from, the intermittent work of sewing carpets and curtains or drapes. However, it is possible that it could arise from such work and to that extent may be classified as occupational.

Marsh v. Industrial Acc. Comm., supra, does not control the facts in this case. In the Marsh case the commission was dealing with a "latent" disease which was not apparent until it culminated in disability, the date of which disability was selected and designated as the date of injury or the date upon which the employee should have known that he was suffering from the disease. In the present case, assuming, as the commission in substance held, that there is some evidence that the neuritic, arthritic, or rheumatic condition arose in part as a result of intermittent employment in the type of work she was engaged in from 1929 to 1940, the disease was no longer a latent one subsequent to April 20, 1940, at which time a definite injury occurred.

The rule to start the statute of limitations adopted in the majority opinion from Williams v. Industrial Acc. Comm., supra, is fulfilled when the date of injury in this case—April 20, 1940—is considered. (1) the disease had progressed to disable the claimant from the usual performance of duties to the extent that she was entitled to compensation. (2) The claimant knew "or in the exercise of ordinary care should have discovered" that she was suffering from an occupational injury or ailment. (3) She knew that she was suffering from a compensable disability caused by her occupation. The commission has always recognized that the date of the injury was April 20, 1940. The physician who stated in 1944 that this ailment might have been caused by the type of work performed fixed the date as between 1929 and 1940.

Against the theory that January, 1942, the date selected in the majority opinion, was the date of injury, and in favor of April 20, 1940 as the date of injury, are the following circumstances: The applicant testified and claimed compensation for a definite injury, namely, twisting of a finger resulting in injury to her arm and shoulder which occurred on a definite date —April 20, 1940. The injury of April 20, 1940, was not a latent injury. On the contrary applicant visited several doctors as a direct result of the injury. The following question and answer appear in the record: "Q. So that at that time when you made application for compensation from the Group Insurance Bureau, you were under the impression, were you not, that your disability was not compensable? A. No." The applicant during a lay-off period visited several persons engaged in healing treatments. When she returned to work the arm "started aching again * * *." Subsequently she was told by one who undertook to treat her: "Don't come here anymore, lady, you are just wasting your time. Your arm will never get any better, as long as you continue with that work." The first doctor she visited three days after the accident to the middle finger of her right hand advised that there should be a "change of occupation." The applicant was given lighter work, although her recollection, which was adopted by the commission and which is binding on the court, is that "lighter work" was not given until some later period than that immediately following the accident. The twisting of the finger appreciably impaired the efficiency of her work and she was entitled to industrial compensation. There is no dispute that she visited a physician as the result of twisting the finger. Subsequent thereto the swelling appeared, pain continued and the hand and forearm were weak. It may be assumed that such condition would tend to lessen efficiency. I agree with the statement in the majority opinion that "It needs no citation of authority to support the proposition that the mere receipt of wages is not inconsistent with a claim of permanent disability."

In addition to the above, the following circumstances appear to be inconsistent with the theory adopted in the majority opinion that the injury occurred in January, 1942. In the first award—May 11, 1942—it was determined that the injury actually occurred on April 20, 1940 and was a temporary disability. On February 5, 1943, the commission determined that a temporary partial disability continued and specifically found that it was not permanent and stationary at that time. On November 30, 1943, the commission found that "The evidence is insufficient to show that the injury has resulted in permanent disability or that the condition, at the present time, is permanent and stationary." By the same order the commission found that the *temporary disability had ter-*

minated. On the present application all of the evidence, documentary and otherwise, showed the date of injury to be April 20, 1940. The commission found that the arthritic condition resulted from repeated motions of hand and arm while sewing carpets and curtains over a period of years beginning in 1929, and that the applicant "while employed as a seamstress on or about April 20, 1940, at Richmond, California, by The Pullman Company, sustained injury arising out of and occurring in the course of said employment." There is not one reference in the findings filed April 10, 1945 to a permanent or otherwise disability occurring in January, 1942. Only the award stated that disability payments began January 30, 1942. It is necessary that each material allegation be determined in the findings. Simmons v. Industrial Acc. Comm., 70 Cal.App.2d 664, 161 P.2d 702. As before noted, the date of injury was necessarily an issue in this case. Notwithstanding that there is no finding of any date in January, 1942, as the date of disability or of injury, the commission awarded the sum of $3,241.05, including attorney fees, "in addition to all fees heretofore awarded, and less all sums heretofore paid as temporary disability indemnity."

Ordinarily when the commission grants an award applicable to a certain disease, courts do not interfere unless it appears that the particular award was made without jurisdiction. Under such circumstances it is the duty of the court to annul the award at any time that matter is brought to its attention. Labor Code, sec. 5952, subd. (c). Statutes of limitation are enacted to give parties a speedy but reasonable opportunity to determine the issues involved. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 197, 106 P. 715, 21 Ann.Cas. 1279.

Since writing the above the majority opinion has been amended. It may be necessary therefore to repeat some of the reasons for this dissent.

The majority opinion attacks the reasoning in the dissenting opinion in that "the Commission has never reopened, for good cause, or otherwise, its 1942 determination that the original claim was not barred by the statute of limitations." When the matter was reopened for a or any cause, good or otherwise, in the discretion of the commission it was then subject to redetermination of any previous just and warranted order or award. Jurisdiction was an issue without the use of discretion by the commission. It was mandatory to determine the question of jurisdiction. If an error in jurisdiction had occurred it was the duty of the commission to correct such error. The majority opinion states that the commission in 1945 "passed on the only issue presented to the commission, namely, whether the disability had become permanent." Permanence of disability was not the only issue presented and passed upon in the 1945 proceedings.

The return to the present writ of review contains a true and correct copy of the record of proceedings considered by the commission on the 1945 award. The return includes the testimony of Adelina Mira, the applicant, who testified relative to the accident on April 20, 1940; the testimony of numerous medical experts, all referring to April 20, 1940 as the date when the applicant twisted her finger; the findings following four separate hearings in which the date of injury was fixed as of April 20, 1940 and not January, 1942; and the awards of 1945 in which no reference is made to a date of injury, but just merely orders payments made commencing as of January 30, 1942. No particular reason appears why January 30th was selected and no reason appears why other dates in January, 1942 were designated in previous awards as the date to commence payment.

The return also contains the report of the referee who recognized that at the time the report was made 245 weeks had expired from the date of injury—"More than 245 weeks has now elapsed since applicant's injury, so that the order the Commission is now about to issue will exhaust its jurisdiction." If the date of injury was in January, 1942, there was no purpose in making the statement in reference to the statute of limitations. If that was the date, 245 weeks have not as yet elapsed. There was not only evidence before the commission relative to the statute of limitations, but the referee in his report refers to his consideration of the statute of limitations. The record in this case on its face shows that the original application was not filed within the statutory period of six months. Any attempt to fix the date of disability as the date of injury is contrary to the acknowledged rule in such case, namely, that it is not the date of disability but the date when the applicant knew or should have known of the existing occupational disease, that may be accepted as the date of injury. The petitioner at no time waived its right to rely on the statute of limitations—that the claim is barred because it was not filed within six months after the injury. The petition for rehearing of the present award urges as one of the grounds "That the findings of fact do not support the order in that, upon the face of the findings of fact, the claim is barred by the statute of limitations because it was not filed in time after receipt of the injury." In any case wherein this court has jurisdiction over a pending case which is to be heard on the merits, and it is called to our attention that the commission has acted in excess of its jurisdiction, any award based thereon should be annulled.

Rehearing denied: WARD, J. dissenting.

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